COLORADO REVISED STATUTES

COURT RULES

BOOK 1

2012

Colorado Revised Statutes

2012

Colorado Court Rules
Book 1

Containing the Rules adopted or amended
by the Supreme Court of Colorado
and received by July 1, 2012

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Annotated, Indexed, and Prepared for Publication
Under the Supervision and Direction of the

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by

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Court rule changes received for publication by the Office of Legislative Legal Services after July 1, 1990, for the rules of civil procedure contain source information showing the date rules were enacted by the court and the effective date.

To obtain prior source information, see the original volume 7, volume 7A from 1977, and volume 7B from 1984.

Annotations

Beginning in 2012, the annotations for Colorado state appellate court decisions include both public domain and regional reporter case cites. In preparing annotations to court decisions, we endeavor to include the most recent decisions. Occasionally, this may result in the inclusion of a decision before it becomes finalized and published in an official reporter. In such instances, the case cite will contain blank spaces for the volume and page number of the reporter. The volume and page number will be substituted for the blank spaces in subsequent publications of the court rules.

The Colorado Rules of Civil Procedure For Courts of Record in Colorado

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Adopted by the

SUPREME COURT OF COLORADO

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CHAPTER 1

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CHAPTER 1

SCOPE OF RULES, ONE FORM OF ACTION, COMMENCEMENT OF ACTION, SERVICE OF PROCESS, PLEADINGS, MOTIONS AND ORDERS

Cross references: For courts and court procedure generally, see title 13, C.R.S.

Rule 1. Scope of Rules

(a) Procedure Governed. These rules govern the procedure in the supreme court, court of appeals, district court and superior courts and in the juvenile and probate courts of the City and County of Denver, in all actions, suits and proceedings of a civil nature, whether cognizable as cases at law or in equity, and in all special statutory proceedings, with the exceptions stated in Rule 81. They shall be liberally construed to secure the just, speedy, and inexpensive determination of every action. Rules of civil procedure governing county courts shall be in accordance with Chapter 25 of this volume. Rules of Procedure governing probate courts and probate proceedings in the district courts shall be in accordance with these rules and Chapter 27 of this volume. (In case of conflict between rules, those set forth in Chapter 27 shall control.) Rules of Procedure governing juvenile courts and juvenile proceedings in the district courts shall be in accordance with these rules and Chapter 28 made effective on the same date as these rules. In case of conflict between rules those set forth in Chapter 28 shall control. Rules of Procedure in Municipal Courts are in Chapter 30.

(b) Effective Date. Amendments of these rules shall be effective on the date established by the Supreme Court at the time of their adoption, and thereafter all laws in conflict therewith shall be of no further force or effect. Unless otherwise stated by the Supreme Court as being applicable only to actions brought after the effective date of an amendment, they govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.

(c) How Known and Cited. These rules shall be known and cited as the Colorado Rules of Civil Procedure, or C.R.C.P.

Source: (c) amended and adopted December 5, 1996, effective January 1, 1997; (b) amended and adopted February 1, 2012, nunc pro tunc January 1, 2012, effective immediately.

Cross references: For exemption of certain statutory proceedings from the rules of civil procedure, see C.R.C.P. 81.

ANNOTATION

I. General Consideration.
II. Procedure Governed.
III. Effective Date.

I. GENERAL CONSIDERATION.

The requirements of the rules may be waived by failure to file objection. Continental Air Lines v. City & County of Denver, 129 Colo. 1, 266 P.2d 400 (1954).

The requirements may be waived by consent. Rose v. Agricultural Ditch & Reservoir Co., 69 Colo. 232, 193 P. 671 (1920); Continental Air Lines v. City & County of Denver, 129 Colo. 1, 266 P.2d 400 (1954).

Where sufficient objection is made at the proper time and place, there is no alternative but to enforce the applicable rule. Continental Air Lines v. City & County of Denver, 129 Colo. 1, 266 P.2d 400 (1954).

Violation of a rule of civil procedure does not create a private cause of action. Weiszmann v. Kirkland and Ellis, 732 F. Supp. 1540 (D. Colo. 1990).

Applied in Murray v. District Court, 189 Colo. 217, 539 P.2d 1254 (1975); Inwood Indus., Inc. v. Priestley, 37 Colo. App. 78, 545 P.2d 732 (1975), aff'd, 191 Colo. 543, 560 P.2d 822 (1976); Smith v. Bridges, 40 Colo. App. 171, 574 P.2d 511 (1977); Sherman v. District Court, 637 P.2d 378 (Colo. 1981); In re Brantley, 674 P.2d 1388 (Colo. App. 1983).

II. PROCEDURE GOVERNED.

Law reviews. For article, "Shall Colorado Procedure Conform with the Proposed Federal Rules of Civil Procedure?", see 15 Dicta 5 (1938). For article, "The Colorado Rules of Civil Procedure", see 23 Rocky Mt. L. Rev. 527 (1951).

Section 21 of the Colorado Constitution's article VI confers upon the supreme court the power to make rules governing practice in civil cases. Colo. River Water Conservation Dist. v. Rocky Mt. Power Co., 174 Colo. 309, 486 P.2d 438 (1971), cert. denied, 405 U.S. 996, 92 S.Ct. 1245, 31 L. Ed. 2d 465 (1972).

The Colorado rules of civil procedure are patterned after the federal rules. Lucas v. District Court, 140 Colo. 510, 345 P.2d 1064 (1959).

These rules provide a complete and orderly procedure for the trial and determination of civil actions. State Bd. of Exam'rs of Architects v. Marshall, 136 Colo. 200, 315 P.2d 198 (1957).

At law or equity. The rules of civil procedure provide for the application of the rules to the procedure in all actions, suits, or proceedings of a civil nature, whether cognizable at law or in equity. State Bd. of Exam'rs of Architects v. Marshall, 136 Colo. 200, 315 P.2d 198 (1957).

Rules of civil procedure apply to habeas corpus actions when the rules are not in conflict with habeas corpus statutes. Zaborski v. Dept. of Corr., 812 P.2d 236 (Colo. 1991).

The primary purpose of the rules of civil procedure is to simplify and clarify procedure and to expedite litigation. Swan v. Zwahlen, 131 Colo. 184, 280 P.2d 439 (1955); Seymour v. District Court, 196 Colo. 102, 581 P.2d 302 (1978).

The rules indicate clearly a general policy to disregard narrow technicalities and to bring about the final determination of justiciable controversies without undue delay. Swan v. Zwahlen, 131 Colo. 184, 280 P.2d 439 (1955).

Taking into consideration the general policy of the rules, they should be liberally construed. Swan v. Zwahlen, 131 Colo. 184, 280 P.2d 439 (1955); Crosby v. Kroeger, 138 Colo. 55, 330 P.2d 958 (1958); Roosevelt v. Beau Monde Co., 152 Colo. 567, 384 P.2d 96 (1963); Colo. River Water Conservation Dist. v. Rocky Mt. Power Co., 174 Colo. 309, 486 P.2d 438 (1971), cert. denied, 405 U.S. 996, 92 S.Ct. 1245, 31 L. Ed. 2d 465 (1972); Moses v. Moses, 180 Colo. 397, 505 P.2d 1302 (1973).

Amendments to pleadings should be granted in accordance with overriding purposes of rules of civil procedure — to secure the just, speedy, and inexpensive determination of every action. Varner v. District Court, 618 P.2d 1388 (Colo. 1980).

Technical errors or defects in proceedings not affecting the substantial rights of parties should be disregarded. Moses v. Moses, 180 Colo. 397, 505 P.2d 1302 (1973).

A strict technical application of time requirements is punitive. While unjustified delay in complying with procedural requirements is not condoned, to apply a strict technical application of time requirements appears to be a punitive disposition of the litigation, resulting in an arbitrary denial of substantial justice, contrary to the spirit of the rules of civil procedure. Moses v. Moses, 180 Colo. 397, 505 P.2d 1302 (1973); Semental v. Denver County Court, 978 P.2d 668 (Colo. 1999) (construing substantially similar language in CRCP 501).

The rules permit a court to deal with a case on the merits and look through form to substance; such was the state of the law in Colorado prior to the adoption of these rules. Waite v. People, 83 Colo. 162, 262 P. 1009 (1928).

Although substantive rights are not affected, the rules of civil procedure are procedural, and there is no attempt under them to affect the substantive rights of litigants. Crowley v. Hardman Bros., 122 Colo. 489, 223 P.2d 1045 (1950).

Special statutory procedures supersede the Colorado rules of civil procedure and must be followed. In re Oxley, 182 Colo. 206, 513 P.2d 1062 (1973).

Language in § 37-92-304 (3) to be construed with section (a). Section 37-92-304 (3)'s mandatory language that hearings shall be held where a protest has been filed and on cases of rereferral by a water referee to a water judge must be construed together with section (a) of this rule. In re Bunger v. Uncompahgre Valley Water Users Ass'n, 192 Colo. 159, 557 P.2d 389 (1976).

Mental health proceedings are not adversary. Where a proceeding is an inquiry into the mental condition of a defendant who has been

committed under a plea of not guilty by reason of insanity, the proceeding is not an adversary proceeding in the usual sense of a case which is controlled by the rules of civil procedure. People v. District Court, 192 Colo. 225, 557 P.2d 414 (1976).

Historically, the supreme court has considered mental health proceedings to be special statutory proceedings. People v. District Court, 192 Colo. 225, 557 P.2d 414 (1976).

Juvenile proceedings are governed by the procedural rules contained in the Colorado Children's Code. People ex rel. M.C.L., 671 P.2d 1339 (Colo. App. 1983).

Applied in Senne v. Conley, 110 Colo. 270, 133 P.2d 381 (1943); Berryman v. Berryman, 115 Colo. 281, 172 P.2d 446 (1946); Bridges v. Ingram, 122 Colo. 501, 223 P.2d 1051 (1950); Stalford v. Bd. of County Comm'rs, 128 Colo. 441, 263 P.2d 436 (1953); Stull v. District Court, 135 Colo. 86, 308 P.2d 1006 (1957); Graham v. District Court, 137 Colo. 233, 323 P.2d 635 (1958); Sprott v. Roberts, 154 Colo. 252, 390 P.2d 465 (1964); Rasmussen v. Freehling, 159 Colo. 414, 412 P.2d 217 (1966); Greco v. Pullara, 166 Colo. 465, 444 P.2d 383 (1968); In re Blair, 42 Colo. App. 270, 592 P.2d 1354 (1979).

III. EFFECTIVE DATE.

Applied in Chamberlin v. Chamberlin, 108 Colo. 538, 120 P.2d 641 (1941) (former code of civil procedure effective to April 6, 1941).

Rule 2. One Form of Action

There shall be one form of action to be known as "civil action".

ANNOTATION

The rules of civil procedure are designed to dispense with ritualistic, common-law, forms-of-action pleading. Bernstein v. Dun & Bradstreet, Inc., 149 Colo. 150, 368 P.2d 780 (1962).

The rules of civil procedure clearly provide for only one form of action. State Bd. of Exam'rs of Architects v. Marshall, 136 Colo. 200, 315 P.2d 198 (1957).

This rule abolishes distinction between actions at law and in equity. Dunlap v. Sanderson, 456 F. Supp. 971 (D. Colo. 1978).

It is immaterial whether an action is one for damages or one for specific performance, since, under this rule, there is but one form of action. McKenzie v. Crook, 110 Colo. 29, 129 P.2d 906 (1942).

This rule providing for one form of action does not abrogate the common law or equity rules relative to the right of one partner to sue another partner. L.H. Heiselt, Inc. v. Brown, 108 Colo. 562, 120 P.2d 644 (1941).

Applied in Uhl v. Fox, 31 Colo. 13, 498 P.2d 1177 (1972).

Rule 3. Commencement of Action

(a) How Commenced. A civil action is commenced (1) by filing a complaint with the court, or (2) by service of a summons and complaint. If the action is commenced by the service of a summons and complaint, the complaint must be filed within 14 days after service. If the complaint is not filed within 14 days, the service of summons shall be deemed to be ineffective and void without notice. In such case the court may, in its discretion, tax a reasonable sum in favor of the defendant to compensate the defendant for expense and inconvenience, including attorney's fees, to be paid by the plaintiff or his attorney. The 14 day filing requirement may be expressly waived by a defendant and shall be deemed waived upon the filing of a responsive pleading or motion to the complaint without reserving the issue.

(b) Time of Jurisdiction. The court shall have jurisdiction from (1) the filing of the complaint, or (2) the service of the summons and complaint; provided, however, if more than 14 days elapses after service upon any defendant before the filing of the complaint, jurisdiction as to that defendant shall not attach by virtue of the service.

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

Cross references: For issuance of summons by attorney or clerk, see C.R.C.P. 4(b).

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, "One Year Review of Civil Procedure and Appeals", see 40 Den. L. Ctr. J. 66 (1963). For article, "Civil Procedure", which discusses recent Tenth Circuit decisions dealing with jurisdiction, see 65 Den. U. L. Rev. 405 (1988).

Annotator's note. Since this rule is similar to § 34 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Applied in Havens v. Hardesty, 43 Colo. App. 162, 600 P.2d 116 (1979); DiChellis v. Peterson Chiropractic Clinic, 630 P.2d 103 (Colo. App. 1981); Styers v. Mara, 631 P.2d 1138 (Colo. App. 1981); Johnson v. McCaughan, Carter & Scharrer, 672 P.2d 221 (Colo. App. 1983).

II. HOW COMMENCED.

A. Complaint or Summons.

An action is commenced by the filing of a complaint or by the service of a summons, which gives a court jurisdiction over the plaintiff and of the action, but not over the person of a defendant, as this can only be acquired through legal service of process. Nelson v. District Court, 136 Colo. 467, 320 P.2d 959 (1957).

For historical review of this alternative procedure, see Haley v. Breeze, 16 Colo. 167, 26 P. 343 (1891); Stevens v. Carson, 21 Colo. 280, 40 P. 569 (1895).

The initial pleading is not required to be filed at the time of the service of summons, but ten days thereafter. Ardison v. Villa, 248 F.2d 226 (10th Cir. 1957).

While a case may pend indefinitely on the filing of the complaint alone, if its status is challenged by the administrative action of the court or by motion to dismiss, then a showing must be made to justify the delay in effecting service of process. Nelson v. Blacker, 701 P.2d 135 (Colo. App. 1985); Cullen v. Phillips, 30 P.3d 828 (Colo. App. 2001).

Where a summons relied upon as an initial pleading does not purport to set forth the claim for relief upon which the action or proceedings is based, it is merely a writ, not a pleading, which must follow within 10 days. Ardison v. Villa, 248 F.2d 226 (10th Cir. 1957).

Complaint fixes the nature of a suit. Miller v. Carnation Co., 33 Colo. App. 62, 516 P.2d 661 (1973).

Filing of an EEOC charge does not constitute the filing of a "complaint" within the meaning of this rule. Bennett v. Furr's Cafeterias, Inc., 549 F. Supp. 887 (D. Colo. 1982).

B. Dismissal.

Dismissal is discretionary. Authority to dismiss an action for failure to file the complaint within the time prescribed rests in the sound legal discretion of the court, because the phrase "may be dismissed" is not the language of a command nor of a penalty; it indicates rather that it is discretionary. Knight v. Fisher, 15 Colo. 176, 25 P. 78 (1890); Burkhardt v. Haycox, 19 Colo. 339, 35 P. 730 (1894).

This discretion should not be arbitrarily exercised. Knight v. Fisher, 15 Colo. 176, 25 P. 78 (1890); Burkhardt v. Haycox, 19 Colo. 339, 35 P. 730 (1894).

It would not be proper to dismiss the cause even though jurisdiction of defendant's person is lacking where the action is instituted and jurisdiction of the court is acquired by the filing of the complaint. Everett v. Wilson, 34 Colo. 476, 83 P. 211 (1905).

Dismissals under this rule are without prejudice and do not operate as an adjudication on the merits. Morehart v. Nat'l Tea Co., 29 Colo. App. 465, 485 P.2d 907 (1971).

Case reinstated where seasonable complaint mislaid. Where a case has, arbitrarily and "ex parte", been dismissed at the instance of defendant without notice to plaintiff on the alleged ground of failure to file the complaint within ten days, the court may, on a showing that the complaint had been seasonably lodged in the clerk's office and had been mislaid, set aside the dismissal and reinstate the case. Howell v. Goldberg, 98 Colo. 412, 56 P.2d 1330 (1936).

Allowance of attorney's fees held erroneous. Where there is no evidence as to whether the complaint was or was not filed, no expression of the opinion by the trial court that the action was vexatiously commenced, and no evidence as to what amount would constitute a reasonable attorney's fee to be taxed as costs, an allowance of attorney's fees under this rule is erroneous. Schwarz v. Ulmer, 149 Colo. 601, 370 P.2d 889 (1962).

III. TIME OF JURISDICTION.

Jurisdiction of the subject matter attaches in the court upon the filing of the complaint according to section (b) of this rule; and, when all parties involved make a general appearance,

the court then has exclusive jurisdiction over both the subject matter and the parties, and no other court of coordinate power can interfere with its action. Pub. Serv. Co. v. Miller, 135 Colo. 575, 313 P.2d 998 (1957); Powder Mtn. Painting v. Peregrine Joint Venture, 899 P.2d 279 (Colo. App. 1994).

On the filing date, the court acquires jurisdiction. On the date that a complaint is filed stating facts which, if proven, would authorize the court to enter a judgment in favor of the plaintiff and against defendant, an action is pending on such date, and on such date the court acquires jurisdiction thereof. Powell v. Nat'l Bank, 19 Colo. App. 57, 74 P. 536 (1903).

Jurisdiction not properly invoked when court order entered. Gutierrez v. District Court, 183 Colo. 264, 516 P.2d 647 (1973); White v. Dept. of Inst., 883 P.2d 575 (Colo. App. 1994).

Rule 4. Process

(a) To What Applicable. This Rule applies to all process except as otherwise provided by these rules.

(b) Issuance of Summons by Attorney or Clerk. The summons may be signed and issued by the clerk, under the seal of the court, or it may be signed and issued by the attorney for the plaintiff. Separate additional or amended summons may issue against any defendant at any time. All other process shall be issued by the clerk, except as otherwise provided in these rules.

(c) Contents of Summons. The summons shall contain the name of the court, the county in which the action is brought, the names or designation of the parties, shall be directed to the defendant, shall state the time within which the defendant is required to appear and defend against the claims of the complaint, and shall notify the defendant that in case of the defendant's failure to do so, judgment by default may be rendered against the defendant. If the summons is served by publication, the summons shall briefly state the sum of money or other relief demanded. The summons shall contain the name, address, and registration number of the plaintiff's attorney, if any, and if none, the address of the plaintiff. Except in case of service by publication under Rule 4(g) or when otherwise ordered by the court, the complaint shall be served with the summons. In any case, where by special order personal service of summons is allowed without the complaint, a copy of the order shall be served with the summons.

(d) By Whom Served. Process may be served within the United States or its Territories by any person whose age is eighteen years or older, not a party to the action. Process served in a foreign country shall be according to any internationally agreed means reasonably calculated to give notice, the law of the foreign country, or as directed by the foreign authority or the court if not otherwise prohibited by international agreement.

(e) Personal Service. Personal service shall be as follows:

(1) Upon a natural person whose age is eighteen years or older by delivering a copy thereof to the person, or by leaving a copy thereof at the person's usual place of abode, with any person whose age is eighteen years or older and who is a member of the person's family, or at the person's usual workplace, with the person's supervisor, secretary, administrative assistant, bookkeeper, human resources representative or managing agent; or by delivering a copy to a person authorized by appointment or by law to receive service of process.

(2) Upon a natural person whose age is at least thirteen years and less than eighteen years, by delivering a copy thereof to the person and another copy thereof to the person's father, mother, or guardian, or if there be none in the state, then by delivering a copy thereof to any person in whose care or control the person may be; or with whom the person resides, or in whose service the person is employed; and upon a natural person under the age of thirteen years by delivering a copy to the person's father, mother, or guardian, or if there be none in the state, then by delivering a copy thereof to the person in whose care or control the person may be.

(3) Upon a person for whom a conservator has been appointed, by delivering a copy thereof to such conservator.

(4) Upon any form of corporation, partnership, association, cooperative, limited liability company, limited partnership association, trust, organization, or other form of entity that is recognized under the laws of this state or of any other jurisdiction, (including any

such organization, association or entity serving as an agent for service of process for itself or for another entity) by delivering a copy thereof to the registered agent for service as set forth in the most recently filed document in the records of the secretary of state of this state or of any other jurisdiction, or that agent's secretary or assistant, or one of the following:

(A) An officer of any form of entity having officers, or that officer's secretary or assistant;

(B) A general partner of any form of partnership, or that general partner's secretary or assistant;

(C) A manager of a limited liability company or limited partnership association in which management is vested in managers rather than members, or that manager's secretary or assistant;

(D) A member of a limited liability company or limited partnership association in which management is vested in the members or in which management is vested in managers and there are no managers, or that member's secretary or assistant;

(E) A trustee of a trust, or that trustee's secretary or assistant;

(F) The functional equivalent of any person described in paragraphs (A) through (E) of this subsection (4), regardless of such person's title, under:

(I) the articles of incorporation, articles of organization, certificate of limited partnership, articles of association, statement of registration, or other documents of similar import duly filed or recorded by which the entity or any or all of its owners obtains status as an entity or the attribute of limited liability, or

(II) the law pursuant to which the entity is formed or which governs the operation of the entity;

(G) If no person listed in subsection (4) of this rule can be found in this state, upon any person serving as a shareholder, member, partner, or other person having an ownership or similar interest in, or any director, agent, or principal employee of such entity, who can be found in this state, or service as otherwise provided by law.

(5) Repealed.

(6) Upon a municipal corporation, by delivering a copy thereof to the mayor, city manager, clerk, or deputy clerk.

(7) Upon a county, by delivering a copy thereof to the county clerk, chief deputy, or county commissioner.

(8) Upon a school district, by delivering a copy thereof to the superintendent.

(9) Upon the state by delivering a copy thereof to the attorney general.

(10) (A) Upon an officer, agent, or employee of the state, acting in an official capacity, by delivering a copy thereof to the officer, agent, or employee, and by delivering a copy to the attorney general.

(B) Upon a department or agency of the state, subject to suit, by delivering a copy thereof to the principal officer, chief clerk, or other executive employee thereof, and by delivering a copy to the attorney general.

(C) For all purposes the date of service upon the officer, agent, employee, department, or agency shall control, except that failure to serve copies upon the attorney general within 7 days of service upon the officer, agent, employee, department, or agency shall extend the time within which the officer, agent, employee, department, or agency must file a responsive pleading for 63 days (9 weeks) beyond the time otherwise provided by these Rules.

(11) Upon other political subdivisions of the State of Colorado, special districts, or quasi-municipal entities, by delivering a copy thereof to any officer or general manager, unless otherwise provided by law.

(12) Upon any of the entities or persons listed in subsections (4) through (11) of this section (e) by delivering a copy to any designee authorized to accept service of process for such entity or person, or by delivery to a person authorized by appointment or law to receive service of process for such entity or person. The delivery shall be made in any manner permitted by such appointment or law.

(f) Substituted Service. In the event that a party attempting service of process by personal service under section (e) is unable to accomplish service, and service by publication or mail is not otherwise permitted under section (g), the party may file a motion, supported by an affidavit of the person attempting service, for an order for substituted

service. The motion shall state (1) the efforts made to obtain personal service and the reason that personal service could not be obtained, (2) the identity of the person to whom the party wishes to deliver the process, and (3) the address, or last known address of the workplace and residence, if known, of the party upon whom service is to be effected. If the court is satisfied that due diligence has been used to attempt personal service under section (e), that further attempts to obtain service under section (e) would be to no avail, and that the person to whom delivery of the process is appropriate under the circumstances and reasonably calculated to give actual notice to the party upon whom service is to be effective, it shall:

(1) authorize delivery to be made to the person deemed appropriate for service, and

(2) order the process to be mailed to the address(es) of the party to be served by substituted service, as set forth in the motion, on or before the date of delivery. Service shall be complete on the date of delivery to the person deemed appropriate for service.

(g) Other Service. Except as otherwise provided by law, service by mail or publication shall be allowed only in actions affecting specific property or status or other proceedings in rem. When service is by publication, the complaint need not be published with the summons. The party desiring service of process by mail or publication under this section (g) shall file a motion verified by the oath of such party or of someone in the party's behalf for an order of service by mail or publication. It shall state the facts authorizing such service, and shall show the efforts, if any, that have been made to obtain personal service and shall give the address, or last known address, of each person to be served or shall state that the address and last known address are unknown. The court, if satisfied that due diligence has been used to obtain personal service or that efforts to obtain the same would have been to no avail, shall:

(1) Order the party to send by registered or certified mail a copy of the process addressed to such person at such address, requesting a return receipt signed by the addressee only. Such service shall be complete on the date of the filing of proof thereof, together with such return receipt attached thereto signed by such addressee, or

(2) Order publication of the process in a newspaper published in the county in which the action is pending. Such publication shall be made once each week for five successive weeks. Within 14 days after the order the party shall mail a copy of the process to each person whose address or last known address has been stated in the motion and file proof thereof. Service shall be complete on the day of the last publication. If no newspaper is published in the county, the court shall designate one in some adjoining county.

(h) Manner of Proof. Proof of service shall be made as follows:

(1) If served personally, by a statement, certified by the sheriff, marshal or similar governmental official, or statement duly acknowledged under oath by any other person completing the service as to date, place, and manner of service;

(2) Repealed.

(3) If served by mail, by an affidavit showing the date of the mailing with the return receipt attached, where required;

(4) If served by publication, by the affidavit of publication, together with an affidavit as to the mailing of a copy of the process where required;

(5) If served by waiver, by the written admission or waiver of service by the person or persons served, duly acknowledged, or by their attorney;

(6) If served by substituted service, by a duly acknowledged statement as to the date, place, and manner of service, accompanied by an affidavit that the process was also mailed to the party to be served by substituted service, setting forth the address(es) where the process was mailed.

(i) Waiver of Service of Summons. A defendant who waives service of a summons does not thereby waive any objection to the venue or to the jurisdiction of the court over the defendant.

(j) Amendment. At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process is issued.

(k) **Refusal of Copy.** If a person to be served refuses to accept a copy of the process, service shall be sufficient if the person serving the process knows or has reason to identify the person who refuses to be served, identifies the documents being served, offers to deliver a copy of the documents to the person who refuses to be served, and thereafter leaves a copy in a conspicuous place.

Source: Entire rule amended and adopted, April 30, 1997, effective July 1, 1997; entire rule amended and effective March 23, 2006; (h)(1) amended and effective February 7, 2008; (e)(10)(C) and (g)(2) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); (e)(1) and (e)(4) amended and effective June 21, 2012.

Cross references: For service of process upon any person subject to the jurisdiction of the courts of Colorado, see § 13-1-125, C.R.S.; for publication of legal notices, see part 1 of article 70 of title 24, C.R.S.; for performance of the duties of the sheriff by the coroner when the former is a party to the action, see § 30-10-605, C.R.S.; for parties, see C.R.C.P. 17 to 25; for subpoenas, see C.R.C.P. 45; for attachments, see C.R.C.P. 102; for garnishments, see C.R.C.P. 103; for replevin, see C.R.C.P. 104.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, "Rules Committee Proposes Changes in Civil Procedure", see 21 Dicta 159 (1944). For article, "Notes on Proposed Amendments to Colorado Rules of Civil Procedure", see 27 Dicta 165 (1950). For article, "Amendments to the Colorado Rules of Civil Procedure", see 28 Dicta 242 (1951). For article, "One Year Review of Civil Procedure", see 35 Dicta 3 (1958). For article, "One Year Review of Civil Procedure and Appeals", see 37 Dicta 21 (1960). For article, "One Year Review of Civil Procedure and Appeals", see 39 Dicta 133 (1962). For article, "Substituted Service of Process on Cohabitants", see 52 U. Colo. L. Rev. 321 (1981). For article, "Jurisdiction and Service of Process Beyond Colorado Boundaries", see 11 Colo. Law. 648 (1982). For article, "Will Contests — Some Procedural Aspects", see 15 Colo. Law. 787, (1986). For article, "Prosecuting an Appeal from a Decision of the Colorado Public Utilities Commission", see 16 Colo. Law. 2163 (1987). For article, "Civil Procedure", which discusses recent Tenth Circuit decisions dealing with jurisdiction, see 65 Den. U. L. Rev. 405 (1988). For article, "The Rules Have Changed for Quiet Title Actions", see 27 Colo. Law. 69 (May 1998). For article, "2006 Amendments to the Civil Rules: Modernization, New Math, and Polishing", see 35 Colo. Law. 21 (May 2006).

Due process requires notice by actual or substituted service of process. Weber v. Williams, 137 Colo. 269, 324 P.2d 365 (1958).

Purpose of the requirement for serving process and a copy of the complaint upon party defendant is to give that party notice of the commencement of the proceedings so that the party has an opportunity to attend and prepare a defense. Swanson v. Precision Sales & Serv., 832 P.2d 1109 (Colo. App. 1992).

Mere failure to obtain proper service does not warrant dismissal of the cause of action. United Bank of Boulder, N.A. v. Buchanan, 836 P.2d 473 (Colo. App. 1992).

The question of proper service is a factual question to be resolved based upon a preponderance of the evidence. If a court's jurisdic-

tion is contested by means of a C.R.C.P. 12(b)(1) motion and there are contested issues of fact, the trial court is required to hold an evidentiary hearing to resolve those issues. Werth v. Heritage Int'l Holdings, PTO, 70 P.3d 627 (Colo. App. 2003).

Knowledge of a defendant of the pendency of an action cannot be substituted for service of process, for courts acquire jurisdiction in actions "in rem" as well as in actions "in personam" by lawful service of lawful process or by voluntary appearance. Weber v. Williams, 137 Colo. 269, 324 P.2d 365 (1958).

A judgment rendered without service, or upon the unauthorized appearance of an attorney, is void, and all proceedings had thereunder are as to all persons, irrespective of notice or bona fides, absolute nullities. Weber v. Williams, 137 Colo. 269, 324 P.2d 365 (1958).

Absence of legal service or authorized appearance is jurisdictional, and, without jurisdiction, no judgment whatever will be entered, nor rights acquired thereunder. Weber v. Williams, 137 Colo. 269, 324 P.2d 365 (1958); United Bank of Boulder, N.A. v. Buchanan, 836 P.2d 473 (Colo. App. 1992).

When jurisdiction has been obtained by the service of process, actual or constructive, all subsequent proceedings are an exercise of jurisdiction, and however erroneous, they are not void, but voidable only, and not subject to collateral attack. Brown v. Tucker, 7 Colo. 30, 1 P. 221 (1883).

It is not incumbent upon a defendant to do anything to make service of process upon him valid or regular. Coppinger v. Coppinger, 130 Colo. 175, 274 P.2d 328 (1954); Weber v. Williams, 137 Colo. 269, 324 P.2d 365 (1958).

Proper service question of fact. Whether personal or substituted service on a party has been properly made is a question of fact to be resolved by the trial court. Stubblefield v. District Court, 198 Colo. 569, 603 P.2d 559 (1979); People in Interest of S.C., 802 P.2d 1101 (Colo. App. 1989).

Service on wrong person confers no jurisdiction. Where the person intended to be sued is named as defendant and service is had on a different person who is not acting for, nor an agent of, the defendant, such service confers no jurisdiction over either the person named in the process or the person actually served. Havens v. Hardesty, 43 Colo. App. 162, 600 P.2d 116 (1979).

Distinction between subject matter jurisdiction and personal jurisdiction. Long-arm statute, § 13-1-124, together with defendant's note submitting to jurisdiction of Colorado courts for purposes of enforcement, conferred subject matter jurisdiction. However, in absence of valid service of process, court lacked personal jurisdiction and judgment was void. United Bank of Boulder, N.A. v. Buchanan, 836 P.2d 473 (Colo. App. 1992).

An objection to lack of personal jurisdiction relates to the power of a court to compel a defendant to appear and to defend or face entry of a default judgment. And, an objection to service of process is directed to the manner of notifying a defendant that a plaintiff seeks to have a court exercise personal jurisdiction over the defendant. United Bank of Boulder, N.A. v. Buchanan, 836 P.2d 473 (Colo. App. 1992).

Applied in Blank v. District Court, 190 Colo. 114, 543 P.2d 1255 (1975); Burrows v. Greene, 198 Colo. 167, 599 P.2d 258 (1979); People v. Hurst, 200 Colo. 537, 618 P.2d 1113 (1980); People v. Dutton, 629 P.2d 103 (Colo. 1981).

II. TO WHAT APPLICABLE.

Law reviews. For article, "Actions Concerning Real Estate Including Service of Process: Rule 105 and Rule 4", see 23 Rocky Mt. L. Rev. 614 (1951). For article, "Standard Pleading Samples to Be Used in Quiet Title Litigation", see 30 Dicta 39 (1953).

Service of notice in proceedings under § 14-10-105 of Uniform Dissolution of Marriage Act is governed by the rules of civil procedure. In re Henne, 620 P.2d 62 (Colo. App. 1980).

Proceedings commenced under § 37-92-302 (1)(a) are not subject to service of process requirements of rule but rather are handled through the unique resume-notice provisions of § 37-92-302 (3). Gardner v. State, 200 Colo. 221, 614 P.2d 357 (1980).

Proceedings commenced under Torrens Land Registration Act are not subject to service of process requirements of this rule but rather are handled through the notice provisions of the Torrens Act. Rael v. Taylor, 876 P.2d 1210 (Colo. 1994).

III. ISSUANCE OF SUMMONS AND OTHER PROCESS.

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

Annotator's note. Since section (5) of this rule is similar to § 35 of the former Code of Civil Procedure, which was supplanted by the rules of civil procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

The summons provided for by this rule is not a writ or process within the meaning of the constitution; there is no definition of "process", given by any accepted authority, which implies that any writ or method by which a suit is commenced is necessarily "process". A party is entitled to notice and to a hearing under the constitution before he can be affected, but it is

nowhere declared or required that such notice shall be only a writ issuing out of a court. Comet Consol. Mining Co. v. Frost, 15 Colo. 310, 25 P. 506 (1890).

A summons may be signed by an attorney and need not be under seal of court. Rand v. Pantagraph Co., 1 Colo. App. 270, 28 P. 661 (1891).

When a clerk has been appointed by a judge, so long as the appointment is not revoked, the clerk or his deputy alone has power to discharge the clerical duties of the office, and a summons issued and signed by the judge is void, notwithstanding the disqualification of the clerk to act on account of absence or sickness. McNevins v. McNevins, 28 Colo. 245, 64 P. 199 (1901).

A judge may elect to perform the duties of clerk of his court, and, when he does so elect, he is authorized to issue and sign all processes from his court. McNevins v. McNevins, 28 Colo. 245, 64 P. 199 (1901).

A summons not issued and signed either by the clerk or plaintiff's attorney is no summons. Russell v. Craig, 10 Colo. App. 428, 51 P. 1017 (1897).

The service of an unsigned summons does not effectively bring defendants within the jurisdiction of the court. Brown v. Amen, 147 Colo. 468, 364 P.2d 735 (1961).

An acceptance of service of a purported summons which was signed by neither the clerk nor plaintiff's attorney would be no acceptance of service of summons. Russell v. Craig, 10 Colo. App. 428, 51 P. 1017 (1897).

Entry of appearance by defendant to an action waives objections to summons or service thereof. Russell v. Craig, 10 Colo. App. 428, 51 P. 1017 (1897); see Brown v. Amen, 147 Colo. 468, 364 P.2d 735 (1961).

Summons issued upon a defective, but amendable, complaint is not void. A complaint which is defective, but amendable, cannot be regarded as entirely void, nor can a summons be so regarded merely because it is issued upon such a complaint. And it is of no importance that a copy of the original complaint was attached to the summons as served upon the respondents, because they are bound to take notice of the rule relating to amendments, and, if they choose to act on the assumption either that the plaintiff would not seek an amendment or that the court would not permit one, they do so at their peril. Goodman v. City of Ft. Collins, 164 F. 970 (8th Cir. 1908).

IV. CONTENTS OF SUMMONS.

A. In General.

Law reviews. For article, "One Year Review of Civil Procedure and Appeals", see 36 Dicta 5 (1959).

Annotator's note. Since section (c) of this rule is similar to § 36 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

The summons is a process by which parties are brought into court, so as to give a court jurisdiction over their persons. Fletcher v. District Court, 137 Colo. 143, 322 P.2d 96 (1958).

The purpose of a summons is to notify the defendant that an action has been brought against him, by whom, the place and court in which the same is brought, the relief demanded, and the time within which he must appear and answer in order to escape a judgment by default. Burkhardt v. Haycox, 19 Colo. 339, 35 P. 730 (1894).

The form of a summons is prescribed by law, and whatever that form may be, it must be observed at least substantially. Fletcher v. District Court, 137 Colo. 143, 322 P.2d 96 (1958).

The provisions of this rule concern the essential content of a summons. Susman v. District Court, 160 Colo. 475, 418 P.2d 181 (1966).

Provision of law is mandatory. Where the law expressly directs that process shall be in a specified form and issued in a particular manner, such a provision is mandatory, and a failure on the part of the proper official to comply with the law in that respect will render such process void. Smith v. Aurich, 6 Colo. 388 (1883).

A summons must contain all that is required by this rule whether deemed needful or not. Fletcher v. District Court, 137 Colo. 143, 322 P.2d 96 (1958).

A summons which does not meet the requirements of the law is a nullity. Fletcher v. District Court, 137 Colo. 143, 322 P.2d 96 (1958).

If the summons is void, there is no jurisdiction over the parties. Fletcher v. District Court, 137 Colo. 143, 322 P.2d 96 (1958).

The summons must be prejudicial to be void. It is manifest without argument that a defect in the summons which will be sufficient to constitute it void or erroneous must be of such a character as to mislead the defendant to his prejudice, and to prejudicially affect, or tend to so affect, some substantial right. Rich v. Collins, 12 Colo. App. 511, 56 P. 207 (1898).

There is a wide difference between a total failure and an inaccuracy or incompleteness of a required statement, especially so where the inaccuracy does not prejudicially affect a party nor tend in any manner to his injury. Rich v. Collins, 12 Colo. App. 511, 56 P. 207 (1898).

If all of the material objects are clearly accomplished by the process, although other language be used than that of the rule, it would be unreasonable to say that the defendant might

be heard to complain. Kimball v. Castagnio, 8 Colo. 525, 9 P. 488 (1885).

If copy served on defendant is sufficient, deficiencies in certified copy are immaterial. Where a certified copy of a summons obtained from the clerk of the court below, and purporting to have been served on defendant, is deficient, but the copy of the summons certified to the court in the transcript of the record as served on the defendant does not show such deficiency, an objection that the summons served in the action is deficient will not be considered. Tabor v. Goss & Phillips Mfg. Co., 11 Colo. 419, 18 P. 537 (1888).

A reference to the complaint for particulars does not aid a defective summons. Atchison, T. & S. F. R. R. v. Nichols, 8 Colo. 188, 6 P. 512 (1884); Fletcher v. District Court, 137 Colo. 143, 322 P.2d 96 (1958).

B. Naming of Parties.

Rules make no exception to naming requirement. The rules of civil procedure make no exception in "in rem" actions, as distinguished from "in personam" actions, to the requirement that defendants be named if their names are known or be designated as "unknown" when such is the case. Barker v. District Court, 199 Colo. 416, 609 P.2d 628 (1980).

The words "et al." do not satisfy requirements that parties shall be named. Smith v. Aurich, 6 Colo. 388 (1882).

An abbreviation of person's name may suffice to identify party. Rich v. Collins, 12 Colo. App. 511, 56 P. 207 (1899).

The omission of defendant's middle initial in a summons is immaterial, since in legal contemplation such initial constitutes no part of a person's name. Clark v. Nat'l Adjusters, Inc., 140 Colo. 593, 348 P.2d 370 (1959).

Naming of defendants insufficient. The designations, "owner" and "operator", in the caption of the case, without naming them, when those persons were known to the district attorney, are not in compliance with the requirements of the rules of civil procedure that a party defendant shall be named unless his name is unknown. Barker v. District Court, 199 Colo. 416, 609 P.2d 628 (1980).

C. Nature of Action.

Early provision required summons to state "the cause and general nature of the action". Barndollar v. Patton, 5 Colo. 46 (1879) (decided under repealed Civil Code 1887, § 34).

By a subsequent proviso it became no longer necessary. Burkhardt v. Haycox, 19 Colo. 339, 35 P. 730 (1894); Rich v. Collins, 12 Colo. App. 511, 56 P. 207 (1899).

Even under the early provision, statement of nature of action was not necessary if copy of complaint was served. Swem v. Newell, 19 Colo. 397, 35 P. 734 (1894).

D. Relief Demanded.

Summons which fails to comply with the provision of this rule, which provides that it shall briefly state the sum of money or other relief demanded in the action, is fatally defective, and a motion to quash should be sustained. Farris v. Walter, 2 Colo. App. 450, 31 P. 231 (1892).

A summons in a suit for contribution which states that the action is brought to recover judgment for such amount as should be found to be due from each defendant is not vulnerable to a motion to quash on the ground that it does not state the amount of money demanded. Taylor v. Hake, 92 Colo. 330, 20 P.2d 546 (1933).

Prayer for relief can be aided by statements in complaint where copy thereof is served with summons. Sage Inv. Co. v. Haley, 59 Colo. 504, 149 P. 437 (1915).

Under early proviso, reference to this pleading in no way aided a defective description in summons. Atchison, T. & S. F. R. R. v. Nichols, 8 Colo. 188, 6 P. 512 (1884) (decided under repealed Civil Code 1887, § 34).

This rule does not require that a copy of the complaint must be served with the summons. Smith v. Aurich, 6 Colo. 388 (1882); Seeley v. Taylor, 17 Colo. 70, 28 P. 461 (1891), 28 P. 723 (1892).

Summons in an action based on tort for false representations should show that the action is to recover damages for obtaining money from plaintiff by false and fraudulent representations or by deceit. Erisman v. McCarty, 77 Colo. 289, 236 P. 777 (1925).

Action shown to be on contract. A summons stating that the action is for the recovery of money and interest thereon as well as attorney fees, according to the terms of each, shows that the action is on contract. Erisman v. McCarty, 77 Colo. 289, 236 P. 777 (1925).

The phrase, "in consequence of certain acts and doings of said defendants", is too indefinite to be capable of itself of imparting any information whatever, as to what the defendant is called upon to answer, nor can an expression so void of advice be aided by reference to the complaint. Smith v. Aurich, 6 Colo. 388 (1882).

The relief demanded does not limit the plaintiff in respect to the remedy which he may have; the court will disregard the prayer and rely upon the facts alleged and proved as the basis of its remedial action. Nevin v. Lulu & White Silver Mining Co., 10 Colo. 357, 15 P. 611 (1887); Powell v. Nat'l Bank, 19 Colo. App. 57, 74 P. 536 (1903).

Principle that clerk must look to summons alone for amount may apply only to entry of judgment. Where there is no imperative reason insofar as service and notice and the entry of default are concerned why the summons should state the sum of money demanded, the contention that the clerk must look to the summons alone for the amount demanded can be applied only to the lawful power of the clerk to enter the judgment, and when the clerk does not enter the judgment, but only enters the default, this contention fails for lack of application. Griffing v. Smith, 26 Colo. App. 220, 142 P. 202 (1914).

Applied in Ardison v. Villa, 248 F.2d 226 (10th Cir. 1957).

V. BY WHOM SERVED.

Law reviews. For article, "Constitutional Law", see 32 Dicta 397 (1955).

Annotator's note. Since section (d) of this rule is similar to § 39 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

The words "or by any person not a party to the action" are intended to mean any other person competent to make the service, which, of necessity, excludes the attorneys in the case, they being incompetent. Nelson v. Chittenden, 53 Colo. 30, 123 P. 656 (1912).

The service of a summons by a plaintiff in the cause is void, and a judgment entered in the absence of the defendant and upon such service is a nullity. Toenniges v. Drake, 7 Colo. 471, 4 P. 790 (1884).

Service of process by an employee of counsel who is not counsel or associate counsel is proper service and does not violate the provisions of this rule requiring service to be made by any person not a party to the action. People in Interest of T.G., 849 P.2d 843 (Colo. App. 1992)

Server is not required to go outside county in which action is pending. The sheriff, or person not a party to the action, to whom the summons in a civil action is delivered for service is not in his search for the defendant required to go outside the county in which the action brought is pending. The return thereon by such officer or person that defendant cannot after diligent search be found therein constitutes a proper and sufficient basis for publication of summons. Gamewell v. Strumpler, 84 Colo. 459, 271 P. 180 (1928).

The sheriff loses his official character when he passes out of his own county, so that in serving a summons in another county he acts merely as an individual, and such service must be shown by his affidavit. His mere return, unsworn, is no evidence of the service, and judgment rendered upon such return of service, not otherwise shown, is void. Munson v. Pawnee Cattle Co., 53 Colo. 337, 126 P. 275 (1912).

VI. PERSONAL SERVICE IN STATE.

A. In General.

Law reviews. For article, "One Year Review of Civil Procedure and Appeals", see 36 Dicta 5 (1959). For article, "One Year Review of Civil Procedure and Appeals", see 40 Den. L. Ctr. J. 66 (1963). For note, "Service of Process in Colorado: A Proposed Revision of Rule Four", see 41 U. Colo. L. Rev. 569 (1969).

Annotator's note. Since section (e) of this rule is similar to § 40 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

This rule requires that a "copy" of the summons be served, not a duplicate original. Hocks v. Farmers Union Co-op. Gas & Oil Co., 116 Colo. 282, 180 P.2d 860 (1947).

The rule is satisfied where a transcript of the original summons, bearing the names of the clerk and counsel for the plaintiff in typewriting is served; actual signatures were not necessary. Hocks v. Farmers Union Co-op. Gas & Oil Co., 116 Colo. 282, 180 P.2d 860 (1947).

Voluntary appearance of a party is equivalent to personal service of process. Munson v. Luxford, 95 Colo. 12, 34 P.2d 91 (1935).

In motions to quash the service of process, the plaintiffs in such actions have the burden, after challenge, of establishing by competent evidence all facts essential to jurisdiction. Harvel v. District Court, 166 Colo. 520, 444 P.2d 629 (1968).

Clear and convincing proof by defendant is required. If the return on a summons is in proper form and shows service in accordance with the rule, the burden is upon defendant to overthrow the return by clear and convincing proof. Gibbs v. Ison, 76 Colo. 240, 230 P. 784 (1924).

Mere failure to obtain proper service does not warrant dismissal of the cause of action. Fletcher v. District Court, 137 Colo. 143, 322 P.2d 96 (1958).

A cause of action filed may remain so indefinitely pending service of process upon the parties. Fletcher v. District Court, 137 Colo. 143, 322 P.2d 96 (1958).

Counsel impliedly authorized to accept service of process. Where an attorney is hired to commence a lawsuit, he is authorized to accept service of process in a closely related judicial proceeding. Southerlin v. Automotive Elec. Corp., 773 P.2d 599 (Colo. App. 1988).

B. Upon Natural Persons.

Law reviews. For article, "In Re: The Mourners", see 6 Dicta 7 (April 1929).

A registered agent may be served in the same manner as a "natural person" under this rule. Goodman Assocs., LLC v. WP Mtn. Props., LLC, 222 P.3d 310 (Colo. 2010).

Service of process on defendant's registered agent was proper where delivered to agent's assistant at defendant's workplace. Agent's failure to receive process because of his own carelessness and neglect does not invalidate its proper service. Goodman Assocs., LLC v. WP Mtn. Props., LLC, 222 P.3d 310 (Colo. 2010).

This rule requires that the copy of the summons and complaint be "delivered" to the proper person. Martin v. District Court, 150 Colo. 577, 375 P.2d 105 (1962).

Clearly, by its own terms, the rule does not require that this "delivery" be accompanied by a reading aloud of the documents so served, or by explaining what they are, or by verbally advising the person sought to be served as to what he or she should do with the papers. Martin v. District Court, 150 Colo. 577, 375 P.2d 105 (1962); Goodman Assocs., LLC v. WP Mtn. Props., LLC, 222 P.3d 310 (Colo. 2010).

The term "usual place of abode" has generally been construed to mean the place where that person is actually living at the time service is attempted. Neher v. District Court, 161 Colo. 445, 422 P.2d 627 (1967); Security State Bank v. Weingardt, 42 Colo. App. 219, 597 P.2d 1045 (1979).

It is not synonymous with "domicile". Neher v. District Court, 161 Colo. 445, 422 P.2d 627 (1967); Security State Bank v. Weingardt, 42 Colo. App. 219, 597 P.2d 1045 (1979).

Upon one's induction into the armed forces, his parent's home ceases to be his place of abode, and it does not matter in this regard that some of his clothing and personal belongings remain there or that he intends to return to his mother's home, wherever it may be, as soon as his military service is terminated. While filial love binds him to his parents wherever they may be, and their home is his for lack of another, it is no longer his "actual place of abode" within the intendment of the rule. Neher v. District Court, 161 Colo. 445, 422 P.2d 627 (1967).

The term "family" includes husband's adult daughter who was visiting him at the time of service. In re Eisenhuth, 976 P.2d 896 (Colo. App. 1999).

Service of summons upon an infant over the age of 14 years, but not upon the guardian, no guardian "ad litem" being appointed, but the record reciting that the infant defendant appeared by his next friend as well as by attorney was sufficient service and the appearance was authorized. Filmore v. Russell, 6 Colo. 171 (1881).

C. Upon Unincorporated Associations.

Annotator's note. Since section (e)(4) of this rule is similar to that section of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

The general rule at common law was that where the obligation was joint only, all the joint obligors must be made parties defendant and must be sued jointly. Sargeant v. Grimes, 70 F.2d 121 (10th Cir.), cert. denied, 293 U.S. 568, 55 S. Ct. 79, 79 L. Ed. 667 (1934).

The purpose of this rule is to change the common-law rule and provide a procedure whereby a partnership could be sued upon a partnership obligation, service made upon one or more but not all of the partners, and a judgment rendered binding the partnership and its property as well as the individual property of the partners served as partners. Sargeant v. Grimes, 70 F.2d 121 (10th Cir.), cert. denied, 293 U.S. 568, 55 S. Ct. 79, 79 L. Ed. 667 (1934).

This rule only provides a method of suing a partnership in addition to the remedy already existing. Peabody v. Oleson, 15 Colo. App. 346, 62 P. 234 (1900).

This rule is cumulative merely and does not affect the right to sue all the members of a firm by their several individual names and obtain a joint judgment against them as partners. Peabody v. Oleson, 15 Colo. App. 346, 62 P. 234 (1900).

It makes the service of summons upon one partner sufficient to bring the partnership into court and bind its property by the judgment. Peabody v. Oleson, 15 Colo. App. 346, 62 P. 234 (1900).

Service of summons includes serving member of family over 18 at residence. Service of summons upon a member of a partnership by leaving a copy of the summons and complaint at his usual place of residence with a member of his family over 15 (now 18) years of age is sufficient service on a partnership under this rule. Barnes v. Colo. Springs & C. C. D. Ry., 42 Colo. 461, 94 P. 570 (1908).

No personal judgment can be obtained against the partners not served; as to them, the judgment rendered can bind only their interests in the partnership property. The judgment should be against the partnership, and in a proper manner, the individual property of the member or members served might be reached for the purpose of satisfying it. Peabody v. Oleson, 15 Colo. App. 346, 62 P. 234 (1900); Ellsberry v. Block, 28 Colo. 477, 65 P. 629 (1901); Blythe v. Cordingly, 20 Colo. App. 508, 80 P. 495 (1905).

A judgment against a partnership binds the joint property of the associates and the separate property of members duly served with process. Denver Nat'l Bank v. Grimes, 97 Colo. 158, 47 P.2d 862 (1935).

Where in an action upon a partnership debt only one of two partners was served with summons and a judgment was entered against the individual partner served, but no judgment was entered against the partnership and the other partner was afterwards brought in by "scire facias" and a judgment was entered against said partner as for an individual debt, then, in the absence of a judgment against the firm, it was error to render judgment against the other partner for the individual debt. Ellsberry v. Block, 28 Colo. 477, 65 P. 629 (1901).

A judgment on copartnership promissory notes merged the notes into the judgment, although only one of the partners was served with summons or appeared in the action, and suit could not thereafter be maintained on the notes against the partners not served. Blythe v. Cordingly, 20 Colo. App. 508, 80 P. 495 (1905).

Any member being served with summons has notice that he may appear in the case and set up any defense to the partnership liability or to his liability as a partner. Denver Nat'l Bank v. Grimes, 97 Colo. 158, 47 P.2d 862 (1935); Sargeant v. Grimes, 70 F.2d 121 (10th Cir.), cert. denied, 293 U.S. 568, 55 S. Ct. 79, 79 L. Ed. 667 (1934).

Court has jurisdiction of a partner who is served for purposes of proceeding to final judgment against him. A judgment having been entered against a partnership and execution thereon having been returned unsatisfied under the provisions of this rule, the court has and continues to have jurisdiction of a partner who had been served with summons for the purpose of proceeding to final judgment against him. Denver Nat'l Bank v. Grimes, 97 Colo. 158, 47 P.2d 862 (1935).

Service upon a partner in a partnership that, in turn, is a partner in a second partnership does not provide notice to the second partnership with sufficient notice of suit against it. Bush v. Winker, 892 P.2d 328 (Colo. App. 1994), aff'd, 907 P.2d 79 (Colo. 1995).

Mere knowledge of the general partner of a partnership, which, in turn, is a partner in a second partnership, that a legal proceeding is pending is not a substitute for service upon the proper entity. Bush v. Winker, 892 P.2d 328 (Colo. App. 1994), aff'd, 907 P.2d 79 (Colo. 1995).

An amendment adding name of another partner is not a change of the cause of action. Where an action is brought against a partnership under the proper partnership name and against one partner who is served with summons, an amendment setting forth the name of another partner and making him a party to the action is not a change of the cause of action by changing the parties to the contract sued on where the partnership named in the amendment and the matter sued on are the same as those named in the original. Adamson v. Bergen, 15 Colo. App. 396, 62 P. 629 (1900).

An action may be maintained against a subordinate or branch organization or association upon a mutual benefit insurance policy where the policy is the obligation of the subordinate or branch association, although the association is under the control of, and the certificate is under the seal of, a supreme lodge. On such a policy an action is properly brought against them under its associate name. Endowment Rank of K. P. v. Powell, 25 Colo. 154, 53 P. 285 (1898).

Ruling denying motion to quash service is appealable order. Where the defendant appears specially and moves to quash the service of summons upon the ground that the service under section (e)(4) of this rule is ineffective and void, then, when the trial court overrules this motion, this ruling denying the defendants' motion to quash the service of summons is an appealable order. Wells Aircraft Parts Co. v. Allan J. Kayser Co., 118 Colo. 197, 194 P.2d 326 (1947).

D. Upon Corporations.

Determining corporate presence within the state is resolved by: (1) Leaving the matter in the sound discretion of a trial court; (2) distinguishing between those cases where merely the internal affairs of a corporation are involved and those cases where the corporation has had transactions with third persons; and (3) considering the equities of the case. Hibbard, Spencer, Bartlett & Co. v. District Court, 138 Colo. 270, 332 P.2d 208 (1958).

The question of what constitutes doing business is a fact to be determined as any other fact. Hibbard, Spencer, Bartlett & Co. v. District Court, 138 Colo. 270, 332 P.2d 208 (1958).

The contracting of a debt is a sufficient doing of business within this state to render a corporation amenable to the courts of this state if jurisdiction could be obtained by service of process as provided in this rule. Colo. Iron-Works v. Sierra Grande Mining Co., 15 Colo. 499, 25 P. 325 (1890).

The Colorado supreme court has not condemned the manner of service of process under this rule as being unfair or as failing to give notice. Focht v. Southwestern Skyways, Inc., 220 F. Supp. 441 (D. Colo. 1963), aff'd, 336 F.2d 603 (10th Cir. 1964).

To bind a corporation, the service of process must be upon the identical agent provided by the rule. Great W. Mining Co. v.

Woodmas of Alston Mining Co., 12 Colo. 46, 20 P. 771 (1888).

Subsection (e)(1) requires either personal service or substituted service at the party's usual place of business, with the party's stenographer, bookkeeper, or chief clerk. People in Interest of S.C., 802 P.2d 1101 (Colo. App. 1989).

Service upon the vice-president of a corporation is sufficient even though the return does not show that the president could not be found in the county. Comet Consol. Mining Co. v. Frost, 15 Colo. 310, 25 P. 506 (1890).

Determination of whether a person is a general agent of a corporation for service of process requires an analysis of that person's duties, responsibilities, and authority. Denman v. Great Western Ry. Co., 811 P.2d 415 (Colo. App. 1990).

Delivery of suit papers to corporation's registered agent may be accomplished in the same manner as service on a "natural person" under subsection (e)(1). Thus, delivery of such papers to a registered agent's "stenographer, bookkeeper, or chief clerk" constitutes delivery to that agent. Merrill Chadwick Co. v. October Oil Co., 725 P.2d 17 (Colo. App. 1986); Swanson v. Precision Sales & Serv., 832 P.2d 1109 (Colo. App. 1992).

Secretary's corporate employer which was the sole shareholder of defendant corporation and whose president was the defendant corporation's registered agent held to be registered agent's "stenographer" under rule authorizing service of process on natural person's stenographer. Swanson v. Precision Sales & Serv., 832 P.2d 1109 (Colo. App. 1992).

Service held proper where secretary was performing service directly for registered agent at the same address that he had listed as defendant's corporation's registered office since it was reasonable to conclude that the secretary would have given registered agent notice of service. Swanson v. Precision Sales & Serv., 832 P.2d 1109 (Colo. App. 1992).

Service of process on defendant was proper where two copies of summons were served on an agent representing both defendants in the case and the summons did not specifically indicate which of the two defendants was being served. A party assumes the risk that errors in transmittal of service of process by its registered agent, who also receives service of process for numerous other entities, will bind the principal. Brown Grain & Livestock, Inc. v. Union Pac. Res. Co., 878 F.2d 157 (Colo. App. 1994).

Nonresident officer not on business may be served in state. Under this rule service is legally sufficient when made on an officer of a corporation whose residence is in another state and who is at the time of service temporarily in this state on business not connected with the corporation; the fact that such officer invited such service would be pertinent in determining the validity thereof. Venner v. Denver Union Water Co., 40 Colo. 212, 90 P. 623 (1907).

Service may properly be made upon agent of receivers who have displaced ordinary officers. The receivers of a foreign corporation, who by their appointment as such displace the ordinary officers of a corporation, are to be treated as foreign receivers, and if the return of the sheriff shows a service that would have been sufficient upon the corporation under its ordinary management, it must be equally sufficient if made upon an agent of the receivers when the affairs of the corporation are under the management of the latter. Ganebin v. Phelan, 5 Colo. 83 (1879).

Under this rule, service is proper upon the agent of a foreign corporation if made within the state. White-Rodgers Co. v. District Court, 160 Colo. 491, 418 P.2d 527 (1966).

Corporation was properly served when the individual registered agent was properly served and thus the trial court had in personam jurisdiction. Merrill Chadwick Co. v. October Oil Co., 725 P.2d 17 (Colo. App. 1986).

Service shall be made upon agent in county where action is brought. In a suit against a foreign corporation, service must be made upon it by delivering a copy of the summons to its agent found within the county where the action is brought. Venner v. Denver Union Water Co., 15 Colo. App. 495, 63 P. 1061 (1900).

It is only in such agent not found within the county that substituted service is valid. Venner v. Denver Union Water Co., 15 Colo. App. 495, 63 P. 1061 (1900).

Service upon stockholder is a nullity unless agent is not found. Service upon a stockholder, unless there is a failure to find the agent, is a nullity. Venner v. Denver Union Water Co., 15 Colo. App. 495, 63 P. 1061 (1900).

A person engaged in settling an insurance loss in state is an agent. Where a foreign insurance corporation employs an adjusting company to settle a loss sustained in Colorado and an employee of the latter company is given the insurance company's files and drafts for payment of any sum agreed upon in settlement of the claim and invested with full power to make the adjustment, then, in these circumstances, such an employee of the adjustment company is the agent of the insurance company, and service of process on him is service on the latter company. Union Mut. Life Co. v. District Court, 97 Colo. 108, 47 P.2d 401 (1935).

In an action against a corporation upon a claim for services by an agent assigned by such agent to plaintiff, service of summons upon the agent who assigned the claim is not a sufficient service on the corporation. White

House Mt. Gold Mining Co. v. Powell, 30 Colo. 397, 70 P. 679 (1902).

Service may be had upon stockholder. It is only in the event that no agent is found in the county that service may be had upon a stockholder. Venner v. Denver Union Water Co., 15 Colo. App. 495, 63 P. 1061 (1900).

VII. PERSONAL SERVICE OUTSIDE THE STATE.

A. In General.

Law reviews. For article, "Some Footnotes to the 1945 Statutes", see 22 Dicta 130 (1945). For article, "Constitutional Law", see 32 Dicta 397 (1955). For article, "Another Decade of Colorado Conflicts", see 33 Rocky Mt. L. Rev. 139 (1961). For article, "Colorado's Short-Arm Jurisdiction", see 37 U. Colo. L. Rev. 309 (1965). For article, "Rule-Making in Colorado: An Unheralded Crisis in Procedural Reform", see 38 U. Colo. L. Rev. 137 (1966).

B. Natural Persons.

Law reviews. For article, "Conflict of Laws, Constitutional Law, Elections", see 30 Dicta 449 (1953). For article, "Civil Remedies and Civil Procedure", see 30 Dicta 465 (1953).

This rule relating to personal service outside the state is confined to the question of who is, or who is not, a resident of the state of Colorado. Kellner v. District Court, 127 Colo. 320, 256 P.2d 887 (1953).

Burden of proof is on plaintiff. When the question of Colorado residence is raised and a denial thereof is prima facie made, the burden of establishing, or proving, that defendants are in fact residents of Colorado is on plaintiffs. Kellner v. District Court, 127 Colo. 320, 256 P.2d 887 (1953).

"Residence" and "domicile" are commonly taken as being synonymous, notwithstanding that in precise usage they are not convertible terms. Rust v. Meredith Publishing Co., 122 F. Supp. 879 (D. Colo. 1954).

"Place of abode" is not necessarily synonymous with "domicile". The term "usual place of abode" has generally been construed to mean the place where that person is actually living at the time service is attempted; it is not necessarily synonymous with "domicile". Neher v. District Court, 161 Colo. 445, 422 P.2d 627 (1967).

Residence is determined by intention of parties supported by acts. Domicile, or residence as used in this rule, in a legal sense, is determined by the intention of the parties. But while intention seems to be the controlling element, it is not always conclusive unless the intention is fortified by some act or acts in support thereof. Kellner v. District Court, 127 Colo. 320, 256 P.2d 887 (1953).

The issue of domicile is a compound question of fact and intention. Kellner v. District Court, 127 Colo. 320, 256 P.2d 887 (1953).

A change of voting place surely is compelling evidence of the intention of making a change of residence. Kellner v. District Court, 127 Colo. 320, 256 P.2d 887 (1953).

Residence may commence in another state before a definite county or precinct is fixed for a permanent residence. Kellner v. District Court, 127 Colo. 320, 256 P.2d 887 (1953).

C. Other Than Natural Persons.

A corporation organized under the laws of one state is a resident of that state under whose laws it was created and cannot be a resident of any other state. Rust v. Meredith Publishing Co., 122 F. Supp. 879 (D. Colo. 1954).

Even if a corporation has permission to carry on a business in another state upon compliance with the laws of the other state, such permission and compliance does not make it a resident of such other state. Rust v. Meredith Publishing Co., 122 F. Supp. 879 (D. Colo. 1954).

D. Status or In Rem.

Under this rule, service is good if it can be said that the action is one affecting a specific "status" or is a proceeding "in rem". Owen v. Owen, 127 Colo. 359, 257 P.2d 581 (1953).

Colorado recognizes the concept "in rem" or "quasi in rem" jurisdiction acquired through attachment or garnishment of the defendant's property within the state by providing for service of process on owners of specific property without regard to residence or domicile. A judgment which is rendered in such a case operates solely upon the res attached. George v. Lewis, 204 F. Supp. 380 (D. Colo. 1962).

Service outside state for divorce is valid. Personal service outside the state when made upon a defendant in an action for divorce is valid, since an action for divorce unquestionably is an action "in rem". Owen v. Owen, 127 Colo. 359, 257 P.2d 581 (1953).

The rule is not applicable to proceedings for annulment in that matrimonial "status" is not the subject. Owen v. Owen, 127 Colo. 359, 257 P.2d 581 (1953).

VIII. OTHER SERVICE.

A. In General.

Law reviews. For article, "Again — How Many Times?", see 21 Dicta 62 (1944).

Annotator's note. Since section (g) of this rule is similar to § 45 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Where no judgment "in personam" is sought by plaintiffs against a nonresident defendant, the service of summons by publication is proper. Hoff v. Armbruster, 125 Colo. 324, 244 P.2d 1069 (1952).

In cases affecting specific property or in other proceedings in rem, section (g) specifically authorizes service by publication upon a nonresident. In re Ramsey, 34 Colo. App. 338, 526 P.2d 319 (1974).

Proceedings by wife to charge husband's property with alimony is a proceeding "in rem". Where the plaintiff seeks to charge her husband's property with her alimony, and to set aside conveyances made in fraud of her rights, the suit is a proceeding "in rem" within the meaning of this rule. Hanscom v. Hanscom, 6 Colo. App. 97, 39 P. 885 (1895).

A creditor's bill is a proceeding in rem, within the meaning of this rule. Shuck v. Quackenbush, 75 Colo. 592, 227 P. 1041 (1924).

Actions "in the nature of actions in rem" may be supported by constructive service as fully as those truly "in rem". Kern v. Wilson, 91 Colo. 355, 14 P.2d 1014 (1932).

Service by publication of summons in actions "in rem" is not limited to cases involving real estate, but may apply to those involving personal property as well. Hoff v. Armbruster, 125 Colo. 324, 244 P.2d 1069 (1952).

Where plaintiff fails to initiate a traditional in rem action or a quasi in rem action in a negligence suit, service by publication was improper. ReMine ex rel. Liley v. District Court, 709 P.2d 1379 (Colo. 1985).

Substituted service is not available outside the state. Unlike residents, nonresidents must be served personally under the plain language of subsection (f)(1). United Bank of Boulder, N.A. v. Buchanan, 836 P.2d 473 (Colo. App. 1992).

B. By Mail.

The mandatory requirements of this rule include a verified motion by either the plaintiff or counsel in his behalf for an order for service by mail, a hearing "ex parte", and entry of an order of court directing the clerk to send a copy of process by mail to known out-of-state defendants. Jones v. Colescott, 134 Colo. 552, 307 P.2d 464 (1957).

Where a plaintiff does not follow this rule and omits not one but many mandatory steps set out therein, it is error to permit a judgment to stand. Jones v. Colescott, 134 Colo. 552, 307 P.2d 464 (1957).

If summons is properly addressed but not received, it will be presumed that postage was not prepaid. Where it is shown that a copy of the summons in a cause brought against a nonresident defendant was properly addressed and mailed to the defendant whose place of residence was well known, where he had resided for years, and where he was accustomed to receive his mail-matter regularly, but that the same was not received by him, it will be presumed, in the absence of proof to the contrary, that the sender omitted to prepay the postage. Morton v. Morton, 16 Colo. 358, 27 P. 718 (1891).

IX. PUBLICATION.

A. In General.

Law reviews. For article, "A Tax Title Quieted", see 6 Dicta 9 (Nov. 1928). For article, "How Many Times?", see 19 Dicta 231 (1942). For article, "Again — How Many Times?", see 21 Dicta 62 (1944). For article, "Motion for Publication of Summons in Quiet Title Proceedings", see 26 Dicta 182 (1949).

Annotator's note. Since section (h) of this rule is similar to § 45 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

The law requires that personal service shall be had whenever it is obtainable. Coppinger v. Coppinger, 130 Colo. 175, 274 P.2d 328 (1954); Weber v. Williams, 137 Colo. 269, 324 P.2d 365 (1958).

When some evidence indicates the whereabouts of the absent party, any form of substituted service must have a reasonable chance of giving that party actual notice of the proceeding. Synan v. Haya, 15 P.3d 1117 (Colo. App. 2000).

Publication must be for one of enumerated cases. To render a publication of summons effective for any purpose, it must be made in one of the enumerated cases. Hanscom v. Hanscom, 6 Colo. App. 97, 39 P. 885 (1895).

The ground for such service must exist, that is, that the defendant cannot be personally served within the state. Hanshue v. Charles B. Marvin Inv. Co., 67 Colo. 189, 184 P. 289 (1919).

In cases affecting specific property or in other proceedings in rem, section (h) specifically authorizes service by publication upon a nonresident. In re Ramsey, 34 Colo. App. 338, 526 P.2d 319 (1974).

Service by publication in the state where property is located is not always constitutionally adequate in quasi in rem actions. Synan v. Haya, 15 P.3d 1117 (Colo. App. 2000).

Section (h) controls number of publications for child custody jurisdiction act. Since § 14-13-106 (1)(d) does not specify the number of times that publication is required to effect notice under the Uniform Child Custody Jurisdiction Act, section (h) of this rule controls. In re Blair, 42 Colo. App. 270, 592 P.2d 1354 (1979).

Service by publication is last resort. In case service may not be had either personally or by mailing or other substituted service, then service by publication is permissible as a final and last resort. Coppinger v. Coppinger, 130 Colo. 175, 274 P.2d 328 (1954); Weber v. Williams, 137 Colo. 269, 324 P.2d 365 (1958).

Constructive service by publication is a right given by this rule. O'Rear v. Lazarus, 8 Colo. 608, 9 P. 621 (1885); Beckett v. Cuenin, 15 Colo. 281, 25 P. 167 (1890); Trowbridge v. Allen, 48 Colo. 419, 110 P. 193 (1910); Empire Ranch & Cattle Co. v. Coldren, 51 Colo. 115, 117 P. 1005 (1911); Jotter v. Marvin, 67 Colo. 548, 189 P. 19 (1919).

Every material requirement in relation to service by publication must be strictly complied with to give the court jurisdiction. O'Rear v. Lazarus, 8 Colo. 608, 9 P. 621 (1885); Beckett v. Cuenin, 15 Colo. 281, 25 P. 167 (1890); Davis v. John Mouat Lumber Co., 2 Colo. App. 381, 31 P. 187 (1892); Trowbridge v. Allen, 48 Colo. 419, 110 P. 193 (1910); Empire Ranch & Cattle Co. v. Coldren, 51 Colo. 115, 117 P. 1005 (1911); Jotter v. Marvin, 67 Colo. 548, 189 P. 19 (1919); Robinson v. Clauson, 142 Colo. 434, 351 P.2d 257 (1960); Hancock v. Boulder County Pub. Trustee, 920 P.2d 854 (Colo. 1995).

Constructive service is in derogation of the common law, making it imperative that there must be a strict compliance with every requirement of this rule; failure in this respect is fatal. Coppinger v. Coppinger, 130 Colo. 175, 274 P.2d 328 (1954); Weber v. Williams, 137 Colo. 269, 324 P.2d 365 (1958).

Compliance with every condition of this rule must affirmatively appear from the record. Coppinger v. Coppinger, 130 Colo. 175, 274 P.2d 328 (1954); Weber v. Williams, 137 Colo. 269, 324 P.2d 365 (1958).

But order for publication needs not precede the beginning of publication. Where plaintiff expressly advised the court of all relevant facts and circumstances, including the fact that she had already begun publication, no prejudice resulted and neither the service nor the judgment was invalid. Hancock v. Boulder County Pub. Trustee, 920 P.2d 854 (Colo. App. 1995).

Nothing excuses omissions or insufficient statements. Beckett v. Cuenin, 15 Colo. 281, 25 P. 167 (1890); Sylph Mining & Milling Co. v. Williams, 4 Colo. App. 345, 36 P. 80 (1894); Trowbridge v. Allen, 48 Colo. 419, 110 P. 193 (1910); Empire Ranch & Cattle Co. v. Coldren, 51 Colo. 115, 117 P. 1005 (1911); Robinson v. Clauson, 142 Colo. 434, 351 P.2d 257 (1960).

Courts are jealous of abuses in the application thereof. While experience demonstrates that this mode of giving a court jurisdiction of the person is necessary in many instances, yet courts are jealous of abuses in the application thereof; hence, they tolerate the omission of no material step required by law in connection therewith. Israel v. Arthur, 7 Colo. 5, 1 P. 438 (1883).

Where a plaintiff does not follow this rule and omits not one but many mandatory steps set out therein, it is error to permit a judgment to stand. Jones v. Colescott, 134 Colo. 552, 307 P.2d 464 (1957).

This necessity to strictly follow the rule has long been established. O'Rear v. Lazarus, 8 Colo. 608, 9 P. 621 (1885); Davis v. John Mouat Lumber Co., 2 Colo. App. 381, 31 P. 187 (1892).

If rule is not complied with, the service may be collaterally attacked. In obtaining constructive service of process by publication, a compliance with the method pointed out by this rule must be observed, and if the record being offered in evidence shows affirmatively that its provisions relating to service by publication were not complied with, it may be attacked in a collateral proceeding. Trowbridge v. Allen, 48 Colo. 419, 110 P. 193 (1910).

The recital in a judgment that service was complied with does not change this rule. Trowbridge v. Allen, 48 Colo. 419, 110 P. 193 (1910).

The motion and affidavit upon which the order for constructive service is entered takes precedence over recitals in a judgment. Coppinger v. Coppinger, 130 Colo. 175, 274 P.2d 328 (1954); Weber v. Williams, 137 Colo. 269, 324 P.2d 365 (1958).

The authorities are in conflict as to whether the constructive service may be presumed regular where record is silent. Israel v. Arthur, 7 Colo. 5, 1 P. 438 (1883).

Rule seems to be that record must show. Where reliance is placed wholly upon service by publication, the rule seems to be that the record must affirmatively show all the essential jurisdictional facts. This rule is not entirely undisputed, but it is sanctioned by the weight of authority and is founded upon excellent reason. O'Rear v. Lazarus, 8 Colo. 608, 9 P. 621 (1885).

If record is not silent no presumption can be indulged in. Where the record is not silent on this subject and where it affirmatively appears therein that the court did not have jurisdiction of the person, no such presumption can be indulged in. Clayton v. Clayton, 4 Colo. 410 (1878); Israel v. Arthur, 7 Colo. 5, 1 P. 438 (1883).

Errors in the service of summons by publication may be waived by the appearance and answer of defendant to the merits. New York & B. M. Co. v. Gill, 7 Colo. 100, 2 P. 5 (1883).

Applied in George v. Lewis, 228 F. Supp. 725 (D. Colo. 1964).

B. On Verified Motion.

Under this rule a verified motion must state the facts authorizing the service and show the efforts, if any, that have been made to make personal service within the state, and it must name the known defendants who are outside the state and their last known addresses, or that the addresses are unknown. Jones v. Colescott, 134 Colo. 552, 307 P.2d 464 (1957).

In the motion and affidavit, the applicant must be forthright and explicit in setting forth all of the pertinent facts in order that the court may have before it the complete picture to enable correct evaluation and determination whether service by publication is justified or required under the circumstances. Coppinger v. Coppinger, 130 Colo. 175, 274 P.2d 328 (1954); Weber v. Williams, 137 Colo. 269, 324 P.2d 365 (1958); Hancock v. Boulder County Pub. Trustee, 920 P.2d 854 (Colo. App. 1995).

The validity of constructive service is dependent upon the good faith of the plaintiff and the accuracy of the statements contained in his verified motion upon which the order for publication is based. Coppinger v. Coppinger, 130 Colo. 175, 274 P.2d 328 (1954); Weber v. Williams, 137 Colo. 269, 324 P.2d 365 (1958); Hancock v. Boulder County Pub. Trustee, 920 P.2d 854 (Colo. App. 1995).

If plaintiff in any way misrepresents the facts, either actively or merely by failure to reveal them, then it follows as a matter of course that an order directing constructive service of process by publication is invalid. Coppinger v. Coppinger, 130 Colo. 175, 274 P.2d 328 (1954); Weber v. Williams, 137 Colo. 269, 324 P.2d 365 (1958).

Anything short of the full disclosure of all known pertinent facts is a fraud upon the court and renders void any decree thereafter entered. Coppinger v. Coppinger, 130 Colo. 175, 274 P.2d 328 (1954); Weber v. Williams, 137 Colo. 269, 324 P.2d 365 (1958).

To simply go through the form of legalism without a fair disclosure of existing known facts is of no avail. Coppinger v. Coppinger, 130 Colo. 175, 274 P.2d 328 (1954); Weber v. Williams, 137 Colo. 269, 324 P.2d 365 (1958).

Where the plaintiff knows the address of, and how to reach, the defendant in another jurisdiction so as to permit personal service of summons upon him, but instead resorts to publication in a newspaper defendant would be unlikely to see, such conduct is repugnant to equity and constitutes fraud nullifying a decree which is obtained by reason of it. Coppinger v. Coppinger, 130 Colo. 175, 274 P.2d 328 (1954).

Where it appears from the affidavit for publication that the affiant, after due diligence, is unable to learn the whereabouts, residence, or post-office address of a defendant, coupled with further statements that he either resides out of the state, or has departed therefrom without the intention of returning, or is concealing himself to avoid the service of process, it logically follows that the defendant is either a nonresident of the state, has departed from the state without the intention of returning, or is concealing himself to avoid the service of process. Hanshue v. Marvin Inv. Co., 67 Colo. 189, 184 P. 289 (1919).

To obtain an order for service by publication an affidavit to that end must show, among other things, that the defendant resides out of the state, or that he has departed from the state without intention of returning, or that he is concealing himself to avoid service of process; it must also give his post-office address if known, or if unknown show that fact. Robinson v. Clauson, 142 Colo. 434, 351 P.2d 257 (1960).

Verified motion for service by publication held sufficient. Hancock v. Boulder County Pub. Trustee, 920 P.2d 854 (Colo. App. 1995).

Where a verified motion filed for publication of a summons contains no statement that defendant is a nonresident of the state, that he has departed the state without intention of returning, or that he is concealing himself to avoid service of process, and it is recited in the motion that defendant's whereabouts are unknown, but there is no statement that he could not "be served by personal service in the state", then, in the absence of this mandatory requirement, the motion is fatally defective, and the court is without jurisdiction to proceed. Sine v. Stout, 119 Colo. 254, 203 P.2d 495 (1949).

Constructive service of summons founded upon an affidavit which fails to comply with this rule is without effect. Empire Ranch & Cattle Co. v. Gibson, 22 Colo. App. 617, 126 P. 1103 (1912).

Such an affidavit is essential. An affidavit by a person authorized by law to make the same and containing the statements required by this rule is an essential prerequisite to give the court jurisdiction to proceed. Trowbridge v. Allen, 48 Colo. 419, 110 P. 193 (1910); Empire Ranch & Cattle Co. v. Coldren, 51 Colo. 115, 117 P. 1005 (1911); Millage v. Richards, 52 Colo. 512, 122 P. 788 (1912).

Since this rule requires an affidavit to matters involving legal opinion and conclusions of law and fact, it contemplates that such an affidavit will be made upon the only basis on which such opinions and conclusions can be reached. Jotter v. Marvin, 67 Colo. 548, 189 P. 19 (1920).

Affiant's knowledge of matters stated in his affidavit must of necessity frequently rest upon information derived from others, and where this is so it is generally sufficient to aver upon information and belief that such matters are true; in such cases belief is to be considered an absolute term, and perjury may be assigned on such affidavit, if false. Jotter v. Marvin, 67 Colo. 548, 189 P. 19 (1920).

The chief test of the sufficiency of the affidavit is whether it is so clear and certain that an indictment for perjury may be sustained on it if false. Jotter v. Marvin, 67 Colo. 548, 189 P. 19 (1920).

Where the averment made applies to many defendants, both individual and corporate, taken together with the failure to give the post-office addresses of any of the defendants or to state that they are unknown, strongly suggests an effort to conceal all, rather than to furnish any, information by which notice of the suit would possibly reach any of the defendants. Gibson v. Wagner, 25 Colo. App. 129, 136 P. 93 (1913).

To state that the residence is unknown is not in strict compliance with this rule which requires an affidavit for publication of summons to state that the post-office address is unknown. Robinson v. Clauson, 142 Colo. 434, 351 P.2d 257 (1960).

Where an affidavit for the publication of the summons states that certain defendants named, "either reside out of the state or have departed therefrom, or concealed themselves to avoid process, and that their post-office address is unknown to affiant" is a compliance with this rule. Hanshue v. Marvin Inv. Co., 67 Colo. 189, 184 P. 289 (1919).

Where the affidavit sets forth that the officers of a company "reside out of the state", the affidavit is sufficient. Jotter v. Marvin Inv. Co., 67 Colo. 555, 189 P. 22 (1920).

C. The Order.

The object of the publication of summons is to give notice to the defendant of a suit pending and of its purpose. Webster v. Heginbotham, 23 Colo. App. 229, 129 P. 569 (1913), aff'd, 58 Colo. 351, 145 P. 1165 (1915).

Where the judgment is found upon substituted service of summons the defendant's name must be correctly given in the notice, although the doctrine of "idem sonans" applies to records, such as judgments. Robinson v. Clauson, 142 Colo. 434, 351 P.2d 257 (1960).

The failure of the publication notice to contain the forename or Christian name of the party is ordinarily held to prevent a court from obtaining jurisdiction over him. Robinson v. Clauson, 142 Colo. 434, 351 P.2d 257 (1960).

Initial letters only are sufficient. Where the papers do not give the full Christian names of all the parties, but give the initial letters thereof only, this is sufficient. Webster v. Heginbotham, 23 Colo. App. 229, 129 P. 569 (1913), aff'd, 58 Colo. 351, 145 P. 1165 (1915).

It must be evident to every person that a published notice, using the name by which the defendant is commonly known in the community, will as readily attract his attention as if his real name were used, particularly where the initials are the same, and that the use of the name as commonly known will much more readily and probably attract the attention of his acquaintances and friends by whom information might be communicated to him than if the publication had been by his real name by which he was not commonly known. Webster v. Heginbotham, 23 Colo. App. 229, 129 P. 569 (1913), aff'd, 58 Colo. 351, 145 P. 1165 (1915).

Evidence of identity must be made. Upon mere publication of the summons in which one is named as defendant, those claiming under a similar name are not affected unless there is evidence of the identity in fact of former name with the latter one. Bloomer v. Cristler, 22 Colo. App. 238, 123 P. 966 (1912).

D. Period of Time.

A delay of five months between the return of the original summons by the sheriff and the making of the order of publication does not invalidate the order of publication nor render the service void. Richardson v. Wortman, 34 Colo. 374, 83 P. 381 (1905).

Publication must be for four weeks. Jones v. Colescott, 134 Colo. 552, 307 P.2d 464 (1957).

The clerk must within 15 days after the order of publication mail a copy of the process to each of the persons whose addresses are known. Jones v. Colescott, 134 Colo. 552, 307 P.2d 464 (1957).

Service is complete on last day of publication. By presumption of law a defendant who is served with summons by publication is charged with knowledge that service will be complete on the day of the last publication. Netland v. Baughman, 114 Colo. 148, 162 P.2d 601 (1945).

Default judgment entered prior to time allowed is error. After constructive service by publication, a judgment by default entered before the expiration of the time allowed to plead or answer is premature, and in a direct proceeding to review a judgment shown to have been so entered prematurely, a reversal for error must be granted. Netland v. Baughman, 114 Colo. 148, 162 P.2d 601 (1945).

X. MANNER OF PROOF.

Annotator's note. Since section (i) of this rule is similar to § 49 of the former Code of

Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

The return serves no purpose except to show to the court that there has been service and to make a record thereof, so that the court's jurisdiction will appear forever. Sawdey v. Pagosa Lumber Co., 78 Colo. 185, 240 P. 334 (1925).

It is the service of summons that confers jurisdiction over the person of a defendant, not the return. Sawdey v. Pagosa Lumber Co., 78 Colo. 185, 240 P. 334 (1925).

The return of service is not aided by presumption. Venner v. Denver Union Water Co., 15 Colo. App. 495, 63 P. 1061 (1900).

A sheriff's return of service is prima facie evidence of the facts recited therein. Gibbs v. Ison, 76 Colo. 240, 230 P. 784 (1924); Neher v. District Court, 161 Colo. 445, 422 P.2d 627 (1967).

The prima facie evidence represented by a return of service must be overcome by clear and convincing proof. Stegall v. Stegall, 756 P.2d 384 (Colo. App. 1987).

Showing may be sufficient to overcome prima facie showing. Where there is a showing, even though not as detailed as may be desirable, which nonetheless is sufficient as a matter of law to overcome the prima facie showing made by a sheriff's return, the service must therefore be set aside. Neher v. District Court, 161 Colo. 445, 422 P.2d 627 (1967).

An insufficient return should be amended. It is the duty of a person serving a summons to amend his return, by leave of court, as soon as he knows that it is erroneous or insufficient. Sawdey v. Pagosa Lumber Co., 78 Colo. 185, 240 P. 334 (1925).

An erroneous return does not detract from a valid service. Clark v. Nat'l Adjusters, Inc., 140 Colo. 593, 348 P.2d 370 (1959).

Service of summons by acknowledgment is sufficient and gives the court full jurisdiction. Wilson v. Carroll, 80 Colo. 234, 250 P. 555 (1926).

It is the voluntary return that constitutes valid service. It is not alone the delivery of the summons to defendant, but the voluntary return thereof to plaintiff with her written acknowledgment thereon which constitutes valid and sufficient service. Seeley v. Taylor, 17 Colo. 70, 28 P. 461 (1891), 28 P. 723 (1892).

It may be voluntary though accompanied by bitter reproaches. That the writings on the summons constituting an acceptance of service are accompanied by bitter reproaches and severe denunciations of plaintiff by defendant does not change the fact that he received copies of the summons and voluntarily acknowledged and returned the same to plaintiff with full knowledge of the nature and purpose of the action which the plaintiff had brought against him. Seeley v. Taylor, 17 Colo. 70, 28 P. 461 (1891), 28 P. 723 (1892).

Even if defendant says in one part of the indorsement that he did not know the meaning of the summons, it is still good where his whole language taken together clearly shows that he did know and that he returned them to plaintiff that he might secure whatever earthly law might do for him. Seeley v. Taylor, 17 Colo. 70, 28 P. 461 (1891), 28 P. 723 (1892).

Where no appeal is taken from a trial judge's order in which he ruled adversely on a preliminary motion questioning under this rule jurisdiction, the right has been waived. Wells Aircraft Parts Co. v. Allan J. Kayser Co., 118 Colo. 197, 194 P.2d 326 (1947).

In termination of parental rights case, omission of the process server's verified signature is insufficient to cause prejudice to father's case where father acknowledged he received the notices and petitions. Allowing an amendment to cure the defect serves the best interests of the children. In re Petition of Taylor, 134 P.3d 579 (Colo. App. 2006).

XI. AMENDMENT.

A summons is subject to amendment by the court. Erdman v. Hardesty, 14 Colo. App. 395, 60 P. 360 (1900) (decided under § 41 of the former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941).

Originals not to be treated as sacrosanct. As with most pleadings and writings in the nature of pleadings, the purpose of justice is best served not by treating originals as sacrosanct, but rather by permitting the parties to ensure that the issues, as ultimately framed, represent the parties' true positions. Brown v. Schumann, 40 Colo. App. 336, 575 P.2d 443 (1978).

Rule 5. Service and Filing of Pleadings and Other Papers

(a) Service: When Required. Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper

shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

(b) Making Service: (1) Service under C.R.C.P. 5(a) on a party represented by an attorney is made upon the attorney unless the court orders personal service upon the party. A resident attorney, on whom pleadings and other papers may be served, shall be associated as attorney of record with any out-of-state attorney practicing in any courts of this state.

(2) Service under C.R.C.P. 5(a) is made by:

(A) Delivering a copy to the person served by:

(i) handing it to the person;

(ii) leaving it at the person's office with a clerk or other person in charge, or if no one is in charge, leaving it in a conspicuous place in the office; or

(iii) if the person has no office or the office is closed, leaving it at the person's dwelling house or usual place of abode with someone 18 years of age or older residing there;

(B) Mailing a copy to the last known address of the person served. Service by mail is complete on mailing;

(C) If the person served has no known address, leaving a copy with the clerk of the court; or

(D) Delivering a copy by any other means, including E-Service, other electronic means or a designated overnight courier, consented to in writing by the person served. Designation of a facsimile phone number or an email address in the filing effects consent in writing for such delivery. Parties who have subscribed to E-Filing, pursuant to C.R.C.P. 121 Section 1-26 § 1.(d), have agreed to receive E-Service. Service by other electronic means is complete on transmission; service by other consented means is complete when the person making service delivers the copy to the agency designated to make delivery. Service by other electronic means or overnight courier under C.R.C.P. 5(b)(2)(D) is not effective if the party making service learns that the attempted service did not reach the person to be served.

(c) Service: Numerous Defendants. In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) Filing Certificate of Service. All papers after the initial pleading required to be served upon a party, together with a certificate of service, must be filed with the court within a reasonable time after service, but disclosures under Rule C.R.C.P. 26(a)(1) or (2) and the following discovery requests and responses shall not be filed until they are used in the proceeding or the court orders otherwise: (i) depositions, (ii) interrogatories, (iii) requests for documents or to permit entry upon land, and (iv) requests for admission.

(e) Filing with Court Defined. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. A paper filed by E-Filing in compliance with C.R.C.P. 121 Section 1-26 constitutes a written paper for the purpose of this Rule. The clerk shall not refuse to accept any paper presented for filing solely because it is not presented in proper form as required by these rules or any local rules or practices.

(f) Inmate Filing and Service. Except where personal service is required, a pleading or paper filed or served by an inmate confined to an institution is timely filed or served if deposited in the institution's internal mailing system on or before the last day for filing or serving. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule.

Source: (b) amended and effective September 6, 1990; (b), (d), and (e) amended and effective January 1, 1993; entire rule amended and adopted May 17, 2001, effective July 1, 2001; (b), (d), and (e) amended and adopted October 20, 2005, effective January 1, 2006; (b)(1)(D) amended and effective June 21, 2012.

Cross references: For service of process, see C.R.C.P. 4; for parties, see C.R.C.P. 17 to 25.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, "One Year Review of Civil Procedure and Appeals", see 37 Dicta 21 (1960). For article, "One Year Review of Civil Procedure and Appeals", see 40 Den. L. Ctr. J. 66 (1963). For article, "2006 Amendments to the Civil Rules: Modernization, New Math, and Polishing", see 35 Colo. Law. 21 (May 2006).

Although this rule does not specifically refer to an "offer of settlement", it includes any "similar paper", which would include an "offer of settlement" pursuant to § 13-17-202. Serving an offer via facsimile, therefore, was proper under this rule. Dillen v. HealthOne, L.L.C., 108 P.3d 297 (Colo. App. 2004).

Applied in Bd. of Water Works v. Pueblo Water Works Employees Local 1045, 196 Colo. 308, 586 P.2d 18 (1978); Stubblefield v. District Court, 198 Colo. 569, 603 P.2d 559 (1979); Black ex rel. Bayless v. Cullar, 665 P.2d 1029 (Colo. App. 1983).

II. SERVICE: WHEN REQUIRED.

A judgment of dismissal with prejudice entered without notice is void and subject to direct or collateral attack. Thompson v. McCormick, 138 Colo. 434, 335 P.2d 265 (1959); Radinsky v. Kripke, 143 Colo. 454, 354 P.2d 500 (1960).

It is the substance, not the form, of a request to the court which controls the necessity for proper notice. Phillips v. Phillips, 155 Colo. 538, 400 P.2d 450 (1964); Cont'l Oil Co. v. Benham, 163 Colo. 255, 430 P.2d 90 (1967).

Where the issues of fact tendered by a motion "ex parte" in effect and in substance constitute a new and additional claim for relief against defendants in default, they are therefore entitled to service of notice of filing such a motion which effectively and substantially is a pleading asserting a new and additional claim in accordance with section (a) of this rule. Cont'l Oil Co. v. Benham, 163 Colo. 255, 430 P.2d 90 (1967).

Failure to serve any cross claim is not an inexcusable failure to comply with section (a) of this rule which relates to the service of pleadings and does not constitute inexcusable neglect where there is ample time prior to the date set for trial for the filing of any answer to the cross-complaint and counterclaim and where it is not apparent how the substantial rights of any litigant can in any manner be prejudiced by permitting such. Gould & Preisner, Inc. v. District Court, 149 Colo. 484, 369 P.2d 554 (1962).

This rule is without pertinence where one has made an appearance. Section (a) of this rule is without pertinence where C.R.C.P. 55(b)(2), as an express exception, requires the giving of notice of application for judgment to one who has appeared, even though he may be in default at the time. Holman v. Holman, 114 Colo. 437, 165 P.2d 1015 (1946).

Since defendant's right to plead in an action continues after the date beyond which plaintiff can set the cause for trial, he is, although in default in such an action, entitled to notice of amendment of complaint affecting the jurisdiction of the court, in order to plead as contemplated by C.R.C.P. 15(a), section (a) of this rule notwithstanding. Myers v. Myers, 110 Colo. 412, 135 P.2d 235 (1943).

Where parties waive time requirements for responsive pleadings but stipulation is silent on notice provisions, service requirements of this rule apply. Bernhagen v. Burton, 694 P.2d 880 (Colo. App. 1984).

Failure to serve prompt notice is harmless error and does not affect validity of order, where the party against whom a parental rights termination motion was filed had been aware for months that a termination was scheduled, and where service was made 22 days before the hearing. People in Interest of M.M., 726 P.2d 1108 (Colo. 1986).

III. SERVICE: HOW MADE.

Law reviews. For article, "One Year Review of Domestic Relations", see 37 Dicta 55 (1960). For comment on Zika v. Eckel appearing below, see 35 U. Colo. L. Rev. 283 (1963).

Under this rule a party whose appearance is of record should be served personally or through his counsel. Zerobnick v. City & County of Denver, 139 Colo. 139, 337 P.2d 11 (1959).

Proper service on attorney binds client. During the course of a proceeding, service of papers on the attorney of record, where service upon the attorney is proper, binds the client until the attorney is discharged or substituted out of the case in a manner provided by law. Pearson v. Pearson, 141 Colo. 336, 347 P.2d 779 (1959).

Service by mail upon the attorney of record in an administrative hearing is sufficient. North Glenn Sub. Co. v. District Court, 187 Colo. 409, 532 P.2d 332 (1975).

Service must be at address in pleading. The requirement that an attorney is required to specify his office address when he enters an appearance, together with the requirements of this rule, makes it apparent that service must be upon an attorney at the address listed in the pleading. People v. Buscarello, 706 P.2d 805 (Colo. App. 1985).

It is not sufficient to mail notice to a different office of the district attorney than that specified in the pleadings. People v. Buscarello, 706 P.2d 805 (Colo. App. 1985).

Where a second amended complaint did not assert any claims for relief against defendants which were not included in the first amended complaint, and the second amended complaint was served upon the defendant's attorney of record who had appeared for them on their motion to quash service of process after service of the first amended complaint, the trial court did not err in entering default judgments against them, inasmuch as it was unnecessary to serve the second amended complaint personally, since section (b)(1) of this rule provides that service upon a party represented by an attorney shall be made upon the attorney. McHenry F. S., Inc. v. Clausen, 30 Colo. App. 253, 491 P.2d 592 (1971).

Notice to one's attorney to take a deposition is in all respects sufficient and complete. Reserve Life Ins. Co. v. District Court, 126 Colo. 217, 247 P.2d 903 (1952).

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

Attorneys who have once entered an appearance for a litigant and are thereafter discharged are not agents of a litigant for service of notice, even though they were required to remain attorneys of record when the trial court refuses to permit the withdrawal of their appearance, for the court cannot create or continue the relationship of attorney and client by denying the request of discharged lawyers to withdraw their appearance. Phillips v. Phillips, 155 Colo. 538, 400 P.2d 450 (1964).

Service of trial notice on counsel who has been discharged months previously is ineffectual for any purpose. Thompson v. McCormick, 138 Colo. 434, 335 P.2d 265 (1959).

The court may order service upon a party himself, even though he is represented by an attorney, in cases where the court deems such service necessary. Zika v. Eckel, 150 Colo. 302, 372 P.2d 165 (1962).

Where absence and neglect of attorney for defendant is well known to all parties, it is incumbent upon the court to direct service of notice of trial setting upon defendant personally. Zika v. Eckel, 150 Colo. 302, 372 P.2d 165 (1962).

Applied in In re Cooper, 113 P.3d 1263 (Colo. App. 2005).

IV. FILING WITH COURT.

Filing is a ministerial task which a judge may undertake. Stroh v. Johnson, 194 Colo. 411, 572 P.2d 840 (1978).

The fact that a judge is not currently assigned to a particular case does not impair his power, as an officer of the court, to accept papers for the purpose of filing them in that court. Stroh v. Johnson, 194 Colo. 411, 572 P.2d 840 (1978).

Where the judge fails to strictly adhere to this rule, defendant cannot take advantage of such if plaintiff's counsel acted in accordance with section (e) of this rule when the judge permitted the motion to be filed with him. Sprott v. Roberts, 154 Colo. 252, 390 P.2d 465 (1964).

If correctional facility where plaintiff was incarcerated had no system for legal mail, plaintiff's complaint was timely filed and must be reinstated because it was deposited with the facility's internal mail system on or before the filing deadline, even though the trial court received the complaint after the deadline. If the correctional facility did have a legal mail system and plaintiff failed to deposit the complaint with the system on or before the filing deadline, then the trial court correctly dismissed the complaint as untimely. Wallin v. Cosner, 210 P.3d 479 (Colo. App. 2009).

Rule 6. Time

(a) Computation. (1) In computing any period of time prescribed or allowed by these rules, the day of the act, event, or default from which the designated period of time begins to run shall not be included. Thereafter, every day shall be counted, including holidays, Saturdays or Sundays. The last day of the period so computed shall be included,

unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(2) As used in this Rule, "Legal holiday" includes the first day of January, observed as New Year's Day; the third Monday in January, observed as Martin Luther King Day; the third Monday in February, observed as Washington-Lincoln Day; the last Monday in May, observed as Memorial Day; the fourth day of July, observed as Independence Day; the first Monday in September, observed as Labor Day; the second Monday in October, observed as Columbus Day; the 11th day of November, observed as Veteran's Day; the fourth Thursday in November, observed as Thanksgiving Day; the twenty-fifth day of December, observed as Christmas Day, and any other day except Saturday or Sunday when the court is closed.

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 59 and 60(b), except to the extent and under the conditions therein stated.

(c) Unaffected by Expiration of Term. Repealed.

(d) For Motions — Affidavits. Repealed.

(e) Additional Time After Service Under C.R.C.P. 5(b)(2)(B), (C), or (D). Repealed.

Source: (e) amended and effective September 6, 1990; (a) amended and effective October 22, 1992; (a) and (e) amended and adopted October 20, 2005, effective January 1, 2006; (a) and (e) amended and effective and (e) committee comment added and effective June 28, 2007; (a) corrected and effective November 5, 2007; (a) amended, (c), (d), and (e) repealed, and (e) committee comment deleted and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); comment added and adopted June 21, 2012, effective July 1, 2012.

Cross references: For times courts open during terms of court, see C.R.C.P. 77(a); for motions for post-trial relief, see C.R.C.P. 59; for relief from judgment, order, or proceedings for mistakes, inadvertence, surprise, excusable neglect, and fraud, etc., see C.R.C.P. 60(b); for process, see C.R.C.P. 4; for service and filing of pleadings and other papers, see C.R.C.P. 5; for time for filing opposing affidavits for a new trial, see C.R.C.P. 59(d).

COMMENT

After the particular effective date, time computation in most situations is intended to incorporate the Rule of Seven. Under the Rule of Seven, a day is a day, and because calendars are divided into 7-day week intervals, groupings of days are in 7-day or multiples of 7-day intervals. Groupings of less than 7 days have been left as they were because such small numbers do not interfere with the underlying concept. Details of the Rule of Seven reform are set forth in an article by Richard P. Holme, 41 Colo. Lawyer, Vol. 1, P 33 (January 2012).

Time computation is sometimes "forward," meaning starting the count at a particular stated event [such as date of filing] and counting forward to the deadline date. Counting "backward" means counting backward from the event to reach the deadline date [such as a stated number of days being allowed before the commencement of trial]. In determining the effective date of the Rule of Seven time computation/time interval amendments having a statutory basis, said amendments take effect on July 1, 2012 and regardless of whether time intervals are counted forward or backward, both the time computation start date and deadline date must be after June 30, 2012. Further, the time computation/time interval amendments do not apply to modify the settings of any dates or time intervals set by an order of a court entered before July 1, 2012.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, "Pre-Trial in Colorado in Words and at Work", see 27 Dicta 157 (1950). For article, "Notes on Proposed Amendments to Colorado Rules of Civil Procedure", see 27 Dicta 165 (1950). For article, "Amendments to the Colorado Rules of Civil Procedure", see 28 Dicta 242 (1951). For article, "Commitment Procedures in Colorado", see 29 Dicta 273 (1952). For article, "2006 Amendments to the Civil Rules: Modernization, New Math, and Polishing", see 35 Colo. Law. 21 (May 2006). For article, "'Rule of Seven' for Trial Lawyers: Calculating Litigation Deadlines", see 41 Colo. Law. 33 (January 2012).

The provisions of section (e) authorize the addition of three days to the prescribed period for taking certain actions following service by mail. However, the time for filing a C.R.C.P. 59 motion is specifically triggered either by entry of judgment in the presence of the parties or by mailing of notice of the court's entry of judgment if all parties were not present when judgment was entered. As a result, section (e) is not applicable to the filing of C.R.C.P. 59 motions. Wilson v. Fireman's Fund Ins. Co., 931 P.2d 523 (Colo. App. 1996).

The provision of section (e) authorizing the addition of three days for service by e-filing does not apply to statutorily proscribed time periods. This rule does not extend the time period for accepting an offer of settlement under § 13-17-202. Montoya v. Connolly's Towing, Inc., 216 P.3d 98 (Colo. App. 2008).

Section (e) does not modify statutory time period for petitions to review workers' compensation orders. Speier v. Indus. Claim Appeals Office, 181 P.3d 1173 (Colo. App. 2008).

Applied in Joslin Dry Goods Co. v. Villa Italia, Ltd., 35 Colo. App. 252, 539 P.2d 137 (1975); Joslins Dry Goods Co. v. Villa Italia, Ltd., 541 P.2d 118 (Colo. App. 1975); SCA Servs., Inc. v. Gerlach, 37 Colo. App. 20, 543 P.2d 538 (1975); Reiger v. Reiger, 39 Colo. App. 471, 566 P.2d 722 (1977); People ex rel. Garrison v. Lamm, 622 P.2d 87 (Colo. App. 1980); Cortez v. Brokaw, 632 P.2d 635 (Colo. App. 1981); Nat'l Account Sys. v. District Court, 634 P.2d 48 (Colo. 1981); Kofoed v. Blecker, 644 P.2d 74 (Colo. App. 1981); Marks v. District Court, 643 P.2d 741 (Colo. 1982); Blecker v. Kofoed, 672 P.2d 526 (Colo. 1983); Garcia v. Title Ins. Co. of Minnesota, 712 P.2d 1114 (Colo. App. 1985).

II. COMPUTATION.

Day of the act or event from which period runs not to be included in computation. In computing any period of time prescribed or allowed by statute, the day of the act or event from which the designated period of time begins to run is not to be included, but the last day of the period is to be included. Cade v. Regensberger, 804 P.2d 238 (Colo. App. 1990).

Where a complaint is filed on Saturday, and an adjudication had on the following Thursday, such adjudication is invalid for failure to comply with the statutory requirement of five days' notice of the commencement of the proceedings, Saturday being the filing date and therefore eliminated, and Sunday being excluded under this rule, since, the adjudication was held one day less than the minimum requirement of notice. Okerberg v. People, 119 Colo. 529, 205 P.2d 224 (1949).

A motion for a new trial filed on Monday, the eleventh day after the entry of judgment, is timely. Bursack v. Moore, 165 Colo. 414, 439 P.2d 993 (1968).

In computing the time for serving subpoenas, computation shall not include the day of the act or intermediate Saturdays, Sundays, and legal holidays. Thus, subpoenas which were served on Friday morning, directing the witnesses to appear on Monday morning, were not served 48 hours before the time the witnesses were to appear and were properly quashed. Wilkerson v. State, 830 P.2d 1121 (Colo. App. 1992).

Applied in N.E., Inc. v. Iliff & Monaco Assocs., 890 P.2d 146 (Colo. App. 1994).

III. ENLARGEMENT.

A. In General.

The time limits set by the court cannot be extended by a stipulation of the parties to a motion requesting an extension, unless the court approves. Moyer v. Empire Lodge Homeowner's Assoc., 78 P.3d 313 (Colo. 2003).

The granting of an extension of the period allowed for the filing of a reporter's tran-

scription with the clerk rests within the sound discretion of the trial court. Mitchell v. Espinosa, 125 Colo. 267, 243 P.2d 412 (1952).

The action taken will not be disturbed on review in the absence of a clear showing of abuse of that discretion. Mitchell v. Espinosa, 125 Colo. 267, 243 P.2d 412 (1952); Farmer v. Norm "Fair Trade" Stamp, Inc., 164 Colo. 156, 433 P.2d 490 (1967).

Where a reporter's transcript is lodged with the clerk late after the entry of judgment, no application having been made for extension of time pursuant to section (b) of this rule, the reporter's transcript will be ordered stricken from the record on appeal. Hildenbrandt v. Hall, 129 Colo. 16, 269 P.2d 708 (1954).

Where it is clearly manifest that no attempt was made to comply with the provisions concerning the filing of reporter's transcripts, nor was any relief sought from their more or less strict requirements through resort to the simple procedure provided by section (b) of this rule, it is the disagreeable duty of an appellate court to be obliged to adhere to established precedent that the reporter's transcript be stricken from the record on appeal. Continental Air Lines v. City & County of Denver, 129 Colo. 1, 266 P.2d 400 (1954); Freeman v. Cross, 134 Colo. 437, 305 P.2d 759 (1957).

Where a case is before an appellate court on appeal, a motion for enlargement of time for filing a transcript of record should be made to the appellate court, not the trial court. Moreau v. Buchholz, 124 Colo. 302, 236 P.2d 540 (1951).

Removal to federal court made within extended time is timely. When the time for answer after service of summons has been extended by a state court, a motion for removal to a federal court made within the extended time is timely made. Oldland v. Gray, 179 F.2d 408 (10th Cir.), cert denied, 339 U.S. 948, 70 S. Ct. 803, 94 L. Ed. 1362 (1950).

When no motion to extend is made pursuant to this rule, it may be stricken. When one files no motion to extend, nor does the trial court on its own motion extend a period before its expiration, and after the time expires, defendant files no motion alleging excusable neglect in failing to comply with the time limitation set by the court, there is no basis for the court to deny a motion to strike the motion in view of the provisions of section (b) of this rule. AA Constr. Co. v. Gould, 28 Colo. App. 161, 470 P.2d 916 (1970).

Deposit of motion in mail on last day of extension not a sufficient filing. Where, under this rule, a 15-day period was allowed a proponent of a will to make a motion and on the fifteenth day the original motion was deposited in the United States mail for delivery to the court, such delivery was not a sufficient filing, since the deposit of the motion with the clerk, with intent that he retain it, he being in any sufficient manner notified of this purpose, is the essential thing to constitute a filing. Niles v. Shinkle, 119 Colo. 458, 204 P.2d 1077 (1949).

Amendment to timely filed objection permitted. There is no prohibition against filing an amendment to a timely filed objection to a master's report before a hearing on that objection has occurred. Rocky Mt. Power Co. v. Colo. River Water Conservation Dist., 646 P.2d 383 (Colo. 1982).

The trial court has broad latitude under section (b)(2) in permitting enlargement of time within which to file responsive pleadings. People v. McBeath, 709 P.2d 38 (Colo. App. 1985).

For history of section (b), see In re Van Camp, 632 P.2d 1062 (Colo. App. 1981).

Applied in Walter v. Walter, 136 Colo. 405, 318 P.2d 221 (1957); Stuckman v. Kasal, 158 Colo. 232, 405 P.2d 948 (1965).

B. Before Expiration.

Under section (b)(1) of this rule, enlargements of time are so readily obtainable where application is made therefor within apt time that there is rarely an occasion where failure to do so would appear to be excusable. Smith v. Woodall, 129 Colo. 435, 270 P.2d 746 (1954); Freeman v. Cross, 134 Colo. 437, 305 P.2d 759 (1957).

C. After Expiration.

Extensions of time are a nullity where they are not obtained in the manner prescribed in section (b)(2) of this rule. Marcotte v. Olin Mathieson Chem. Corp., 162 Colo. 131, 425 P.2d 37 (1967).

The court's failure to act on a motion to enlarge time period before the time has expired does not automatically extend an existing deadline. Moyer v. Empire Lodge Homeowner's Assoc., 78 P.3d 313 (Colo. 2003).

Court's permission on motion with cause shown is necessary. Authority, under this rule, for a court to permit a paper to be filed upon cause shown and on motion therefor, in the case of excusable neglect, is certainly not authority for such filing without permission of the court, without cause shown, and without motion therefor. Niles v. Shinkle, 119 Colo. 458, 204 P.2d 1077 (1949).

The trial court has broad latitude under the provisions of section (b)(2) of this rule. Farmer v. Norm "Fair Trade" Stamp, Inc., 164 Colo. 156, 433 P.2d 490 (1967).

A court of review will assume that an extension was properly made, in the absence of proper objections to the order of the court. Niles v. Shinkle, 119 Colo. 458, 204 P.2d 1077 (1949).

A trial court may, for good cause, allow an extension of time to file an answer, even though the original time limit has passed. Reap v. Reap, 142 Colo. 354, 350 P.2d 1063 (1960).

Under the language of this rule, the right to file an answer brief is lost where no request for extension of time is made within the time limit the brief was due, except upon a showing that failure to act was the result of excusable neglect. Fraka v. Malernee, 129 Colo. 87, 267 P.2d 651 (1954).

Exception not expanded to reliance on postal employee's assurance of timely delivery. The exception to the requirement of strict compliance with the time limits for filing new trial motions will not be expanded to include late filings resulting from counsel's reliance on a postal employee's assurance of timely delivery, because such expansion would be inconsistent with the language of section (b) and with the policy of giving finality to judgments after a reasonable time has been allowed to seek appellate review. Schuster v. Zwicker, 659 P.2d 687 (Colo. 1983).

"Excusable neglect" occurs when there has been a failure to take proper steps at the proper time, not in consequence of carelessness, but as the result of some unavoidable hindrance or accident. Farmers Ins. Group v. District Court, 181 Colo. 85, 507 P.2d 865, cert. denied, 414 U.S. 878, 94 S. Ct. 156, 38 L. Ed. 2d 123 (1973); Moyer v. Empire Lodge Homeowner's Assoc., 78 P.3d 313 (Colo. 2003).

If statutory section expressly permits a court to accept nonparty designations filed outside the 90-day period when it determines that a "longer period is necessary", the provisions of section (b)(2) concerning demonstration of "excusable neglect" do not apply. Antolovich v. Brown Group Retail, Inc., 183 P.3d 582 (Colo. App. 2007).

In general, most such situations involve unforeseen occurrences. It is impossible to describe the myriad situations showing excusable neglect, but, in general, most situations involve unforeseen occurrences such as personal tragedy, illness, family death, destruction of files, and other similar situations which would cause a reasonably prudent person to overlook a required deadline date in the performance of some responsibility. Farmers Ins. Group v. District Court, 181 Colo. 85, 507 P.2d 865, cert. denied, 414 U.S. 878, 94 S. Ct. 156, 38 L. Ed. 2d 123 (1973).

Failure to act due to carelessness and negligence is not excusable neglect. Farmers Ins. Group v. District Court, 181 Colo. 85, 507 P.2d 865, cert. denied, 414 U.S. 878, 94 S. Ct. 156, 38 L. Ed. 2d 123 (1973).

Section (b) of this rule provides that a court may not extend the time for taking any action under C.R.C.P. 50(b) (provisions now in C.R.C.P. 59); therefore, filing a motion for judgment notwithstanding the verdict within 10 days after receipt of verdict is mandatory, and unless such motion is filed within the time prescribed the court has no power to pass on it. Ross v. Arrow Mfg. Co., 134 Colo. 530, 307 P.2d 196 (1957).

An order for the enlargement of the time within which a motion for a direct verdict after verdict can be filed is abortive in view of the specific provisions of section (b) of this rule prohibiting such enlargement. Mumm v. Adam, 134 Colo. 493, 307 P.2d 797 (1957).

A trial court cannot enlarge the time for the filing of a motion for new trial after the expiration of the specified period permitted by the rules. Austin v. Coll./Univ. Ins. Co. of Am., 30 Colo. App. 502, 495 P.2d 1162 (1972).

Rule is controlling over C.R.C.P. 60(b), as to whether a trial court may extend the period of time for filing a motion for new trial under C.R.C.P. 59(b) (now C.R.C.P. 59(d)), after the original filing period has expired. Liberty Mutual Ins. Co. v. Safeco Ins. Co., 679 P.2d 1115 (Colo. App. 1984).

District court is without discretionary power to deny a motion for default judgment where the opposing party, not an agency of the state, fails to comply with a court order requiring a certain act be done within a specified time and, after expiration of that time, fails to establish such failure to act was a result of excusable neglect. Sauer v. Heckers, 34 Colo. App. 217, 524 P.2d 1387 (1974).

A trial court is in error in extending the period of redemption after the redemption period had already expired; redemption is a purely statutory matter, and there is no rule that would allow the court to enlarge it. AA Constr. Co. v. Gould, 28 Colo. App. 161, 470 P.2d 916 (1970).

Applied in Business & Prod. Promotion, Inc. v. East Tincup, Inc., 154 Colo. 268, 389 P.2d 851 (1964).

IV. UNAFFECTED BY EXPIRATION OF TERM.

Law reviews. For comment on Green v. Hoffman appearing below, see 24 Rocky Mt. L. Rev. 376 (1952).

Section (c) of this rule held inapplicable where section (b) excludes matters under C.R.C.P. 59(e). Green v. Hoffman, 126 Colo. 104, 251 P.2d 933 (1952).

CHAPTER 2

Pleadings and Motions

CHAPTER 2

PLEADINGS AND MOTIONS

Rule 7. Pleadings Allowed: Form of Motions

(a) Pleadings. There shall be a complaint and answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; a third-party answer, if a third-party complaint is served; and there may be a reply to an affirmative defense. No other pleading shall be allowed, except upon order of court.

(b) Motions and Other Papers.

(1) An application to the court for an order shall be made by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) These rules applicable to captions, signing and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

(c) Demurrers, Pleas, etc., Abolished. Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.

(d) Agreed Case, Procedure. Parties to a dispute which might be the subject of a civil action may, without pleadings, file, in the court which would have had jurisdiction if an action had been brought, an agreed statement of facts. The same shall be supported by an affidavit that the controversy is real and that it is filed in good faith to determine the rights of the parties. The matters shall then be deemed an action at issue and all proceedings thereafter shall be as provided by these rules.

Cross references: For counterclaims and cross claims, see C.R.C.P. 13; for third-party practice, see C.R.C.P. 14.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For comments on nomenclature by rules committee, see 22 Dicta 154 (1945). For article, "Pleadings, Rules 7 to 25", see 28 Dicta 368 (1951). For article, "Pleadings and Motions: Rules 7-16", see 23 Rocky Mt. L. Rev. 542 (1951). For note, "Comments on Last Clear Chance — Procedure and Substance", see 32 Dicta 275 (1955). For article, "One Year Review of Civil Procedure", see 34 Dicta 69 (1957).

Applied in Davison v. Bd. of County Comm'rs, 41 Colo. App. 344, 585 P.2d 315 (1978); People ex rel. Losavio v. Gentry, 199 Colo. 212, 606 P.2d 57 (1980); In re Deines, 44 Colo. App. 98, 608 P.2d 375 (1980); In re Stroud, 631 P.2d 168 (Colo. 1981).

II. PLEADINGS.

Law reviews. For article, "Comments on the Rules of Civil Procedure", see 22 Dicta 154 (1945). For standard pleading samples to be used in quiet title litigation, see 50 Dicta 39 (1953).

Strictly speaking, one no longer proceeds by complaint, but rather by claim for relief. Jacobson v. Doan, 136 Colo. 496, 319 P.2d 975 (1957).

Where no reply is ordered and defendants desire to rely on an affirmative defense, they must set forth the affirmative defense in the answer. Trustee Co. v. Bresnahan, 119 Colo. 311, 203 P.2d 499 (1949).

A reply to an affirmative defense is merely permissive. McNeece v. McNeece, 39 Colo. App. 160, 562 P.2d 767 (1977).

Where no reply is required, defendants are put on notice that any matter in avoidance of their defense will be deemed in issue before the court. Davis v. Bonebrake, 135 Colo. 506, 313 P.2d 982 (1957).

An alternative direction to reply or elect to stand is not an unequivocal order to reply within the meaning of the final sentence of section (a) of this rule. North Poudre Irrigation Co. v. Hinderlider, 112 Colo. 467, 150 P.2d 304 (1944).

Where no counterclaim is advanced, plaintiff has no duty to reply. Where neither the pleadings of defendants nor the answers of interveners advanced a counterclaim, plaintiff, under section (a) of this rule, had no primary duty to reply to either. North Poudre Irrigation Co. v. Hinderlider, 112 Colo. 467, 150 P.2d 304 (1944).

Where defendant set up an agreement in its answer which was tantamount to a counterclaim, plaintiff was not required to plead the defenses asserted thereto. Colo. Woman's Coll. v. Bradford-Robinson Printing Co., 114 Colo. 237, 157 P.2d 612 (1945).

The rules specifically authorize the inclusion of counterclaims in replies to counterclaims, and the analogous federal rules have been so interpreted by the federal courts. T. L. Smith Co. v. District Court, 163 Colo. 444, 431 P.2d 454 (1967).

There is nothing inherently improper about asserting a counterclaim in a reply to a counterclaim. T. L. Smith Co. v. District Court, 163 Colo. 444, 431 P.2d 454 (1967).

Summons held to be writ, not a pleading. Where a summons informed the defendant that he had been sued by the plaintiffs for damages as a result of an automobile collision and did not purport to set forth the claim for relief upon which the action or proceedings was based, it was merely a writ, and not a pleading, which, pursuant to C.R.C.P. 3(a), must follow within 10 days after the service of summons. Ardison v. Villa, 248 F.2d 226 (10th Cir. 1957).

III. MOTIONS AND OTHER PAPERS.

Law reviews. For article, "In the Matter of Ex Parte Restraining Orders, Injunctions and Writs of Ne Exeat in Divorce Cases", see 9 Dicta 190 (1932). For article, "Expediting Court Procedure", see 10 Dicta 113 (1933).

Section (b)(1) of this rule is mandatory. Salter v. Bd. of County Comm'rs, 126 Colo. 39, 246 P.2d 890 (1952).

Oral motion cannot be properly considered by trial court. Where a husband failed to pay temporary alimony awarded his wife, the wife filed a motion for citation requiring him to show cause why he should not be punished for contempt for such failure, and in the hearing on the citation an order suspending the monthly payments of alimony was made on oral motion, it was held that the oral motion under the circumstances could not properly be considered by the trial court. Wright v. Wright, 122 Colo. 179, 220 P.2d 881 (1950).

Approved oral motions are nullities where rule is not complied with. Where upon oral motion and without notice, plaintiff obtained ex parte a nunc pro tunc order extending his time to lodge the reporter's transcript, and also obtained a further extension of time ex parte, but not nunc pro tunc, by again oral motion and without notice, it was held that the "purported" extensions of time were in each instance a nullity because neither was obtained in the manner prescribed in C.R.C.P. 6 (b)(2) and section (b)(1) of this rule. Marcotte v. Olin Mathieson Chem. Corp., 162 Colo. 131, 425 P.2d 37 (1967).

Motions made incidental to a hearing need not be reduced to writing. Motions made at a hearing that are obviously incidental to the hearing itself, such as motions to exclude evidence, for a directed verdict, or for a mistrial, etc., are motions which are recorded in the minutes of a hearing or trial, and it is for this reason that such motions need not be reduced to writing and notice thereof given. Wright v. Wright, 122 Colo. 179, 220 P.2d 881 (1950).

Rule 11 sanctions are applicable to motions and other papers pursuant to Rule 7 (b)(2). Jensen v. Matthews-Price, 845 P.2d 542 (Colo. App. 1992).

Default judgment motion must be in writing setting forth grounds therefor. A party fails to follow C.R.C.P. 55 (f) as to default judgments on substituted service where he does not apply for the judgment by written motion setting forth with particularity the grounds in support of the motion and the relief sought as required by section (b)(1) of this rule. Norton v. Raymond, 30 Colo. App. 338, 491 P.2d 1403 (1971).

Statement in motion held insufficient to inform court. Where motion to dismiss complaint stated that "the said complaint is not in accordance to the 1935 Colorado Statutes Annotated, and was filed in violation thereof, and contrary to the said statutes in such case made and provided", the statement was insufficient to inform the court concerning the nature of the grounds upon which the dismissal was sought. Gordon Inv. Co. v. Jones, 123 Colo. 253, 227 P.2d 336 (1951).

Notice requirement where motion to reinstate jail sentence is treated as civil proceeding. Where a motion to reinstate a jail sentence imposed following conviction of vagrancy under a city ordinance, and the case is treated as a civil proceeding, it is incumbent upon a city to serve a copy of such motion or a written notice of hearing thereon upon the defendant personally or through his counsel, and where counsel

has withdrawn, such notice must be served upon the defendant personally under section (b)(1) of this rule. Zerobnick v. City & County of Denver, 139 Colo. 139, 337 P.2d 11 (1959).

IV. DEMURRERS, PLEAS, ETC. ABOLISHED.

Law reviews. For article, "Comments on the Rules of Civil Procedure", see 22 Dicta 154 (1945).

Under this rule, a demurrer to a complaint would be considered a motion to dismiss. Henderson v. Greeley Nat'l Bank, 111 Colo. 365, 142 P.2d 480 (1943).

V. AGREED CASE.

Annotator's note. Since section (d) of this rule is similar to § 310 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Affidavit required by this rule must be filed. Considering a cause as a proceeding brought on an agreed statement is error where there is no compliance with the filing of the affidavit required by section (d) of this rule. Mesch v. Bd. of County Comm'rs, 133 Colo. 223, 293 P.2d 300 (1956).

Relief sought must be expressed in agreement. Where parties waive process and pleading and come before the court upon an agreed case, the nature of the relief sought must be expressed in the agreement. Central City Water Co. v. Kimber, 1 Colo. 475 (1872).

If there is no agreement, a court is not empowered to do anything. Under section (d) of this rule, the court acquires jurisdiction of the parties and of the subject matter by force of the agreement, and if nothing is expressed as to the judgment or decree to be rendered upon the facts stated, the court is not empowered to do anything whatever. Central City Water Co. v. Kimber, 1 Colo. 475 (1872).

Parties cannot merely demand information as to their rights. If parties may go before a court with a naked statement of facts, and demand information as to their rights, without more, the courts will become schools of instruction with little time to attend to their proper and legitimate duties. Central City Water Co. v. Kimber, 1 Colo. 475 (1872).

Inadvertent omission of facts from statement may be relieved against. A stipulation in a case by both parties made for convenience and expedition, but by which counsel inadvertently admit facts not in accord with the premises and injurious to their client, may be relieved against. Welsh v. Noyes, 10 Colo. 133, 14 P. 317 (1890).

To strike out a portion of a stipulation on the suggestion of one party is error if such part is material; rather, the entire stipulation should be canceled. Welsh v. Noyes, 10 Colo. 133, 14 P. 317 (1890).

A party may amend ad damnum in agreed statement. Autrey v. Bowen, 7 Colo. App. 408, 43 P. 908 (1884).

In a case heard on an agreed statement of facts, it is not necessary to move for a new trial. Clayton v. Smith, 1 Colo. 95 (1868).

An agreed statement of facts in an action already pending is not an agreed case. Wagner-Stockbridge Mercantile & Drug Co. v. Goddard, 33 Colo. 387, 80 P. 1038 (1905); Truesdale v. Bd. of Comm'rs, 44 Colo. 416, 99 P. 63 (1908).

Motion instituting suit held not to comply with requirements for agreed statement. Mesch v. Bd. of County Comm'rs, 133 Colo. 223, 293 P.2d 300 (1956).

Applied in Metropolitan Denver Sewage Disposal Dist. No. 1 v. Farmers Reservoir & Irrigation Co., 179 Colo. 36, 499 P.2d 1190 (1972).

Rule 8. General Rules of Pleading

(a) Claims for Relief. A pleading which sets forth a claim for a relief whether an original claim, counterclaim, cross-claim, or a third-party claim, shall contain: (1) If the court is of limited jurisdiction, a short and plain statement of the grounds upon which the court's jurisdiction depends; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for judgment for the relief to which the pleader claims to be entitled. No dollar amount shall be stated in the prayer or demand for relief. Relief in the alternative or of several different types may be demanded. Each pleading containing an initial claim for relief in a civil action, other than a domestic relations, probate, water, juvenile, or mental health action, shall be accompanied by a completed Civil Cover Sheet in the form and content of Appendix to Chapters 1 to 17, Form 1.2 (JDF 601), at the time of filing. Failure to file the cover sheet shall not be considered a jurisdictional defect in the pleading but may result in a clerk's show cause order requiring its filing.

(b) Defenses; Form of Denials. A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments of the adverse party.

If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligations set forth in Rule 11.

(c) Affirmative Defenses and Mitigating Circumstances. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. Any mitigating circumstances to reduce the amount of damage shall be affirmatively pleaded. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(d) Effect of Failure to Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required shall be taken as denied or avoided. Averments in a pleading to which a responsive pleading is permitted but not required shall be taken as denied or avoided if no responsive pleading is filed.

(e) Pleading to be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. When a pleader is without direct knowledge, allegations may be made upon information and belief. No technical forms of pleading or motions are required. Pleadings otherwise meeting the requirements of these rules shall not be considered objectionable for failure to state ultimate facts as distinguished from conclusions of law.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.

(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.

Source: Entire rule amended and adopted November 6, 2003, effective July 1, 2004; entire rule amended and adopted June 10, 2004, effective for District Court Civil Actions filed on or after July 1, 2004.

Cross references: For amended and supplemental pleadings, see C.R.C.P 15; for one form of action, see C.R.C.P. 2; for commencement of action, see C.R.C.P. 3; for counterclaims and cross claims, see C.R.C.P. 13; for the signing of pleadings, see C.R.C.P. 11; for presentation of defenses and objections by pleading or motion, see C.R.C.P. 12.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For comments on nomenclature by rules committee, see 22 Dicta 154 (1945). For article, "Use of Summary Judgments and the Discovery Procedure", see 24 Dicta 193 (1947). For article, "Pleadings, Rules 7 to 25", see 28 Dicta 368 (1951). For article, "Pleadings and Motions: Rules 7-16", see 23 Rocky Mt. L. Rev. 542 (1951). For article, "One Year Review of Civil Procedure", see 34 Dicta 69 (1957). For article, "One Year Review of Civil Procedure", see 35 Dicta 3 (1958). For article, "One Year Review of Civil Procedure and Appeals", see 40 Den. L. Ctr. J. 66 (1963).

Applied in Gore Trading Co. v. Alice, 35 Colo. App. 97, 529 P.2d 324 (1974); Blackwell v. Del Bosco, 35 Colo. App. 399, 536 P.2d 838 (1975); Union Supply Co. v. Pust, 196 Colo. 162, 583 P.2d 276 (1978); Griffin v. Pate, 644 P.2d 51 (Colo. App. 1981); Nelson v. Lake Canal Co., 644 P.2d 55 (Colo. App. 1981); In re Boyd, 643 P.2d 804 (Colo. App. 1982); Memorial Gardens, Inc. v. Olympian Sales & Mgt. Consultants, Inc., 661 P.2d 296 (Colo. App. 1982); People v. Steinberg, 672 P.2d 543 (Colo. App. 1983); Riva Ridge Apts. v. Robert G. Fisher Co., 745 P.2d 1034 (Colo. App. 1987).

II. CLAIMS FOR RELIEF.

Law reviews. For article, "Comments on the Rules of Civil Procedure", see 22 Dicta 154 (1945).

This rule provides that plaintiff's complaint shall set forth a "claim for relief". Lamborn v. Eshom, 132 Colo. 242, 287 P.2d 43 (1955).

Complaint shall contain a short and plain statement. This rule provides that a complaint shall contain a short and plain statement of the claim showing that the pleader is entitled to relief. Weick v. Rickenbaugh Cadillac Co., 134 Colo. 283, 303 P.2d 685 (1956).

This rule contemplates notice to the opposing party concerning that which he is expected to defend. Bryant v. Hand, 158 Colo. 56, 404 P.2d 521 (1965).

The theory of pleading is to give an adversary notice of what is to be expected at trial. Lyons v. Hoffman, 31 Colo. App. 306, 502 P.2d 980 (1972).

A complaint must advise defendant of relief sought and grounds thereof. A complaint under the rules of civil procedure to be sufficient as a claim against a motion to dismiss is required to advise defendant of the nature of the relief sought against him and the grounds thereof. People ex rel. Bauer v. McCloskey, 112 Colo. 488, 150 P.2d 861 (1944).

Under this rule the essential element of a complaint is "a short and plain statement of the claim showing that the pleader is entitled to relief". Bernstein v. Dun & Bradstreet, Inc., 149 Colo. 150, 368 P.2d 780 (1962); DiChellis v. Peterson Chiropractic Clinic, 630 P.2d 103 (Colo. App. 1981).

Plaintiff is not required to set out "a cause of action" under the rules of civil procedure. Smith v. Mills, 123 Colo. 11, 225 P.2d 483 (1950).

Theories of action are no longer significant. Continental Sales Corp. v. Stookesbury, 170 Colo. 16, 459 P.2d 566 (1969).

The rules of civil procedure were intended to deemphasize the theory of a "cause of action" and to place the emphasis upon the facts giving rise to the asserted claim. Bridges v. Ingram, 122 Colo. 501, 223 P.2d 1051 (1950); Hutchinson v. Hutchinson, 149 Colo. 38, 367 P.2d 594 (1961).

One does not stand or fall on a "theory" or "cause of action", as obtained under the practice prior to adoption of the rules. Hutchinson v. Hutchinson, 149 Colo. 38, 367 P.2d 594 (1961).

The basic theory of plaintiff's pleading under the present rule is that the transaction or occurrence is the subject matter of a claim, rather than the legal rights arising therefrom. Brown v. Mountain States Tel. & Tel. Co., 121 Colo. 502, 218 P.2d 1063 (1950).

A generalized summary of the case that affords fair notice is all that is required. Smith v. Mills, 123 Colo. 11, 225 P.2d 483 (1950).

Since the purpose of a complaint under the rules of civil procedure is to afford the defendant reasonable notice of the general nature of the matter presented. Vance v. St. Charles Mesa Water Ass'n, 170 Colo. 313, 460 P.2d 782 (1969); DiChellis v. Peterson Chiropractic Clinic, 630 P.2d 103 (Colo. App. 1981).

The purpose of this rule is not to require the pleader to set forth the facts with particularity, but merely to apprize the adverse party of the nature of his claim. Bridges v. Ingram, 122 Colo. 501, 223 P.2d 1051 (1950); Smith v. Mills, 123 Colo. 11, 225 P.2d 483 (1950); Rasmussen v. Freehling, 159 Colo. 414, 412 P.2d 217 (1966); Discovery Land & Dev. Co. v. Colo.-Aspen Dev. Corp., 40 Colo. App. 292, 577 P.2d 1101; D'Amico v. Smith, 42 Colo. App. 369, 600 P.2d 84 (1979).

The chief function of a complaint is to give notice. Bridges v. Ingram, 122 Colo. 501, 223 P.2d 1051 (1950); Jacobson v. Doan, 136 Colo.

496, 319 P.2d 975 (1957); Spomer v. City of Grand Junction, 144 Colo. 207, 355 P.2d 960 (1960); Kluge v. Wilson, 167 Colo. 526, 448 P.2d 786 (1968); Continental Sales Corp. v. Stookesbury, 170 Colo. 16, 459 P.2d 566 (1969); Brown v. Central City Opera House Ass'n, 36 Colo. App. 334, 542 P.2d 86 (1975), aff'd, 191 Colo. 372, 553 P.2d 64 (1976).

Failure to specify in a complaint the precise statute on which claim is based does not prevent plaintiff from seeking attorney fees. Plaintiff is only required to put defendant on notice that damages and reasonable attorney fees are being sought for defendant's failure to pay severance as provided in employment agreement. Fang v. Showa Entetsu Co., 91 P.3d 419 (Colo. App. 2003).

Plaintiff is entitled to receive relief regardless of claim in demand. While a demand for judgment is necessary, if the plaintiff is entitled to any relief under his stated claim, such relief may be granted, regardless of the specific relief contained in the demand for judgment. DiChellis v. Peterson Chiropractic Clinic, 630 P.2d 103 (Colo. App. 1981).

Precatory language no bar to treatment of document as complaint. Where a document is signed "plaintiff" and submitted along with a petition and unsigned order to waive the docket fee, the use of precatory language does not prevent the document from being a complaint. DiChellis v. Peterson Chiropractic Clinic, 630 P.2d 103 (Colo. App. 1981).

Under this rule pleadings need only serve notice of the claim asserted and need not express a complete recitation of all the facts which support the cause of action. Blake v. Samuelson, 34 Colo. App. 183, 524 P.2d 624 (1974); Eliminator, Inc. v. 4700 Holly Corp., 681 P.2d 536 (Colo. App. 1984); Bain v. Town of Avon, 820 P.2d 1133 (Colo. App. 1991).

If sufficient notice concerning the transaction involved is afforded the adverse party, the theory of the pleader is not important. Bridges v. Ingram, 122 Colo. 501, 223 P.2d 1051 (1950); Jacobson v. Doan, 136 Colo. 496, 319 P.2d 975 (1957); Spomer v. City of Grand Junction, 144 Colo. 207, 355 P.2d 960 (1960); Hutchinson v. Hutchinson, 149 Colo. 38, 367 P.2d 594 (1961); Vance v. St. Charles Mesa Water Ass'n, 170 Colo. 313, 460 P.2d 782 (1969).

Substance rather than appellation controls. The substance of the claim rather than the appellation applied to the pleading by the litigant is what controls. Brown v. Central City Opera House Ass'n, 36 Colo. App. 334, 542 P.2d 86 (1975), aff'd, 191 Colo. 372, 553 P.2d 64 (1976).

If from the allegations of a complaint the plaintiff is entitled to relief under any theory, it is sufficient to state a claim. Hutchinson v. Hutchinson, 149 Colo. 38, 367 P.2d 594 (1961).

If, under the facts, the substantive law provides relief upon any "theory", the cause should proceed to judgment. Bridges v. Ingram, 122 Colo. 501, 223 P.2d 1051 (1950); Jacobson v. Doan, 136 Colo. 496, 319 P.2d 975 (1957); Spomer v. City of Grand Junction, 144 Colo. 207, 355 P.2d 960 (1960); Hutchinson v. Hutchinson, 149 Colo. 38, 367 P.2d 594 (1961).

Under this rule a complaint is sufficient if it contains a short and plain statement of the claim showing that the pleader is entitled to relief. Hinsey v. Jones, 159 Colo. 326, 411 P.2d 242 (1966); Shapiro and Meinhold v. Zartman, 823 P.2d 120 (Colo. 1992); Elliott v. Colo. Dept. of Corr., 865 P.2d 859 (Colo. App. 1993).

A complaint is sufficient if the pleader clearly identifies the transaction which forms the basis of his claim. Kluge v. Wilson, 167 Colo. 526, 448 P.2d 786 (1968).

A complaint need not express all facts that support the claim but need only serve notice of the claim asserted. Grizzell v. Hartman Enters., Inc., 68 P.3d 551 (Colo. App. 2003).

Plaintiff need not anticipate the assertion of the statute of limitations and negate its effect in his complaint, for the defendants may waive such defense. Davis v. Bonebrake, 135 Colo. 506, 313 P.2d 982 (1957).

An amended complaint shall state a claim. A claim alleged in an amended complaint arising out of and connected with the occurrence pleaded in the original complaint shall state a claim entitling plaintiffs to relief. Espinoza v. Gurule, 144 Colo. 381, 356 P.2d 891 (1960).

A plaintiff is not required to file an amended complaint repeating allegations contained in claims later dismissed, when the claims are incorporated by reference in a claim not dismissed. Hadley v. Moffat County Sch. Dist. RE-1, 681 P.2d 938 (Colo. 1984).

If a party states any claim and proves it by a preponderance of the evidence, he is entitled to relief, without regard to a specific theory or cause of action. Spomer v. City of Grand Junction, 144 Colo. 207, 355 P.2d 960 (1960); Continental Sales Corp. v. Stookesbury, 170 Colo. 16, 459 P.2d 566 (1969).

Issues joined upon matters which are immaterial to a claim are surplusage and need not be proved. Spomer v. City of Grand Junction, 144 Colo. 207, 355 P.2d 960 (1960).

The prayer of a complaint is not the statement of the cause of action. Flemming v. Colo. State Bd. of Educ., 157 Colo. 45, 400 P.2d 932 (1965).

A prayer is a necessary part of a claim for relief under this rule. Jacobson v. Doan, 136 Colo. 496, 319 P.2d 975 (1957).

The prayer of the complaint was not formerly an essential part of the pleading, and the cause of action was not to be determined therefrom, but resort thereto could be had not only to determine what the pleader intended by

the complaint itself but what his adversary might be led to believe therefrom. Green v. Davis, 67 Colo. 52, 185 P. 369 (1919) (decided under repealed Code of Civil Procedure which was replaced by the Rules of Civil Procedure in 1941).

Under previous code, the form of the prayer seemed to be immaterial. Waterbury v. Fisher, 5 Colo. App. 362, 38 P. 846 (1894), aff'd, 23 Colo. 256, 47 P. 277 (1896); Powell v. Nat'l Bank of Commerce, 19 Colo. App. 57, 74 P. 536 (1903).

If the allegations of the complaint state a cause of action or show one entitled to relief, it should be granted regardless of the remedy sought. Flemming v. Colo. State Bd. of Educ., 157 Colo. 45, 400 P.2d 932 (1965).

If one misconceives his remedy, court will not be deprived of jurisdiction. If the allegations of the petition are such as to invoke both the jurisdiction of the court and to entitle the petitioner, on the face thereof, to some relief, the mere fact that one misconceives his remedy will not deprive the court of jurisdiction to act. In re Legislative Reapportionment, 150 Colo. 380, 374 P.2d 66 (1962).

The court will grant the relief entitled under the facts pleaded. If the plaintiff has stated a cause of action for any relief, it is immaterial what he designates it or what he has asked for in his prayer, for the court will grant him the relief to which he is entitled under the facts pleaded. Berryman v. Berryman, 115 Colo. 281, 172 P.2d 446 (1946).

A party cannot avoid facts or their legal significance by the form of his complaint; basic facts control. Maes v. Tuttoilmondo, 31 Colo. App. 248, 502 P.2d 427 (1972).

A complaint is not subject to a motion to dismiss if it shows that the pleader is entitled to some relief "upon any theory of the law". Hinsey v. Jones, 159 Colo. 326, 411 P.2d 242 (1966).

A dismissal of the action is error. If any of the allegations of the complaint, as amended, give notice to the defendants of a claim for relief and there is some competent evidence produced at the trial upon which relief could be granted, a dismissal of the action is error. Spomer v. City of Grand Junction, 144 Colo. 207, 355 P.2d 960 (1960).

A motion to dismiss for failure to state a claim was improperly sustained where the complaint set out all the allegations necessary for an absolute divorce and the prayer was for a judicial separation, for the allegations plainly showed that plaintiff was entitled to relief, though not to the specific relief prayed. Berryman v. Berryman, 115 Colo. 281, 172 P.2d 446 (1946).

If a plaintiff declares his intention of seeking a particular form of relief and of refusing all other relief, the legality or propriety of the relief sought might properly be determined on a motion to dismiss, though the complaint states facts entitling plaintiff to other relief than that he seeks. Berryman v. Berryman, 115 Colo. 281, 172 P.2d 446 (1946).

When it appears on the face of the complaint, or is admitted, that the complaint does not state a claim upon which relief can be granted, the claim is barred, the court has no jurisdiction of the subject matter, and the court can, for that reason, grant a motion to dismiss on this ground. Fort Collins-Loveland Water Dist. v. City of Fort Collins, 174 Colo. 79, 482 P.2d 986 (1971).

Where the prayer is for "interest and costs of suit", it is sufficient to meet the requirements of § 13-21-101 entitling a plaintiff to interest on the verdict from the date of filing a complaint. Jacobson v. Doan, 136 Colo. 496, 319 P.2d 975 (1957).

A complaint stated a claim for relief for damages when it contained allegations of the relationship between bank and depositor and that the defendant bank had disbursed funds of the plaintiff depositor without the latter's authority and in violation of the agreement between them. Henderson v. Greeley Nat'l Bank, 111 Colo. 365, 142 P.2d 480 (1943); Rivera v. Central Bank & Trust Co., 155 Colo. 383, 395 P.2d 11 (1964).

Claim stated where attached exhibit made part of complaint by reference. Where claims under mining agreements were at issue and a blank form of these agreements was set out in the complaint with no date stated, no allegation as to with whom made, no consideration stated, and no statements as to its terms, such did not render the complaint insufficient to state a claim, since an exhibit attached to the complaint and by reference made a part thereof listed the claims allegedly owned, the names of the owners who executed the agreements, and the book and page where these executed agreements could be found on record. Gold Uranium Mining Co. v. Chain O'Mines Operators, 128 Colo. 399, 262 P.2d 927 (1953).

Suit by acquitted person for return of arrest record not dismissed for failure to state a claim. When a person has been acquitted of a crime and denied the return of the arrest record without justification, a suit by the person alleging violation of the right of privacy is not to be dismissed for failure to state a claim upon which relief could be granted. Davidson v. Dill, 180 Colo. 123, 503 P.2d 157 (1972).

Complaint held not to be a "short and plain statement". A 15-page complaint containing some 100 separately numbered paragraphs seeking damages from one or all or any combination of some nine different defendants, together with a seven-page amendment, was not considered a "short and plain statement of the claim showing that the pleader is entitled to

relief" as envisioned by this rule. Ripple & Howe, Inc. v. Fensten, 156 Colo. 322, 399 P.2d 97 (1965).

Complaint did not comply with section (a). Where complaint is 30 pages long with an additional 10 pages of attached exhibits, consists of 178 separate paragraphs setting forth 36 separate claims for relief, and incorporates other portions of the complaint over 400 times, the plaintiffs did not comply with the requirements of section (a) of this rule. Borwick v. Bober, 34 Colo. App. 423, 529 P.2d 1351 (1974).

Allegations sufficient to comply with rule. Snyder v. City Council, 35 Colo. App. 32, 531 P.2d 643 (1974).

Plaintiff was merely required to set forth a legally cognizable injury causing harm for which she was entitled to some relief to meet the requirements of this rule. Dotson v. Dell L. Bernstein, P.C., 207 P.3d 911 (Colo. App. 2009).

Applied in Buena Vista Bank & Trust Co. v. Lee, 191 Colo. 551, 554 P.2d 1109 (1976); McNeece v. McNeece, 39 Colo. App. 160, 562 P.2d 767 (1977); Gardner v. State, 200 Colo. 221, 614 P.2d 357 (1980); A.R.A. Mfg. Co. v. Brady Auto Accessories, Inc., 622 P.2d 113 (Colo. App. 1980); LaFond v. Basham, 683 P.2d 367 (Colo. App. 1984).

III. DEFENSES.

Law reviews. For note, "Pleading a Claim Barred by Statute of Limitations by Way of Recoupment", see 7 Rocky Mt. L. Rev. 204 (1935). For article, "The Law of Libel in Colorado", see 28 Dicta 121 (1951).

This rule provides that a defendant's answer to plaintiff's claim for relief shall be denominated "defenses". Lamborn v. Eshom, 132 Colo. 242, 287 P.2d 43 (1955).

General plea denying existence of plaintiff's cause of action is sufficient. The time within which a plaintiff must bring his action is of the very essence of his claim, and even a general plea denying existence of his cause of action is sufficient under section (b) of this rule. Denning v. A. D. Wilson & Co., 137 Colo. 372, 326 P.2d 77 (1958).

No general denial where not any foundation. This rule contemplates an answer that speaks the truth, and where none of the specific denials has any foundation in fact, a general denial should not be filed. Lewis v. Buckskin Joe's, Inc., 156 Colo. 46, 396 P.2d 933 (1964).

Defense of truth in libel suit may be raised by general denial rather than special denial. Where the complaint in a libel action alleged the published articles were "false, defamatory, untrue and libelous" and defendants by answer denied generally the allegation, this allegation of plaintiff and its denial by defendants presented the issue of the truth of the published articles, and under these circumstances, a special defense of truth was not required. Hadden v. Gateway W. Publishing Co., 130 Colo. 73, 273 P.2d 733 (1954).

The defense of suicide in accident policy action can be raised by general denial. In an action on an accident policy where the plaintiff alleges death of the insured as the result of an accident, the defense of suicide can be raised by a general denial, for the defendant-insurer's denial that insured met his death by accidental means is equivalent to an affirmative plea of suicide, which need not be specially pleaded. Murray v. Travelers Ins. Co., 143 Colo. 258, 352 P.2d 678 (1960).

Where no responsive pleading is filed in a case, there is no issue presented for determination. Hercules Equip. Co. v. Smith, 138 Colo. 458, 335 P.2d 255 (1959).

Where defense of fraud was stated with sufficient particularity and supported by affidavit in defendant's response to motion for partial summary judgment, it should have been incorporated in defendant's answer for the purpose of technical compliance with subsection (c), even though the defense is more properly asserted in an answer. Alien, Inc. v. Futterman, 924 P.2d 1063 (Colo. App. 1995).

IV. AFFIRMATIVE DEFENSES AND MITIGATING CIRCUMSTANCES.

A. In General.

Law reviews. As to the addition of the sentence: "Any mitigating circumstances to reduce the amount of damage shall be affirmatively pleaded" in this rule, see "The Federal Rules from the Standpoint of the Colorado Code", 27 Dicta 170 (1950). For note, "Comments on Last Clear Change — Procedure and Substance", see 32 Dicta 275 (1955). For comment on Carpenter v. Hill appearing below, see 32 Dicta 393 (1955). For article, "One Year Review of Civil Procedure and Appeals", see 36 Dicta 5 (1959). For article, "Austin v. Litvak, Colorado's Statute of Repose for Medical Malpractice Claims: An Uneasy Sleep", see 62 Den. U. L. Rev. 825 (1985).

Section (c) entitles a party to have an affirmative defense considered by the trier of fact so long as it has been properly pleaded, evidence is presented at trial to support its consideration, and the party asserting it brings it to the court's attention. Watson v. Cal-Three, LLC, 254 P.3d 1189 (Colo. App. 2011).

It is fundamental that pleas in bar must be specially pleaded. Dillinger v. North Sterling Irrigation Dist., 135 Colo. 100, 308 P.2d 608 (1957).

Where a defense is neither pleaded nor raised at any stage of the proceedings in the trial court, it cannot be urged for the first time

on appeal. Bernklau v. Stevens, 150 Colo. 187, 371 P.2d 765 (1962).

Matters not presented to a trial court by pleading pursuant to this rule will not be considered by the supreme court on review. Hercules Equip. Co. v. Smith, 138 Colo. 458, 335 P.2d 255 (1959).

Rigidity of section (c) softened by C.R.C.P. 15(b). The apparent rigidity of section (c) of this rule, which states that a party shall affirmatively plead all matters constituting an avoidance or affirmative defense, is softened by C.R.C.P. 15(b), which provides that when issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Great Am. Ins. Co. v. Ferndale Dev. Co., 185 Colo. 252, 523 P.2d 979 (1974).

The trial court errs in considering such defenses where objected to. Where such defenses are first urged upon the court orally at the trial, not having been pled as required, the trial court errs in considering such defenses, especially over the objections of opposing counsel. Maxey v. Jefferson County Sch. Dist. No. R-1, 158 Colo. 583, 408 P.2d 970 (1965).

Where no objection is made to evidence introduced in regard to an affirmative defense which has not been specifically set forth in the pleadings as required by section (c) of this rule, such issue may be treated as raised in the pleadings under C.R.C.P. 15(b). Metropolitan State Bank, Inc. v. Cox, 134 Colo. 260, 302 P.2d 188 (1956).

Issue not specifically alleged as affirmative defense may be tried by express or implied consent. Bill Dreiling Motor Co. v. Shultz, 168 Colo. 59, 450 P.2d 70 (1969) (consent not found).

Such issue must be "intentionally and actually tried". Where there is express or implied consent to try issues not raised by the pleadings, such issues may be tried in all respects as if they had been so raised, pursuant to C.R.C.P. 15(b); however, the record must show an "express or implied consent" to try an issue of fact which section (c) of this rule requires to be specifically alleged as an affirmative defense and the issue must be "intentionally and actually tried", it not being enough that some evidence is received germane to the issue sought to be raised. Bill Dreiling Motor Co. v. Shultz, 168 Colo. 59, 450 P.2d 70 (1969).

This rule provides for various affirmative defenses in civil actions. Indus. Comm'n v. Ewing, 160 Colo. 503, 418 P.2d 296 (1966).

This rule also provides that mitigating circumstances to reduce the amount of damages shall be affirmatively pleaded. Indus. Comm'n v. Ewing, 160 Colo. 503, 418 P.2d 296 (1966).

Burden of proving mitigation on defendants. Mitigation or failure to mitigate is an affirmative defense to be pleaded by the defendants, and the burden of proving the same is also on them. Comfort Homes, Inc. v. Peterson, 37 Colo. App. 516, 549 P.2d 1087 (1976).

It is not a plaintiff's burden to produce the evidence on which any reduction of damages is to be predicated. Comfort Homes, Inc. v. Peterson, 37 Colo. App. 516, 549 P.2d 1087 (1976).

Under this rule, affirmative defense may not be raised by motion but only by answer, the plaintiff thereafter having an opportunity to raise and try all issues relating to such defenses. Markoff v. Barenberg, 149 Colo. 311, 368 P.2d 964 (1962).

Where the inclusion of the affirmative defense of release in a summary judgment motion was treated as being incorporated in the defendant's answer for the purpose of technical compliance with section (c) of this rule, the supreme court held that the plaintiffs were not prejudiced in any way because the affirmative defense of release had not been included in the defendant's answer. Cox v. Pearl Inv. Co., 168 Colo. 67, 450 P.2d 60 (1969).

Where defendant did not include the affirmative defense of acknowledgment in her answer, but included the defense in her motion for judgment on the pleadings and again in her response to plaintiff's motion for summary judgment, defendant alleged acknowledgment in the motions and sufficiently raised the defense such that the court could treat the answer as amended in compliance with rule 8(c). Drake v. Tyner, 914 P.2d 519 (Colo. App. 1996).

If affirmative defense is asserted in a motion for summary judgment and responded to without objection, it is deemed incorporated into the answer. Horodyskyj v. Karanian, 5 P.3d 332 (Colo. App. 1999), rev'd on other grounds, 32 P.3d 470 (Colo. 2001).

Inclusion of affirmative defense in motion deemed incorporated in defendant's answer. When the events providing the basis of a defendant's summary judgment motion occur subsequent to the complaint and answer and are fully set forth in the motion, the inclusion of the affirmative defense in the motion is deemed incorporated in defendant's answer. Bilar, Inc. v. Sherman, 40 Colo. App. 38, 572 P.2d 489 (1977).

Even if notice requirement, in suit against city, was affirmative defense, it was deemed to be incorporated in city's answer to suit by its inclusion in city's summary judgment motion, and thus city did not waive notice requirement. Mountain Gravel and Const. v. Cortez, 721 P.2d 698 (Colo. App. 1986).

Failure to plead an affirmative defense as required by section (c), and failure to present any evidence or argument on the matter in the district court, preclude the reviewing court from reviewing the issue. Crocker v. Colo. Dept. of Rev., 652 P.2d 1067 (Colo. 1982).

A party waives all defenses and objections which he does not present in his answer. Duke v. Pickett, 168 Colo. 215, 451 P.2d 288 (1969).

Improper assertion of affirmative defense must be objected to, or it is waived. By arguing the merits of defendant's motion for summary judgment without raising objection in the trial court as to the assertion of the affirmative defense of release initially therein, plaintiffs waived any valid objection they may have had to this procedure. Cox v. Pearl Inv. Co., 168 Colo. 67, 450 P.2d 60 (1969).

Affirmative defenses may be considered on motion for summary judgment. Lin Ron, Inc. v. Mann's World of Arts & Crafts, Inc., 624 P.2d 1343 (Colo. App. 1981); Bain v. Town of Avon, 820 P.2d 1133 (Colo. App. 1991).

B. Statute of Limitations and Laches.

A statute of limitations is an affirmative defense and hence must be affirmatively pleaded. Knighton v. Howse, 167 Colo. 530, 448 P.2d 641 (1968).

A statute of limitations defense, being affirmative in nature, must be raised by responsive pleading. Trustees of Mtg. Trust of Am. v. District Court, 621 P.2d 310 (Colo. 1980).

Limitations of time are matters which cannot be raised by a motion to dismiss. Where an independent action to obtain relief from a judgment is resorted to, the limitations of time are those of laches and the statute of limitations, matters which cannot be raised by a motion to dismiss under this rule. Terry v. Terry, 154 Colo. 41, 387 P.2d 902 (1963).

Generally a statute of limitations defense should be raised in the answer to the complaint rather than in a motion to dismiss, but this position is not universally followed. Many courts hold that the defense of limitations may be raised by a motion to dismiss where the time alleged in the complaint shows that the action was not brought within the statutory period. The adoption of F.R.C.P. 9(f) allows averments in a complaint to be tested for sufficiency in regards to time. Thus, for example, a complaint which fails to specify time so that the statutory time may be computed may properly be dismissed pursuant to a motion pursuant to C.R.C.P. 12(b)(5). Wasinger v. Reid, 705 P.2d 533 (Colo. App. 1985); Reider v. Dawson, 856 P.2d 31 (Colo. App. 1992), aff'd, 872 P.2d 212 (Colo. 1994).

The statute of limitations is not ground for motion to dismiss for failure to state a claim upon which relief can be granted under C.R.C.P. 12(b), since, under section (c) of this rule, that is a defense which must be set forth affirmatively by answer. Smith v. Kent Oil Co., 128 Colo. 80, 261 P.2d 149 (1953); Davis v. Bonebrake, 135 Colo. 506, 313 P.2d 982 (1957); Fort Collins-Loveland Water Dist. v. City of Fort Collins, 174 Colo. 79, 482 P.2d 986 (1971).

The statute of limitations cannot be the basis for dismissal on motion on the grounds that it appears from the complaint that the claim was not timely made for the reasons that in the absence of an affirmative defense based on the statute of limitations such defense is waived, and the assertion or waiver of the defense can only be determined from the answer. Furthermore, even if pleaded, the running of the statute of limitations may have been tolled, and plaintiff in his complaint is not required to anticipate the defense. Smith v. Kent Oil Co., 128 Colo. 80, 261 P.2d 149 (1953); Davis v. Bonebrake, 135 Colo. 506, 313 P.2d 982 (1957).

Under this rule, a plea in bar based upon the statute of limitations cannot be raised by motion to dismiss, it being a defense which may or may not be relied upon and, if relied upon, must be pleaded as an affirmative defense. Fletcher v. Colo. & Wyoming Ry., 141 Colo. 72, 347 P.2d 156 (1959).

A statute of limitations is a defense which is waived if not affirmatively pleaded. In re Estate of Randall v. Colo. State Hosp., 166 Colo. 1, 441 P.2d 153 (1968).

Defense of statute of limitations sufficiently raised. An allegation that a claim is barred by the statute of limitations of this state in such case made and provided is sufficient to raise the defense of limitations. Denning v. A. D. Wilson & Co., 137 Colo. 372, 326 P.2d 77 (1958).

Limitations of time cannot be raised by a motion to strike. Laches and the statute of limitations cannot be raised by motion to dismiss or strike. McPherson v. McPherson, 145 Colo. 170, 358 P.2d 478 (1960).

The statute of limitations and laches must be affirmatively pleaded in an answer. McPherson v. McPherson, 145 Colo. 170, 358 P.2d 478 (1960); Terry v. Terry, 154 Colo. 41, 387 P.2d 902 (1963).

Laches is an affirmative defense and must be pleaded. Buss v. McKee, 115 Colo. 159, 170 P.2d 268 (1946); Duke v. Pickett, 168 Colo. 215, 451 P.2d 288 (1969).

Laches is form of estoppel and contemplates an unconscionable delay in asserting one's rights which works to the defendant's prejudice or injury in relation to the subject matter of the litigation. Lin Ron, Inc. v. Mann's World of Arts & Crafts, Inc., 624 P.2d 1343 (Colo. App. 1981).

Dismissal for failure to prosecute held not to be affirmative defense of laches. Columbine Valley Mut. Imp. & Maintenance Ass'n v. Bd. of County Comm'rs, 173 Colo. 321, 478 P.2d 312 (1970).

Prejudice necessary to claim laches may be couched in terms of detrimental change of

position on the part of the defendant or it may be occasioned by loss of evidence, death of witnesses, or other circumstances arising during the period of delay which affect the defendant's ability to defend. Lin Ron, Inc. v. Mann's World of Arts & Crafts, Inc., 624 P.2d 1343 (Colo. App. 1981).

Evidence insufficient for level of prejudice contemplated by doctrine of laches. While failure to litigate the issue of personal liability in either of two earlier actions against a corporate entity may have been poor judicial economy, the expense and inconvenience of further litigation, without more, did not rise to the level of prejudice contemplated by the doctrine of laches, where the defendants (individual owners of a corporation) were not indispensable parties to the first action under C.R.C.P. 19, but rather permissive parties under C.R.C.P. 18. Lin Ron, Inc. v. Mann's World of Arts & Crafts, Inc., 624 P.2d 1343 (Colo. App. 1981).

C. Res Judicata.

"Res judicata" is also an affirmative defense which must be affirmatively pled by way of answer. In re Crowley's Estate, 122 Colo. 244, 221 P.2d 378 (1950); Ruth v. Dept. of Hwys., 153 Colo. 226, 385 P.2d 410 (1963); Terry v. Terry, 154 Colo. 41, 387 P.2d 902 (1963); Bakery Workers Local 240 v. Am. Bakery Workers Local 240, 165 Colo. 210, 437 P.2d 783 (1968).

The defense of res judicata is considered waived if it is not appropriately raised. In re Wright, 841 P.2d 358 (Colo. App. 1992); Vincent v. Clean Water Action Project, 939 P.2d 469 (Colo. App. 1997).

Although term "res judicata" not explicitly used, it is not waived where arguments raised gave adequate notice that party was defending, in part, on the basis that the parties were bound by the earlier judgment. In re Wright, 841 P.2d 358 (Colo. App. 1992); Vincent v. Clean Water Action Project, 939 P.2d 469 (Colo. App. 1997).

Res judicata bars relitigation not only of all issues actually decided, but of all issues that might have been decided. Pomeroy v. Waitkus, 183 Colo. 344, 517 P.2d 396 (1973).

However, res judicata applies only when there exists identity of subject matter, cause of action, parties, and capacity in the person for whom or against whom the claim is made. Also, the decision in the prior case must have been rendered on the merits. People in Interest of G.K.H., 698 P.2d 1386 (Colo. App. 1984).

A voluntary dismissal pursuant to an invalid stipulation is not a decision to which the doctrine of res judicata applies to preclude a subsequent action in dependency or neglect. People in Interest of G.K.H., 698 P.2d 1386 (Colo. App. 1984).

Res judicata holds that an existing judgment is conclusive of the rights of the parties in any subsequent suit on the same claim. Pomeroy v. Waitkus, 183 Colo. 344, 517 P.2d 396 (1973).

The defense of res judicata does not apply when the initial forum, the bankruptcy court, lacked the authority to award the full measure of the relief sought in the subsequent litigation, post-petition debts. In re Wright, 841 P.2d 358 (Colo. App. 1992).

Res judicata requires an identity of parties or their privies, as it would be unfair to preclude a party from litigating an issue merely because he could have litigated it against a different party. Pomeroy v. Waitkus, 183 Colo. 344, 517 P.2d 396 (1973).

To sustain the defense of "res judicata" under section (c) of this rule, facts in support of it must be affirmatively shown either by the evidence adduced at the trial or by way of uncontroverted facts properly presented in a motion for summary judgment, or by a motion to dismiss under C.R.C.P. 12(b) where the court, on the basis of facts properly presented outside of the pleadings, is enabled to treat the same as a motion for summary judgment under C.R.C.P. 56. Ruth v. Dept. of Hwys., 153 Colo. 226, 385 P.2d 410 (1963); Saunders v. Bankston, 31 Colo. App. 551, 506 P.2d 1253 (1972).

Where facts are presented in evidence which constitute a defense of "res judicata", the court is not required to consider them when this defense was not pleaded. Bakery Workers Local 240 v. Am. Bakery Workers Local 240, 165 Colo. 210, 437 P.2d 783 (1968).

The question of "res judicata" cannot be raised by motion to dismiss. Fletcher v. Colo. & Wyoming Ry., 141 Colo. 72, 347 P.2d 156 (1959); Terry v. Terry, 154 Colo. 41, 387 P.2d 902 (1963).

Defendant may assert a claim preclusion defense for the first time in a motion to dismiss where plaintiff fails to show prejudice. Dave Peterson Elec., Inc. v. Beach Mountain Builders, Inc., 167 P.3d 175 (Colo. App. 2007).

It is error to sustain a motion to dismiss. Where prior adjudication is not affirmatively set up as a separate defense under this rule, but is presented by motion, it is error to sustain the motion. Kubat v. Kubat, 124 Colo. 491, 238 P.2d 897 (1951).

Party was not estopped from invoking doctrine of res judicata regarding small claims court judgment because of failure to raise doctrine in a pleading. The plaintiff could not seek to benefit from the small claims court judgment and simultaneously to prohibit defen-

dant from using it. Vincent v. Clean Water Action Project, 939 P.2d 469 (Colo. App. 1997).

D. Estoppel, Waiver, and Mistake.

Estoppel is an affirmative defense and must be set forth as a part of the pleadings. Kimmel v. Batty, 168 Colo. 431, 451 P.2d 751 (1969).

Collateral estoppel is in the nature of an affirmative defense which must be specifically pleaded in an answer. Banek v. Thomas, 733 P.2d 1171 (Colo. 1986).

The doctrine of collateral estoppel is designed to save judicial time and resources and relieve the burden on litigants of having to litigate claims more than once. Central Bank v. Mehaffy, Rider, Windholz, 940 P.2d 1097 (Colo. App. 1997).

Collateral estoppel, or issue preclusion, bars relitigation of an issue determined in a prior proceeding if: (1) The issue precluded is identical to an issue actually determined in the prior proceeding; (2) the party against whom estoppel is asserted has been a party to or in privity with a party in the prior proceeding; (3) there is a final judgment on the merits in the prior proceeding; and (4) the party against whom estoppel is asserted has had a full and fair opportunity to litigate the issue in the prior proceeding. Maryland Casualty Co. v. Messina, 874 P.2d 1058 (Colo. 1994); City and County of Denver v. Block 173 Assocs., 814 P.2d 824 (Colo. 1991); Central Bank v. Mehaffy, Rider, Windholz, 940 P.2d 1097 (Colo. App. 1997); In re Estate of Bell, 4 P.3d 504 (Colo. App. 2000); Williamsen v. People, 735 P.2d 176 (Colo. 1987); Byrd v. People, 58 P.3d 50 (Colo. 2002).

An order temporarily denying relief is not a final judgment; rather it is an interlocutory order. Therefore, a temporary order does not create collateral estoppel. M & M Management Co. v. Indus. Claim Appeals Office, 979 P.2d 574 (Colo. App. 1998).

When a party has a full and fair opportunity to litigate an issue, the mere fact that the judgment was incorrect does not affect its conclusiveness. Under such circumstances, it is not unfair to apply collateral estoppel simply because the prior judgment may be wrong. Central Bank v. Mehaffy, Rider, Windholz, 940 P.2d 1097 (Colo. App. 1997).

A court may refuse to apply collateral estoppel when there are prior inconsistent judgments against the same party. A case is not a prior inconsistent judgment if that prior judgment involves a case in a different context and with different parties. Central Bank v. Mehaffy, Rider, Windholz, 940 P.2d 1097 (Colo. App. 1997).

If a trial court judgment is based on determinations of multiple issues, any of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to any of the issues standing alone. Any one of the five elements for a new trial could have been a reason for denying the new trial in a criminal case, and consequently, none of the elements is entitled to preclusive effect in an attorney malpractice case. Schultz v. Stanton, 198 P.3d 1253 (Colo. App. 2008), aff'd on other grounds, 222 P.3d 303 (Colo. 2010).

Immunity from suit is an affirmative defense. Brown v. Rosenbloom, 34 Colo. App. 109, 524 P.2d 626 (1974), aff'd, 188 Colo. 83, 532 P.2d 948 (1975).

Matters raised by a motion to dismiss which are in the nature of avoidance, discharge, and waiver are affirmative defenses which under this rule cannot be raised by motion but only by answer. Markoff v. Barenberg, 149 Colo. 311, 368 P.2d 964 (1962).

Waiver and abandonment are special defenses in the nature of confession and avoidance which must be specially pleaded. Seeger's Estate v. Puckett, 115 Colo. 185, 171 P.2d 415 (1946).

A waiver of an asserted right must be affirmatively pleaded if it is to be used as a defense. Rudd v. Rogerson, 162 Colo. 103, 424 P.2d 776 (1967); Duke v. Pickett, 168 Colo. 215, 451 P.2d 288 (1969).

It is necessary for defendants to set forth a "lien waiver" if they desire to rely thereon under section (c) of this rule, as this is an affirmative defense. Trustee Co. v. Bresnahan, 119 Colo. 311, 203 P.2d 499 (1949).

Burden of proving estoppel, waiver, and mistake on person raising. Person who raises the affirmative defenses of estoppel, waiver, and mistake has the burden to prove the truth of the proposition asserted. Adams County Dept. of Soc. Servs. v. Frederick, 44 Colo. App. 378, 613 P.2d 642 (1980).

Mutuality is no longer required for collateral estoppel to apply, and a non-party to a judgment may invoke collateral estoppel to bar relitigation of an issue. Collateral estoppel requires only that the party against whom collateral estoppel asserted was a party in the initial proceedings. Central Bank v. Mehaffy, Rider, Windholz, 940 P.2d 1097 (Colo. App. 1997).

As a general rule, collateral estoppel has no applicability to prior rulings in the same pending case. Central Bank v. Mehaffy, Rider, Windholz, 940 P.2d 1097 (Colo. App. 1997).

Nonmutual defensive use of collateral estoppel is used by a defendant to bind a plaintiff to a prior judgment when that defendant was not a party to that judgment. A court's discretion to refuse to apply defensive nonmutual collateral estoppel is highly circumscribed. Central Bank v. Mehaffy, Rider, Windholz, 940 P.2d 1097 (Colo. App. 1997).

Offensive nonmutual collateral estoppel occurs when a plaintiff seeks to foreclose a defendant from litigating an issue the defendant previously litigated unsuccessfully in another action against another party. When the doctrine of collateral estoppel was expanded to include offensive collateral estoppel, its application was made discretionary with the trial court because it does not promote judicial economy in the same way as defensive nonmutual collateral estoppel and because it often will be unfair to defendants. Central Bank v. Mehaffy, Rider, Windholz, 940 P.2d 1097 (Colo. App. 1997).

E. Negligence Actions.

The last clear chance doctrine is a matter constituting an affirmative defense which must be pleaded, and defendant's purpose to avail himself of such defense should be stated in his answer to plaintiff's complaint. Markley v. Hilkey Bros., 113 Colo. 562, 160 P.2d 394 (1945).

Mutual denials of negligence are sufficient to raise affirmative defense of unavoidable accident. While it is the usual practice to plead unavoidable accident as an affirmative defense, the fact still remains that unavoidable accident is but a denial of negligence, and where the pleadings disclose that there were mutual denials of negligence the issue is in the case. Union P. R. R. v. Shupe, 131 Colo. 271, 280 P.2d 1115 (1955).

The issue of sudden emergency need not be stated in the complaint as an affirmative basis for relief, nor in the answer as a basis of defense; rather, notice of its applicability in any case is found in the evidence that may be offered in support of the claims or defenses. Davis v. Cline, 177 Colo. 204, 493 P.2d 362 (1972).

If negligence is a defense, defendants are deprived thereof by failing to file an affirmative pleading. Carpenter v. Hill, 131 Colo. 553, 283 P.2d 963 (1955).

The burden of alleging and proving contributory negligence rests upon the defendant under section (c) of this rule. Thorpe v. City & County of Denver, 30 Colo. App. 284, 494 P.2d 129 (1971).

Where defendant alleges in one defense of his answer that plaintiff's injuries and damages, if any, were proximately caused by plaintiff's own failure to exercise due care for his own safety, plaintiff is put on notice of defendant's contention of contributory negligence and of possibility of having to rebut showing of negligence on his part, and, therefore, it is reversible error to fail to submit issue of contributory negligence to jury. Lyons v. Hoffman, 31 Colo. App. 306, 502 P.2d 980 (1972).

"Seat belt defense" may not be pleaded affirmatively. An injured driver, or passenger, may recover the actual damages proximately caused by a tort-feasor's negligence, and the amount of such damages is not affected by, and may not be reduced, because the injured person failed to wear a seat belt, since the "seat belt defense" may not be pleaded affirmatively in defense of an action for negligence, and evidence that the injured party failed to wear a seat belt is not admissible to establish contributory negligence or to reduce the amount of the injured party's damages. Moore v. Fischer, 31 Colo. App. 425, 505 P.2d 383 (1972), aff'd, 183 Colo. 392, 517 P.2d 458 (1974).

F. Other Defenses.

An issue of accord and satisfaction is an affirmative defense under section (c) of this rule and must be specifically set forth in the pleadings. Metropolitan State Bank, Inc. v. Cox, 134 Colo. 260, 302 P.2d 188 (1956).

In an action on a foreign judgment, the defense of payment must be specially alleged in the answer. Grandbouche v. Waisner, 136 Colo. 374, 317 P.2d 328 (1957).

Failure of consideration is an affirmative defense under section (c) of this rule and C.R.C.P. 12(h), which, if not pleaded, is waived. Bernklau v. Stevens, 150 Colo. 187, 371 P.2d 765 (1962).

Statute of frauds must be pleaded. It is error to rule that an assignment is ineffective because of the statute of frauds when the statute has not been pleaded or relied upon. Ochsner v. Langendorf, 115 Colo. 453, 175 P.2d 392 (1946).

Assertion that claim is barred by the statute of frauds is an affirmative defense that must ordinarily be raised by answer and, if not, will be deemed waived. Univex Int'l, Inc. v. Orix Credit Alliance, Inc., 902 P.2d 877 (Colo. App. 1995).

It is not necessary to identify a particular statute of frauds by section number to satisfy requirements of this rule where defendant pled the statute of frauds affirmatively as a defense in its answer and listed the statute of frauds as a defense in its disclosure certificate, where the parties had sufficient opportunity to argue the issue to the trial court, and where the defendant had brought the statute to the court's attention in the form of supplemental authority in support of its motion for summary judgment. Univex Int'l, Inc. v. Orix Credit Alliance, Inc., 902 P.2d 877 (Colo. App. 1995).

Mitigation of damages must be affirmatively pleaded. Franklin v. Nolan, 28 Colo. App. 229, 472 P.2d 166 (1970).

Reimbursement for paid taxes is claim in mitigation of damages. Where defendants destroyed a valuable property relying upon a tax

deed that was invalid and compensatory damages were allowed based on the value of replacing the improvements and the value of the personalty, their claim for reimbursement for taxes paid could only be a claim in mitigation of damages which must be affirmatively pleaded. Carlson v. McNeill, 114 Colo. 78, 162 P.2d 226 (1945).

Where defendant does not plead adverse possession but attempts to amend his answer at the conclusion of the trial, the court properly denies the motion, acting within its discretion. City & County of Denver v. Just, 175 Colo. 260, 487 P.2d 367 (1971).

Lack of maturity is not one of the defenses specified as mandatory subjects of affirmative pleading under section (c), and where it was apparent from the transcript that this issue was tried by the parties and fully considered by the trial court, the defendant was entitled to consideration of this defense. L.C. Fulenwider, Inc. v. Ginsberg, 36 Colo. App. 246, 539 P.2d 1320 (1975).

Reliance on advice of counsel or consultants is not an affirmative defense or mitigating circumstance, therefore defendant is not required to plead it in its answer. Antolovich v. Brown Group Retail, Inc., 183 P.3d 582 (Colo. App. 2007).

Rescission of contract must be pleaded. Affirmative defense that plaintiff misrepresented facts in course of negotiating employment contract with defendant would not be construed as demand for rescission where defendant did not give plaintiff or court any specific notice of its intent to rescind. Ice v. Benedict Nuclear Pharmaceuticals, Inc., 797 P.2d 757 (Colo. App. 1990).

Set-off allowed notwithstanding defendant's denomination of defense as a counterclaim. In an action by the assignee of a carrier for shipping charges on an article of furniture, a set-off for damage in transit to such article was properly allowable, notwithstanding defendant denominated defense as a counterclaim rather than set-off. Transport Clearings of Colo., Inc. v. Linstedt, 151 Colo. 166, 376 P.2d 518 (1962).

Statutory limitation on judgment not affirmative defense. The statutory limitation on judgment in § 24-10-114 is not an affirmative defense and is not waived if not presented in the pleadings, at trial, or in a motion for a new trial. City of Colo. Springs v. Gladin, 198 Colo. 333, 599 P.2d 907 (1979).

Plaintiff relying on unjust enrichment must allege that he conferred a benefit which was known to or appreciated by the defendant, and which the defendant accepted or retained, making it inequitable for him to retain the benefit without payment. Backus v. Apishapa Land & Cattle Co., 44 Colo. App. 59, 615 P.2d 42 (1980).

Making an argument for collateral estoppel in a responsive brief and not affirmatively making a motion based on the defense does not negate the duty to affirmatively plead the defense. Trujillo v. Farmers Ins. Exchange, 862 P.2d 962 (Colo. App. 1993).

Plaintiff is entitled to recover based on unjust enrichment of defendant when the plaintiff has no alternative right on an enforceable contract. Backus v. Apishapa Land & Cattle Co., 44 Colo. App. 59, 615 P.2d 42 (1980).

Filing a homestead claim was not a responsive pleading pursuant to section (c) which requires a party to affirmatively plead a previous discharge in bankruptcy. Matter of Lombard, 739 F.2d 499 (10th Cir. 1984).

Although inconsistent pleadings are permissible, a party may not assert one theory and induce reliance thereon and then shortly before trial reverse theories without acting contrary to the spirit of the rules. Gaybatz v. Marquette Minerals, Inc., 688 P.2d 1128 (Colo. App. 1984).

Buyer's claim under § 38-35-126 (3) to void installment land contract was an affirmative defense and compulsory counterclaim. As such, defense and claim should have been asserted in buyer's responsive pleading (or amended responsive pleading) or they are waived. Buyer's claim was related to seller's claim and, therefore, was a compulsory counterclaim. In addition, the primary remedy sought by buyer was rescission, which is a defense or claim which must be pleaded in accordance with section (c) of this rule. Dinosaur Park Invs., L.L.C. v. Tello, 192 P.3d 513 (Colo. App. 2008).

G. Election of Remedies.

Doctrine of election of remedies precludes pursuit of alternative remedies where the remedial rights sought necessarily repudiate each other. Newland v. Holland, 624 P.2d 933 (Colo. App. 1981).

Party is not required to make election of remedies where the remedies he invokes are consistent. Newland v. Holland, 624 P.2d 933 (Colo. App. 1981).

Inconsistency of demand makes election of one remedy estoppel against other remedy. It is not the fact that the causes of action are different, but the inconsistency of the demands, that makes the election of one remedial right an estoppel against the assertion of the other remedial right. Newland v. Holland, 624 P.2d 933 (Colo. App. 1981).

V. EFFECT OF FAILURE TO DENY.

Law reviews. For article, "The Plea of Want of Consideration in Colorado", see 3 Rocky Mt. L. Rev. 168 (1931).

When an issue is tried before a court without timely objection or motion, the issue shall be deemed properly before the court despite any defect in the pleading. Butler v. Behaeghe, 37 Colo. App. 282, 548 P.2d 934 (1976).

Where it was necessary for defendants to set forth a "lien waiver" in their answer if they desired to rely thereon under section (c) of this rule, since no reply was ordered by the court, and they did not, this affirmative defense was deemed denied under section (d) of this rule. Trustee Co. v. Bresnahan, 119 Colo. 311, 203 P.2d 499 (1949).

Where no reply was required under the rules, defendants were put on notice that any matter in avoidance of their defense of the statute of limitations would be deemed in issue before the court. Davis v. Bonebrake, 135 Colo. 506, 313 P.2d 982 (1957).

Mutual mistake theory in reply to marriage dissolution petition not waived. In a dispute over a separation agreement, a theory of mutual mistake is not waived by failure to raise the issue in the reply to the petition for dissolution of marriage, since no reply is required and averments in a pleading to which no responsive pleading is required shall be taken as denied or avoided. In re Deines, 44 Colo. App. 98, 608 P.2d 375 (1980).

Applied in Alspaugh v. District Court, 190 Colo. 282, 545 P.2d 1362 (1976).

VI. PLEADING TO BE CONCISE AND DIRECT.

Law reviews. For article, "Comments on the Rules of Civil Procedure", see 22 Dicta 154 (1945). For article, "The Federal Rules from the Standpoint of the Colorado Code", see 27 Dicta 170 (1950). For article, "One Year Review of Cases on Contracts", see 33 Dicta 57 (1956). For note, "One Year Review of Colorado Law — 1964", see 42 Den. L. Ctr. J. 140 (1965).

This rule provides that no technical forms of pleading are required. Bernstein v. Dun & Bradstreet, Inc., 149 Colo. 150, 368 P.2d 780 (1962); Vincent v. Clean Water Action Project, 939 P.2d 469 (Colo. App. 1997).

Technical rules will not be permitted to render a pleading defective where the attempt of the pleader to make the pleading more accurate and complete is frustrated at the instance of an objecting party. Boltz v. Bonner, 95 Colo. 350, 35 P.2d 1015 (1934).

Under this rule pleadings otherwise meeting the requirements of the rules are not objectionable for failure to state ultimate facts as distinguished from conclusions of law. Weick v. Rickenbaugh Cadillac Co., 134 Colo. 283, 303 P.2d 685 (1956).

Plaintiffs may state as many separate claims as they have regardless of their consistency and whether based on legal or equitable grounds or on both; the evidence will determine the appropriate relief to be granted. Apex Inv., Inc. v. Peoples Bank, 163 Colo. 325, 430 P.2d 613 (1967).

Where the same amount in question is involved in each of the claims, plaintiffs can only recover that amount. Apex Inv., Inc. v. Peoples Bank, 163 Colo. 325, 430 P.2d 613 (1967).

Where a party has alternative remedies of rescission and of damages for breach, he must elect which remedy he will base his action upon. Holscher v. Ferry, 131 Colo. 190, 280 P.2d 655 (1955).

Colorado's rules of civil procedure are designed to dispense with ritualistic, common-law, forms-of-action pleading. Bernstein v. Dun & Bradstreet, Inc., 149 Colo. 150, 368 P.2d 780 (1962).

Colorado has a liberal policy under C.R.C.P. 2 and this rule of dispensing with the overly technical aspects of common-law pleading. Bernstein v. Dun & Bradstreet, Inc., 149 Colo. 150, 368 P.2d 780 (1962).

The new practice is not concerned with meeting technical requirements of theories of causes of actions. Bridges v. Ingram, 122 Colo. 501, 223 P.2d 1051 (1950); Hutchinson v. Hutchinson, 149 Colo. 38, 367 P.2d 594 (1961).

It no longer is necessary to elect at the peril of the pleader a particular theory or "cause of action". Weick v. Rickenbaugh Cadillac Co., 134 Colo. 283, 303 P.2d 685 (1956); Hinsey v. Jones, 159 Colo. 326, 411 P.2d 242 (1966); Behlen Mfg. Co. v. First Nat'l Bank, 28 Colo. App. 300, 472 P.2d 703 (1970).

The theory of pleading is to give an adversary notice of what is to be expected at trial. Lyons v. Hoffman, 31 Colo. App. 306, 502 P.2d 980 (1972).

The modern philosophy concerning pleadings is that they do little more than indicate generally the type of litigation involved. Smith v. Mills, 123 Colo. 11, 225 P.2d 483 (1950).

In most cases it is sufficient if the pleader clearly identifies the transactions which form the basis of the claim for relief, and if upon any theory of the law relief is warranted by the evidence offered and received in support of the claim, it should not be denied because of the possible selection by counsel of the wrong technical cause of action. Weick v. Rickenbaugh Cadillac Co., 134 Colo. 283, 303 P.2d 685 (1956); Hinsey v. Jones, 159 Colo. 326, 411 P.2d 242 (1966); Behlen Mfg. Co. v. First Nat'l Bank, 28 Colo. App. 300, 472 P.2d 703 (1970).

A plaintiff is not limited in evidence to those examples of conduct contained in the complaint. Since the purpose of the complaint is to provide reasonable notice of the general nature of the matter presented, it need not contain specific examples of misconduct, and there-

fore, it need not contain all examples of misconduct that are presented at trial. Southerland v. Argonaut Ins. Co., 794 P.2d 1102 (Colo. App. 1990).

Technical theory cannot defeat claim if pleader is entitled to relief under any theory. The technical theory of the old cause of action, as it existed under the common law and to a lesser extent under the former Code of Civil Procedure, can no longer be urged to defeat a litigation if upon any theory of law the claim stated entitles the pleader to relief. Weick v. Rickenbaugh Cadillac Co., 134 Colo. 283, 303 P.2d 685 (1956); Hinsey v. Jones, 159 Colo. 326, 411 P.2d 242 (1966).

Just because a formal court order is not sought and entered, petitioner may not be despoiled of any rights in a matter; otherwise, such a holding would be highly technical and essentially unjust. Gillespie v. District Court, 119 Colo. 242, 202 P.2d 151 (1949).

Grounds of recovery can appear partly from both allegations of fact and legal conclusions. It is not a valid objection on a motion to dismiss a complaint as insufficient that the grounds of recovery appear partly from allegations of fact and partly from allegations of legal conclusions of the pleader. People ex rel. Bauer v. McCloskey, 112 Colo. 488, 150 P.2d 861 (1944).

If the conclusions of law alleged, rather than the ultimate facts from which they flow, are accepted as not objectionable to support the claim under section (e)(1) of this rule, then the complaint is sufficient as against motion to dismiss. People ex rel. Bauer v. McCloskey, 112 Colo. 488, 150 P.2d 861 (1944).

A trial court errs in dismissing the complaint based on the contentions of the defendant that plaintiffs' "theories" are deficient in one element or another, for this is a matter of evidence and cannot be resolved by the statement of counsel. Kluge v. Wilson, 167 Colo. 526, 448 P.2d 786 (1968).

Pleadings sufficient to put contributory negligence in issue, although negligence alleged. Where plaintiff contended that, although the pleadings made it clear that defendant was alleging negligence by plaintiff, the failure to designate it as contributory negligence changed the nature of preparation necessary to meet the issue at trial, the court held that, regardless of whether it was designated as "negligence" or "contributory negligence", the pleadings did put plaintiff on notice that he might have to rebut a showing of negligence on his part, and therefore, the pleadings, although not in the best form, were adequate to put contributory negligence in issue. Lyons v. Hoffman, 31 Colo. App. 306, 502 P.2d 980 (1972).

Statute of limitations sufficiently pleaded. An allegation in a reply to a counterclaim that the counterclaim is barred by the statute of limitations in such case made and provided is a sufficient pleading to comply with section (e) of this rule. Denning v. A. D. Wilson & Co., 137 Colo. 372, 326 P.2d 77 (1958).

Where plaintiff commingles in one court several causes of action, a defendant who fails to require plaintiff to state these causes separately and files an answer by way of general denial must be prepared to meet all such causes. Smith v. Gvirtzman, 109 Colo. 314, 124 P.2d 926 (1942).

Issues not pleaded may properly be determined by the trial court by consent, express or implied, where evidence presenting such issues is tendered and received without objection. First Nat'l Bank v. Jones, 124 Colo. 451, 237 P.2d 1082 (1951).

Extraneous issues may not be tried in the absence of amendment of the pleadings where timely objection is made. First Nat'l Bank v. Jones, 124 Colo. 451, 237 P.2d 1082 (1951).

Complaint did not comply with section (e). Where complaint is 30 pages long with an additional 10 pages of attached exhibits, consists of 178 separate paragraphs setting forth 36 separate claims for relief, and incorporates other portions of the complaint over 400 times, the plaintiffs did not comply with the requirements of section (e) of this rule. Borwick v. Bober, 34 Colo. App. 423, 529 P.2d 1351 (1974).

VII. CONSTRUCTION.

Annotator's note. Since section (f) of this rule is similar to § 83 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Rulings under former practice and procedure that pleadings are construed most strongly against the pleader are not in harmony with present procedure. Spomer v. City of Grand Junction, 144 Colo. 207, 355 P.2d 960 (1960).

The rule now is that pleadings are to be construed in favor of the pleader. Spomer v. City of Grand Junction, 144 Colo. 207, 355 P.2d 960 (1960); Denver & R. G. W. R. R. v. Wood, 28 Colo. App. 534, 476 P.2d 299 (1970).

Pleadings are to be liberally construed, and doubts are to be resolved in favor of pleader. Lyons v. Hoffman, 31 Colo. App. 306, 502 P.2d 980 (1972).

The trial court in its sound discretion should allow plaintiff to amend his 42 U.S.C. § 1983 complaint if justice so requires, especially in light of the liberal construction rules regarding pro se complaints under this statute. Deason v. Lewis, 706 P.2d 1283 (Colo. App. 1985).

Under this rule all pleadings are to be so construed as to do substantial justice, and a court is empowered to grant the relief to which

the parties are entitled. Fletcher v. District Court, 137 Colo. 143, 322 P.2d 96 (1958); McCoy v. People, 165 Colo. 407, 439 P.2d 347 (1968).

Though the title by which a litigant may designate a pleading is not controlling, the substance of the claim rather than the appellation applied thereto controls. Hutchinson v. Hutchinson, 149 Colo. 38, 367 P.2d 594 (1961).

Although a defense is labeled as an attack on subject matter jurisdiction, the specific allegations may be sufficient to raise the issue of lack of personam jurisdiction, depending on the factual context, and regardless of the attached label. Nations Enters., Inc. v. Process Equip. Co., 40 Colo. App. 390, 579 P.2d 655 (1978).

Where an alleged defect in a complaint is a mere matter of interpretation, defendant cannot interpret plaintiff out of court. Mountain States Tel. & Tel. Co. v. Sanger, 87 Colo. 369, 287 P. 866 (1930).

Amendment of complaint by later argument. Where there are allegations in a complaint and facts appearing in an affidavit which may be construed as supporting the theories of estoppel and waiver, and those theories are argued to the trial court, although the theories were not specifically alleged in the complaint, the trial court must treat the complaint as amended for purposes of considering a motion for summary judgment. Discovery Land & Dev. Co. v. Colo.-Aspen Dev. Corp., 40 Colo. App. 292, 577 P.2d 1101 (1977).

Objection for insufficient facts overruled if pleading can be upheld by liberal construction. While the objection for insufficient facts is not waived by answer, but may be made at any time, making it for the first time at the trial is not encouraged by the courts and when so made will be overruled if by fair implication or most liberal construction the pleading can be held to state a cause of action. Musgrove v. Brown, 93 Colo. 559, 27 P.2d 590 (1933).

Judicial notice held proper aid in construing pleading. Where the complaint and summons were entitled in the county of Teller and the complainant alleged a contract to be performed "in the city of Victor", not specifying in what county it was held, on motion to change the venue, that the court might take judicial notice that the city of Victor is situate in the county of Teller and construed the complaint accordingly. Gould v. Mathes, 55 Colo. 384, 135 P. 780 (1913).

Supreme court endeavors to ascertain the spirit and intent of the rules. In construing the rules of civil procedure applicable to a cause of action, the supreme court endeavors to ascertain the spirit and intent of the rules as reflected by the language employed. Hutchinson v. Hutchinson, 149 Colo. 38, 367 P.2d 594 (1961).

Relief granted, if consistent with the pleadings liberally construed, will not be disturbed. A judgment will not be disturbed on the ground that it is not warranted by the pleadings where the cause has been remanded merely to permit the introduction of evidence on the undetermined issues, and the facts established by the evidence entitle the party to the relief granted, which was consistent with the pleadings liberally construed. Schiffer v. Adams, 13 Colo. 572, 22 P. 964 (1889); Marriott v. Clise, 12 Colo. 561, 21 P. 909 (1889).

The admission into evidence of a copy of a revoked will was held in conformity with the pleadings under section (f) of this rule where the will had been executed when the antenuptial agreement in issue was signed and the complaint alleged that "in view of all the circumstances, the antenuptial agreement was not fair, equitable or reasonable". Linker v. Linker, 28 Colo. App. 131, 470 P.2d 921 (1970).

Pleading a defense of failure to state a claim upon which relief can be granted is sufficient to raise the issue of failure of plaintiff to join an indispensable party. Cold Springs Ranch v. Dept. of Nat. Res., 765 P.2d 1035 (Colo. App. 1988).

Rule 9. Pleading Special Matters

(a) (1) **Capacity.** It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge, and on such issue the party relying on such capacity, authority, or legal existence, shall establish same on the trial.

(2) **Identification of Unknown Party.** When a party is designated in the caption as one "whose true name is unknown" the pleader shall allege such matters as are within his knowledge to identify such unknown party and his connection with the claim set forth.

(3) **Interest of Unknown Parties.** When parties are designated in the caption as "all unknown persons who claim any interest in the subject matter of this action" the pleader shall describe the interests of such persons, and how derived, so far as his knowledge extends.

(4) **Description of Interest.** Where unknown parties claim some interest through some one or more of the named defendants, it shall be a sufficient description of their interests and of how derived to state that the interests of the unknown parties are derived through some one or more of the named defendants.

(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

(c) Conditions Precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity, and when so made the party pleading the performance or occurrence shall establish on the trial the facts showing such performance or occurrence.

(d) Official Document or Act. In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer within the United States or within a territory or insular possession subject to the dominion of the United States, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it. A denial of jurisdiction shall be made specifically and with particularity and when so made the party pleading the judgment or decision shall establish on the trial all controverted jurisdictional facts.

(f) Time and Place. For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) Special Damages. When items of special damage are claimed, they shall be specifically stated.

(h) [There is no section (h).]

(i) Pleading Statute. In pleading a statute of Colorado or of the United States, the same need not be set forth at length, but it shall be sufficient to refer to such statute by the appropriate designation in the official or recognized compilation thereof, or otherwise identify the same, and the court shall thereupon take judicial knowledge thereof.

Cross references: For pleadings concerning parties plaintiff and joint defendants, see §§ 13-25-117 and 13-25-118, C.R.S.; for conclusion of a judgment in rem against unknown defendants, see C.R.C.P 54(g); for general rules of pleading, see C.R.C.P. 8.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, "Pleadings, Rules 7 to 25", see 28 Dicta 368 (1951). For article, "Pleadings and Motions: Rules 7-16", see 23 Rocky Mt. L. Rev. 542 (1951). For article, "One Year Review of Civil Procedure", see 35 Dicta 3 (1958). For article, "One Year Review of Civil Procedure and Appeals", see 37 Dicta 21 (1960). For article, "One Year Review of Civil Procedure and Appeals", see 39 Dicta 133 (1962).

Applied in Daniel v. M.J. Dev., Inc., 43 Colo. App. 92, 603 P.2d 947 (1979); K-R Funds, Inc. v. Fox, 640 P.2d 257 (Colo. App. 1981); Ed Hackstaff Concrete, Inc. v. Powder Ridge Condo., 679 P.2d 1112 (Colo. App. 1984); Padilla v. Ghuman, 183 P.3d 653 (Colo. App. 2007).

II. CAPACITY.

Annotator's note. The last clause of section (a)(1) beginning with the words "and on such issue", is not in F.R.C.P. 9(a)(1) was added because of the decision in Home Ins. Co. v. Taylor, 94 Colo. 446, 32 P.2d 183 (1934) concerning the burden of proof.

Want of legal capacity to sue must be raised by special plea. Bohen v. Bd. of County Comm'rs, 109 Colo. 283, 124 P.2d 606 (1942).

It is unnecessary to aver in the pleadings the authority of a party to sue in a representative manner. Alder v. Alder, 167 Colo. 145, 445 P.2d 906 (1968).

If a party desires to raise an issue as to the authority of a party to sue in a representative manner, he must do so by specific negative averment. Adler v. Adler, 167 Colo. 145, 445 P.2d 906 (1968).

An answer stating that the defendant is without knowledge of plaintiff's corporate existence and capacity to sue is not sufficiently specific under this rule to place that matter in issue so that plaintiff's failure to prove its capacity may properly serve as the basis for dismissal of its complaint, and does not meet this rule's requirement for a specific negative averment. Tex-Am Carriers, Inc. v. A.S.T. Brokerage, Inc., 41 Colo. App. 438, 586 P.2d 667 (1978).

Where the pleadings of the plaintiffs in error do not contain the negative averment, the issue is never before the trial court and the objection is waived. Adler v. Adler, 167 Colo. 145, 445 P.2d 906 (1968).

Neither the legal existence of a party nor its capacity to sue can be challenged by motion to dismiss for failure to state a claim, for such issue can be raised only by specific negative averment, and the issue, when so raised, becomes an issue to be settled on the trial of the matter. Northwest Dev., Inc. v. Dunn, 29 Colo. App. 364, 483 P.2d 1361 (1971).

Determination whether assignee of claim for attorney's fee acted as a nonlicensed collection agency in bringing suit was not necessary where no issue concerning the capacity of assignee to sue was raised by the pleadings, the pre-trial order did not permit extension of the issues beyond those stated in the order, and the action was neither one to determine the legality of the assignment contract nor one to invoke a penalty against assignee for violation of the collection agency statute. Reilly v. Cook, McKay & Co., 152 Colo. 269, 381 P.2d 261 (1963).

Where defendant failed to file an objection to plaintiff's motion for substitution of parties and also failed to challenge the trial court's order permitting the substitution, then right to review on appeal has been waived. Thomason v. McAlister, 748 P.2d 798 (Colo. App. 1987).

Trial court had personal jurisdiction over estate after plaintiffs amended complaint to name estate and estate's special administrator as defendants instead of deceased, non-existent defendant before any answer had been filed in the case. This cured the defect in personal jurisdiction contained in the original complaint. Currier v. Sutherland, 218 P.3d 709 (Colo. 2009).

III. IDENTIFICATION OF UNKNOWN PARTY.

Under this rule, unknown persons may be made parties to a suit to quiet title to lands and may be concluded by the decree therein. Brackett v. McClure, 24 Colo. App. 524, 135 P. 1110 (1913) (decided under § 50(b) of the former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941).

IV. INTEREST OF UNKNOWN PARTIES.

Law reviews. For article on requirements of this rule, see 6 Dicta 9 (1929). For article, "Standard Pleading Samples to Be Used in Quiet Title Litigation", see 30 Dicta 39 (1953).

V. FRAUD, MISTAKE, CONDITION OF THE MIND.

Law reviews. For article, "Use of Summary Judgments and the Discovery Procedure", see 24 Dicta 193 (1947).

Federal rule is substantially identical, therefore federal cases interpreting F.R.C.P. 9(b) are persuasive in interpreting C.R.C.P. 9(b). State Farm Mutual Auto. Ins. Co. v. Parrish, 899 P.2d 285 (Colo. App. 1994).

Fraud is never presumed. Fidelity Fin. Co. v. Groff, 124 Colo. 223, 235 P.2d 994 (1951).

This rule provides that in all averments of fraud the "circumstances constituting fraud" shall be stated with "particularity". Western Homes, Inc. v. District Court, 133 Colo. 304, 296 P.2d 460 (1956); Coon v. District Court, 161 Colo. 211, 420 P.2d 827 (1966); State Farm Mutual Auto. Ins. Co. v. Parrish, 899 P.2d 285 (Colo. App. 1994).

Where complaint alleged a conspiracy to defraud an insurance company by virtually every conceivable method of doing so, but failed to identify which of the hundreds of transactions between the parties over a period of years involved fraud, dismissal of the conspiracy claim and other claims incorporating the allegations contained in the conspiracy claim was proper. State Farm Mutual Auto. Ins. Co. v. Parrish, 899 P.2d 285 (Colo. App. 1994).

Allegations of fraud must be stated with the "particularity" required by this rule. O.K. Uranium Dev. Co. v. Miller, 140 Colo. 490, 345 P.2d 382 (1959).

Particularity requirement is intended in part to protect defendants from reputational harm that may result from unsupported allegations of fraud, a charge which involves moral turpitude. State Farm Mutual Auto. Ins. Co. v. Parrish, 899 P.2d 285 (Colo. App. 1994).

The "particularity" required includes all of the material elements of an action in fraud and deceit as such had theretofore been laid down in the numerous decisions of this court antedating the adoption of the rules of civil procedure. Ginsberg v. Zagar, 126 Colo. 536, 251 P.2d

1080 (1952); Coon v. District Court, 161 Colo. 211, 420 P.2d 827 (1966).

Particularity requirement applies to all claims "sounding in fraud", regardless of the label that a party has attached to a particular claim. State Farm Mutual Auto. Ins. Co. v. Parrish, 899 P.2d 285 (Colo. App. 1994).

Rescission based on fraud in the inducement, asserted as an affirmative defense to action on an employment contract, held insufficiently pleaded where defendant did not allege specific damage attributable to reliance on plaintiff's misrepresentations and did not include demand for rescission in complaint. Ice v. Benedict Nuclear Pharmaceuticals, Inc., 797 P.2d 757 (Colo. App. 1990).

Where defense of fraud was stated with sufficient particularity and supported by affidavit in defendant's response to motion for partial summary judgment, it should have been incorporated in defendant's answer for the purpose of technical compliance with C.R.C.P. 8(c), even though the defense is more properly asserted in an answer. Alien, Inc. v. Futterman, 924 P.2d 1063 (Colo. App. 1995).

Earlier cases defining "particularity" required in actions for fraud and deceit. Brown v. Linn, 50 Colo. 443, 115 P. 906 (1911); Kilpatrick v. Miller, 55 Colo. 419, 135 P. 780 (1913); Morrison v. Goodspeed, 100 Colo. 470, 68 P.2d 458 (1937).

Where a plaintiff alleges that specific material representations were made by a defendant, it is insufficient merely to characterize them as false, but such plaintiff must set forth the falsity thereof by direct and particular allegation of the true facts, demonstrating thereby that the representations are untrue. Ginsberg v. Zagar, 126 Colo. 536, 251 P.2d 1080 (1952).

Although this rule requires particularity in averments of fraud, it does not require detailed allegations of evidentiary facts. Northwest Dev., Inc. v. Dunn, 29 Colo. App. 364, 483 P.2d 1361 (1971).

It is sufficient to state the main facts constituting the fraud. It is not necessary to recite in the bill of complaint all the evidence that may be adduced to prove the fraud, it being sufficient merely to state the main facts or incidents which constitute the fraud. Fidelity Fin. Co. v. Groff, 124 Colo. 223, 235 P.2d 994 (1951).

Failure to allege precise dates or exact places of misrepresentations would not render fraud defense insufficient. Had the alleged fraud been pleaded with the "particularity" required by section (b) of this rule, the fact that the defendants failed to allege in their answer setting up the defense of fraud the precise dates upon which the misrepresentations were made, or the exact places where they were made, would not render the proposed defense legally insufficient. Coon v. District Court, 161 Colo. 211, 420 P.2d 827 (1966).

The allegations and proofs of fraud must be clear and convincing. Fidelity Fin. Co. v. Groff, 124 Colo. 223, 235 P.2d 994 (1951).

Allegations of fraud sufficiently averred. Western Homes, Inc. v. District Court, 133 Colo. 304, 296 P.2d 460 (1956).

Where plaintiff does not make a prima facie showing of actionable fraud with the particularity required by section (b) of this rule, the trial court is correct in directing a verdict for defendant and against plaintiff. Roblek v. Horst, 147 Colo. 55, 362 P.2d 869 (1961).

Where a complaint does not allege fraud with the particularity required by this rule and a motion to dismiss is filed, but neither argued nor ruled upon, and an answer thereafter filed in which the motion to dismiss is not repeated and trial proceeds on the issues framed by the complaint and answer without the sufficiency of the complaint being again challenged, an amendment to conform to the proof would have been in order under C.R.C.P. 15(b). O.K. Uranium Dev. Co. v. Miller, 140 Colo. 490, 345 P.2d 382 (1959).

Complaint contained sufficient allegations of fraud to satisfy the requirements of section (b) where a corporation alleged that former officers and directors misused their access to confidential information regarding customers' identities, contracts, pricing, cost data, suppliers and production techniques to compete with the corporation and produce similar products using production and fabrication process substantially similar to the corporation's confidential processes. Scott Sys., Inc. v. Scott, 996 P.2d 775 (Colo. App. 2000).

Although the court did not decide whether claims arising under the Colorado Consumer Protection Act must be pled under section (b), complaint satisfied the heightened pleading requirements when it contained facts that alleged that a corporation had deceived consumers about their goods' geographic origins. People ex rel. Suthers v. Mandatory Poster, 260 P.3d 9 (Colo. App. 2009).

VI. CONDITIONS PRECEDENT.

Law reviews. For article, "One Year Review of Contracts", see 35 Dicta 18 (1958).

Annotator's note. (1) The last clause of section (c) commencing with the words "and when so made" is not in F.R.C.P. 9(c) and was added because of the decision in Home Ins. Co. v. Taylor, 94 Colo. 446, 32 P.2d 183 (1934) concerning the burden of proof.

(2) Since section (c) of this rule is similar to § 72 of the former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941, relevant cases construing that

section have been included in the annotations to this rule.

This rule provides that in pleading performance or occurrence of condition precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred but that a denial of performance "shall be made specifically and with particularity". Lively v. Price, 165 Colo. 111, 437 P.2d 526 (1968).

This rule permits a plaintiff to plead generally the performance of all conditions. Sullivan v. McCarthy, 136 Colo. 150, 314 P.2d 901 (1957).

Complaint on bond may adopt general averment. A complaint on a bond which prescribes conditions to be performed by the obligee in order to fix the liability of the obligor may effectually adopt the general averment of conditions performed. United States Fid. & Guar. Co. v. Newton, 50 Colo. 379, 115 P. 897 (1911).

Plaintiff under the allegation of performance of an insurance contract can prove waiver of policy requirements by the company. Southern Sur. Co. v. Farrell, 79 Colo. 53, 244 P. 475 (1926).

Complaint failing to allege performance by plaintiff is fatally defective. A complaint based upon a contract executory as to the plaintiff which is silent upon the question of plaintiff's performance and contains no averments which, if true, would excuse performance is fatally defective. Armor v. Fisk, 1 Colo. 148 (1869); Jones v. Perot, 19 Colo. 141, 34 P. 728 (1893); Bd. of Pub. Works v. Hayden, 13 Colo. App. 36, 56 P. 201 (1899); Mulford v. Central Life Assurance Soc'y, 25 Colo. App. 527, 139 P. 1044 (1914); Galligan v. Bua, 77 Colo. 386, 236 P. 1016 (1925).

It is not defective for failure to state plaintiff "duly" performed all conditions. In an action on a hail insurance policy where the allegations of the complaint substantially complied with this provision, it is held that it was not defective because it failed to state that plaintiff "duly" performed all of the conditions of the contract. Great Am. Ins. Co. v. Scott, 89 Colo. 99, 299 P. 1051 (1931).

It is error to refuse filing of answer denying performance. Where the petition alleged performance of the contract on the part of the petitioner, an answer denying the allegations of performance in the petition created a material issue, and it was error to refuse to permit it to be filed. Bd. of Pub. Works v. Hayden, 13 Colo. App. 36, 56 P. 201 (1899).

Defendant must specially allege nonperformance of conditions precedent. Where an averment of performance of conditions precedent is allowed in the complaint, the rule is that if a defendant relies upon nonperformance he must specially allege the condition or conditions on the nonperformance of which he relies and negate their performance. Helvetia Swiss Fire Ins. Co. v. Allis Co., 11 Colo. App. 264, 53 P. 242 (1898); Pennsylvania Mut. Life Ins. Co. v. Ornauer, 39 Colo. 498, 90 P. 846 (1907); Nat'l Sur. Co. v. Queen City Land Co., 63 Colo. 105, 164 P. 722 (1917).

Denial must be made specifically and with particularity. If an adverse party denies the performance of any such conditions, the rule requires that such denial shall be made specifically and with particularity. Sullivan v. McCarthy, 136 Colo. 150, 314 P.2d 901 (1957).

Plaintiff is not obliged to prove performance of condition precedent not put in issue by defendant. Under this rule in an action where a plaintiff alleges generally the performance of all conditions precedent and defendant denies with particularity the performance of specific conditions, the plaintiff is not obliged to prove performance of a condition precedent with reference to which the defendant has tendered no issue. Sullivan v. McCarthy, 136 Colo. 150, 314 P.2d 901 (1957).

VII. JUDGMENT.

Annotator's note. The last sentence of section (e) is not in F.R.C.P. 9(e) and was added because of the decision in Home Ins. Co. v. Taylor, 94 Colo. 446, 32 P.2d 183 (1934) concerning the burden of proof.

The manner of pleadings of this rule is prescribed not only to simplify the pleadings relating to judgments, but also to apprise the pleader of a judgment or decision of a court that it is being challenged for jurisdictional reasons as well as the particular grounds of the attack upon it, and for the further purpose of preventing final judgments and decisions of courts from being overthrown unadvisedly. Lamberson v. Thomas, 146 Colo. 539, 362 P.2d 180 (1961).

The party pleading a foreign judgment must establish all jurisdictional facts when denial of jurisdiction is made with particularity by the opponent. Superior Distrib. Corp. v. White, 146 Colo. 595, 362 P.2d 196 (1961).

A general denial of the validity of the decree is not sufficient to assail it. Lamberson v. Thomas, 146 Colo. 539, 362 P.2d 180 (1961).

If plaintiff intends to attack a decree upon jurisdictional grounds, he is required to give notice to the defendants by specifically denying jurisdiction and alleging with particularity the grounds showing lack of jurisdiction. Lamberson v. Thomas, 146 Colo. 539, 362 P.2d 180 (1961).

The mandatory provisions of this rule are not waived by the first pleaders having alleged jurisdictional facts in support of a judgment or decree. Lamberson v. Thomas, 146 Colo. 539, 362 P.2d 180 (1961).

Contrary rulings by the court under the former code are no longer authority in Colorado. Lamberson v. Thomas, 146 Colo. 539, 362 P.2d 180 (1961).

Fraud which will be available to a defendant in his attack upon a foreign judgment is fraud which has deprived him of the opportunity to make a full and fair defense. Superior Distrib. Corp. v. White, 146 Colo. 595, 362 P.2d 196 (1961).

Where the very jurisdictional facts alleged as fraud were those heard and decided by the foreign court, no good reason appears why defendants should be permitted to relitigate this matter, they having had their day in court thereon. Superior Distrib. Corp. v. White, 146 Colo. 595, 362 P.2d 196 (1961).

The doctrine of "res judicata" must be applied to questions of jurisdiction in cases arising in state courts involving application of the full faith and credit clause where under the law of the state in which the original judgment was rendered such adjudications are not susceptible to collateral attack. Superior Distrib. Corp. v. White, 146 Colo. 595, 362 P.2d 196 (1961).

The doctrine of "res judicata" applies to adjudications of the person or of the subject matter where such adjudications have been made in proceedings in which those questions were in issue and in which the parties were given full opportunity to litigate. Superior Distrib. Co. v. White, 146 Colo. 595, 362 P.2d 196 (1961).

Court may take judicial notice of doctrine or rule of law adopted in previous action. The rule which precludes a court from taking judicial notice of its own records in other actions, unless properly introduced in evidence, does not prevent it from noticing the doctrine or rule of law adopted by the court in the first action and applying that principle under the theory of "stare decisis" in the second action. Wasinger v. Miller, 154 Colo. 61, 388 P.2d 250 (1964).

The trial court can properly take judicial notice of the fact that defendants had a right established by a previous action in its court and as to the wording used in that judgment, which wording later needed interpretation. Wasinger v. Miller, 154 Colo. 61, 388 P.2d 250 (1964).

In order that an action may be maintained in one state upon a judgment recovered in another state, it is necessary that the judgment should be a valid and final adjudication, remaining in full force and virtue in the state of its rendition, and capable of being there enforced by final process. Gobin v. Citizens' State Bank, 92 Colo. 350, 20 P.2d 1007 (1933) (decided under § 71 of the former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941); Ginsberg v. Gifford, 144 Colo. 186, 355 P.2d 657 (1960); Superior Distrib. Corp. v. McCrory, 144 Colo. 457, 356 P.2d 961 (1960).

Complaint need not "specifically" allege that foreign judgment "can be enforced". It is not essential to a complaint based upon a foreign judgment that the allegations "specifically" state that the judgment sued upon "can be enforced" in the jurisdiction in which it was entered where the allegations in substance allege that the judgment is a valid and final adjudication remaining in full force in the state of its rendition and capable of being there enforced by final process, for under the liberalized rules of civil procedure, it is the substance of the complaint rather than the form that is paramount. Superior Distrib. Corp. v. Zarelli, 143 Colo. 358, 352 P.2d 967 (1960); Ginsberg v. Gifford, 144 Colo. 186, 355 P.2d 657 (1960).

Where the pleadings show that a foreign judgment is a contingent, inconclusive adjudication, interlocutory in nature, the complaint is insufficient to state an enforceable claim on a foreign judgment. Superior Distrib. Corp. v. McCrory, 144 Colo. 457, 356 P.2d 961 (1960).

VIII. TIME AND PLACE.

Where the complaint on its face fails to make the material allegation of place, a motion to dismiss is good. Sprott v. Roberts, 154 Colo. 252, 390 P.2d 465 (1964).

A motion to dismiss based on the fact that the complaint facially established a jurisdictional defect because of a violation of the statute of limitations has the effect of a motion for judgment on the pleadings, as averments of time will be considered in determining the sufficiency of the pleadings. People v. Steinberg, 672 P.2d 543 (Colo. App. 1983).

IX. SPECIAL DAMAGES.

Law reviews. For article, "The Law of Libel in Colorado", see 28 Dicta 121 (1951). For article, "Loss of Use as an Element of Damages", 28 Dicta 277 (1951). For article, "One Year Review of Civil Procedure and Appeals", see 40 Den. L. Ctr. J. 66 (1963).

Special damages must be specifically set forth in complaint. Where the loss of the business use of plaintiff's car was not the usual and natural consequence of any wrongful act on defendant's part, the damages, if any, which he sustained resulting from defendant's acts were required to be specifically set forth in his complaint. Rogers v. Funkhouser, 121 Colo. 13, 212 P.2d 497 (1949).

Purpose of requiring that special damages be pled with specificity is essentially one of notice. Rodriquez v. Denver & R. G. W. R. R., 32 Colo. App. 378, 512 P.2d 652 (1973).

Only when a party seeks to recover such damages as are not the usual and natural consequence of the wrongful act complained of must special damages be specially pled. Rodriquez v. Denver & R. G. W. R. R., 32 Colo. App. 378, 512 P.2d 652 (1973).

Special damages may be considered by the court when not pleaded. Where special damages are not pleaded by plaintiff as required by section (g) of this rule, but defendant neither attacks the sufficiency of the complaint nor objects to evidence introduced relevant thereto, the trial court may, pursuant to C.R.C.P. 15(b), consider the matter of special damages and enter judgment for such amount as warranted by the evidence. Carlson v. Bain, 116 Colo. 526, 182 P.2d 909 (1947).

Where the amended complaint of the plaintiffs did not plead special damages and the record disclosed that the defendant was put on notice of the claim for special damages as early as the pre-trial conference, the trial court's admission of the evidence and grant of leave to amend the complaint to conform to the proof upon motion of the plaintiffs was in conformity with the discretion of C.R.C.P. 15(b). Welborn v. Sullivant, 167 Colo. 35, 445 P.2d 215 (1968); Karakehian v. Boyer, 900 P.2d 1273 (Colo. App. 1994).

Complaint in breach of contract suit "specifically stated" items of special damage where it was alleged that as a result of defendants' refusal to permit plaintiffs to use water specified in an agreement to exchange property, plaintiffs were damaged in that they were forced to drill a well on their own property and that there was also some loss of business and profits in the operation of their tourist court. Hinsey v. Jones, 159 Colo. 326, 411 P.2d 242 (1966).

The only claims of defamation which may be maintained without allegation and proof of special damages are claims of libel per se, or claims of libel per quod where the alleged defamatory words meet certain of the specific criteria required in claims of slander per se. Fort v. Holt, 508 P.2d 792 (Colo. App. 1973).

X. PLEADING STATUTE.

Allegation that action is barred by statute does not require specific citation. Under the rules of pleading the allegation that an action is barred by the statute in such case made and provided is certainly a reference to the statute on which a plaintiff relies and does not require specific citation to chapter and page. Denning v. A.D. Wilson & Co., 137 Colo. 372, 326 P.2d 77 (1958).

Instruction on statute not objectionable where complaint fails to specifically refer to statute. Instruction covering the subject of damages which are recoverable for wrongful death was not objectionable because plaintiff had failed to specifically refer in his complaint to the wrongful death statute. Reidesel v. Blank, 158 Colo. 340, 407 P.2d 30 (1965).

Court may allow amendment to more specifically plead statute subsequent to proof for clarification. After proof had been offered under the issues tendered and some question arose as to whether the statute of limitations had been pleaded, it was permissible for the court to permit counsel leave to amend by more specifically pleading the statute of limitations for the purpose of clarification. Munro v. Eshe, 113 Colo. 19, 156 P.2d 700 (1944).

Rule 10. Form and Quality of Pleadings, Motions and Other Documents

(a) Caption; Names of Parties. Every pleading, motion, E-filed document under C.R.C.P. 121 (1-26), or any other document filed with the court (hereinafter "document") in both civil and criminal cases shall contain a caption setting forth the name of the court, the title of the action, the case number, if known to the person signing it, the name of the document in accordance with Rule 7(a), and the other applicable information in the format specified by paragraph (d) and the captions illustrated by paragraph (e) or (f) of this rule. In the complaint initiating a lawsuit, the title of the action shall include the names of all the parties to the action. In all other documents, it is sufficient to set forth the name of the first-named party on each side of the lawsuit with an appropriate indication that there are also other parties (such as "et al."). A party whose name is not known shall be designated by any name and the words "whose true name is unknown". In an action in rem, unknown parties shall be designated as "all unknown persons who claim any interest in the subject matter of this action".

(b) Paragraphs; Separate Statements. All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances. A paragraph may be referred to by its paragraph number in all succeeding documents. Each claim founded upon a separate

transaction or occurrence, and each defense other than denials, shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) **Incorporation by Reference; Exhibits.** A statement in a document may be incorporated by reference in a different part of the same document or in another document. An exhibit to a document is a part thereof for all purposes.

(d) **General Rule Regarding Paper Size, Format, and Spacing.** All documents filed after the effective date of this rule, including those filed through the E-Filing System under C.R.C.P. 121 (1-26), shall meet the following criteria:

(1) **Paper:** Where a document is filed on paper, it shall be on plain, white, 8 1/2 by 11 inch paper (recycled paper preferred).

(2) **Format:** All documents shall be legible. They shall be printed on one side of the page only (except for E-Filed documents).

(I) **Margins:** All documents shall use margins of 1 1/2 inches at the top of each page, and 1 inch at the left, right, and bottom of each page. Except for the caption, a left-justified margin shall be used for all material.

(II) **Font:** No less than twelve (12) point font shall be used for all documents.

(III) **Case Caption Information:** All documents shall contain the following information arranged in the following order, as illustrated by paragraphs (e) and (f) of this rule, except that documents issued by the court under the signature of the clerk or judge should omit the attorney section as illustrated in paragraphs (e)(2) and (f)(2). Individual boxes should separate this case caption information; however, vertical lines are not mandatory.

On the left side:
Court name and mailing address.
Name of parties.
Name, address, and telephone number of the attorney or pro se party filing the document. Fax number and e-mail address are optional.
Attorney registration number.
Document title.

On the right side:
An area for "Court Use Only" that is at least 2 1/2 inches in width and 1 3/4 inches in length (located opposite the court and party information).
Case number, division number, and courtroom number (located opposite the attorney information above).

(3) **Spacing:** The following spacing guidelines should be followed.

(I) **Single spacing for all:**
Affidavits
Complaints, Answers, and Petitions
Criminal Informations and Complaints
Interrogatories and Requests for Admissions
Motions
Notices
Pleading forms (all case types)
Probation reports
All other documents not listed in subsection (II) below

(II) **Double spacing for all:**
Briefs and Legal Memoranda
Depositions
Documents that are complex or technical in nature
Jury Instructions
Petitions for Rehearing

Petitions for Writ of Certiorari
Petitions pursuant to C.A.R. 21
Transcripts

(4) **Signature Block:** All documents which require a signature shall be signed at the end of the document. The attorney or pro se party need not repeat his or her address, telephone number, fax number, or e-mail address at the end of the document.

(e) Illustration of Preferred Case Caption Format:
(1) Preferred Caption for documents initiated by a party:

[Designation of Court from subsection (g) below] Court Address:	
Plaintiff(s): v. *[Substitute appropriate party designations & names]* **Defendant(s):**	
Attorney or Party Without Attorney: Name: Address: Phone Number: FAX Number: E-mail: Atty. Reg.#:	▲ COURT USE ONLY ▲ Case Number: Div: Ctrm.:
NAME OF DOCUMENT	

(2) Preferred Caption for documents issued by the court under the signature of the clerk or judge:

[Designation of Court from subsection (g) below] Court Address:	
Plaintiff(s): *[Substitute appropriate party designations & names]* v. **Defendant(s):**	▲ COURT USE ONLY ▲ Case Number: Div.: Ctrm.:
NAME OF DOCUMENT	

(f) Illustration of Optional Case Caption:
(1) Optional Caption for documents initiated by a party:

[Designation of Court from subsection (g) below]

Court Address:

Plaintiff(s):

v. *[Substitute appropriate party designations & names]*
Defendant(s):

Attorney or Party Without Attorney:
Name:
Address:

▲ **COURT USE ONLY** ▲

Case Number:

Phone Number:
FAX Number:
E-mail:
Atty. Reg.#:

Div: Ctrm.:

NAME OF DOCUMENT

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(2) Optional Caption for documents issued by the court under signature of the clerk or judge:

[Designation of Court from subsection (g) below]

Court Address:

Plaintiff(s):

[Substitute appropriate party designations & names]
v.
Defendant(s):

▲ **COURT USE ONLY** ▲

Case Number:

Div.: Ctrm.:

NAME OF DOCUMENT

(g) Court Designation Examples:

APPELLATE
SUPREME COURT, STATE OF COLORADO
COURT OF APPEALS, STATE OF COLORADO

WATER
DISTRICT COURT, WATER DIVISION ___, COLORADO

DISTRICT
DISTRICT COURT, _____ COUNTY, COLORADO

COUNTY
COUNTY COURT, _____ COUNTY, COLORADO

CITY AND COUNTY
COUNTY COURT, CITY AND COUNTY OF _____, COLORADO
PROBATE COURT, CITY AND COUNTY OF _____, COLORADO
JUVENILE COURT, CITY AND COUNTY OF _____, COLORADO
DISTRICT COURT, CITY AND COUNTY OF _____, COLORADO

(h) The forms of case captions provided for in this rule replace those forms of captions otherwise provided for in other Colorado rules of procedure, including but not limited to the Colorado Rules of County Court Procedure, the Colorado Rules of Procedure for Small Claims Courts, and the Colorado Appellate Rules. These forms of case captions apply to criminal cases, as well as civil cases.

(i) State Judicial Pre-Printed or Computer-Generated Forms. Forms approved by the State Court Administrator's Office (designated "JDF" or "SCAO" on pre-printed or computer-generated forms), forms set forth in the Colorado Court Rules, volume 12, C.R.S., (including those pre-printed or computer-generated forms designated "CRCP" or "CPC" and those contained in the appendices of volume 12, C.R.S.), and forms generated by the state's judicial electronic system, "ICON," shall conform to criteria established by the State Court Administrator's Office with the approval of the Colorado Supreme Court. Such forms, whether preprinted or computer-generated, shall employ a form of caption similar to those contained in this rule, contain check-off boxes for the court designation, have at least a 9-point font, and 1 inch left margin, 1/2 inch right and bottom margins, and at least 1 inch top margin, except that for forms designated "JDF" or "SCAO" the requirement of at least 1 inch for the top margin shall apply to forms created or revised on and after April 5, 2010.

Source: (d)(1) amended and effective September 6, 1990; entire rule amended and Comment added June 1, 2000, effective July 1, 2000; entire rule and Comment amended and adopted June 28, 2001, effective July 1, 2001; entire rule amended and adopted November 6, 2003, effective July 1, 2004; entire rule amended and adopted June 10, 2004, effective for District Court Civil Actions filed on or after July 1, 2004; (i) amended and effective March 30, 2006; (i) amended and effective April 5, 2010.

Cross references: For pleadings allowed, see C.R.C.P. 7(a); for general rules of pleading, see C.R.C.P. 8.

COMMENT

This rule sets forth forms of case captions for all documents that are filed in Colorado courts, including both criminal and civil cases. The purpose of the form captions is to provide a uniform and consistent format that enables practitioners, clerks, administrators, and judges to locate identifying information more efficiently. Judges are encouraged in their orders to employ a caption similar to that found in paragraph (e)(2).

The preferred case caption format for documents initiated by a party is found in paragraph (e)(1). The preferred caption for documents issued by the court under the signature of a clerk or judge is found in paragraph (e)(2). Because some parties may have difficulty formatting their documents to include vertical lines and boxes, alternate case caption formats are found in paragraphs (f)(1) and (f)(2). However, the box format is the preferred and recommended format.

The boxes may be vertically elongated to accommodate additional party and attorney information if necessary. The "court use" and "case number" boxes, however, shall always be located in the upper right side of the caption.

Forms approved by the State Court Administrator's Office (designated "JDF" or "SCAO"), forms set forth in the Colorado Court Rules, volume 12, C.R.S. (including those designated "CRCP" or "CPC" and those contained in the appendices of volume 12, C.R.S.), and forms generated by the state's judicial electronic system, "ICON," shall conform to criteria established by the State Court Administrator's Office as approved by the Colorado Supreme Court. This includes pre-printed and computer-generated forms. JDF and SCAO forms and a flexible form of caption which allows the entry of additional party and attorney information are available and can be downloaded from the Colorado courts web page at http://www.courts.state.co.us/scao/Forms.htm.

ANNOTATION

I. General Consideration.

II. Caption; Names of Parties.

III. Adoption by Reference; Exhibits.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Pleadings, Rules 7 to 25", see 28 Dicta 368 (1951). For article, "Pleadings and Motions: Rules 7-16", see 23 Rocky Mt. L. Rev. 542 (1951).

Actions may be brought only by and against legal entities. Actions may be brought only by legal entities and against legal entities. There must be some ascertainable persons, natural or artificial, to whom judgments are awarded and against whom they may be enforced. Barker v. District Court, 199 Colo. 416, 609 P.2d 628 (1980).

II. CAPTION; NAMES OF PARTIES.

Law reviews. For article, "The Federal Rules from the Standpoint of the Colorado Code", see 17 Dicta 170 (1940). For article, "Motion for Publication of Summons on Quiet Title Proceedings", see 26 Dicta 182 (1949). For article, "Standard Pleading Samples to Be Used in Quiet Title Litigation", see 30 Dicta 39 (1953). For article, "Federal Practice and Procedure", which discusses a recent Tenth Circuit decision dealing with John Doe pleadings, see 62 Den. U. L. Rev. 220 (1985).

Naming exception is not applicable to verdicts and judgments. A verdict is not a pleading, and those who formulated in C.R.C.P. 10(a) an exception to naming parties in pleadings did not have any intention of making the same exception for verdicts and judgments. Lewis v. Buckskin Joe's, Inc., 156 Colo. 46, 396 P.2d 933 (1964).

There is no exception to naming requirement. The rules of civil procedure make no exception in "in rem" actions, as distinguished from "in personam" actions, to the requirement that defendants be named if their names are known or be designated as "unknown" when such is the case. Barker v. District Court, 199 Colo. 416, 609 P.2d 628 (1980).

Naming of defendants insufficient. The designations, "owner" and "operator", in the caption of the case, without naming them, when those persons were known to the district attorney, are not in compliance with the requirements of the rules of civil procedure that a party defendant shall be named unless his name is unknown. Barker v. District Court, 199 Colo. 416, 609 P.2d 628 (1980).

Rule is only an attempt to standardize the method of form by which all complaints are to be made, not a device by which claims may be forever preserved. Watson v. Unipress, Inc., 733 F.2d 1386 (10th Cir. 1984).

There is no indication in the rule that naming a "John Doe" defendant operates to toll the statute of limitations, nor have any Colorado courts recognized that the rule was intended to toll the statute or in any manner preserve any claims against later identified parties. Watson v. Unipress, Inc., 733 F.2d 1386 (10th Cir. 1984).

The public has an interest in disclosure of who the parties to an action are. A party may use a pseudonym for the name of a party upon a motion to the court. The court in determining whether use of a pseudonym for a party is appropriate shall evaluate: Whether the justification asserted by the requesting party is merely to avoid the annoyance and criticism that may attend any litigation or is to preserve privacy in a matter of a sensitive and highly personal nature; whether identification poses a risk of retaliatory physical or mental harm to the requesting party or to innocent non-parties; whether the action is against a governmental or a private party; whether the plaintiff would be compelled to admit his or her intention to engage in illegal conduct, thereby risking criminal prosecution; and the risk of unfairness to the opposing party from allowing an action against it to proceed anonymously. A pseudonym may not be used merely to avoid embarrassment, humiliation, or economic loss. Doe v. Heitler, 26 P.3d 539 (Colo. App. 2001).

III. ADOPTION BY REFERENCE; EXHIBITS.

Annotator's note. Since section (c) of this rule is similar to rule 2 of the former supreme court rules, cases construing that rule are included in the annotations to this rule.

Section (c) was intended to eliminate unnecessary repetition. Borwick v. Bober, 34 Colo. App. 423, 529 P.2d 1351 (1974).

This rule was intended to prevent the necessity of repeating the parts relevant to a later count, and it was expected that pleaders would refer only to the relevant parts by the words "as in the first cause of action stated" or their equivalent, as was the custom at common law. Fulton Inv. Co. v. Farmers Reservoir & Irrigation Co., 76 Colo. 472, 231 P. 61 (1925).

The pleader has no right to adopt wholesale all the allegations of a previous cause of action. Fulton Inv. Co. v. Farmers Reservoir & Irrigation Co., 76 Colo. 472, 231 P. 61 (1925).

This rule permits a document to be made a part of a pleading by attaching it as an exhibit, and in so attaching it, it amounts to the same thing as if it were set forth in the body of the pleading, as was the practice before the rule. Sparks v. Eldred, 78 Colo. 55, 239 P. 730 (1925).

Rule 11. Signing of Pleadings

(a) Obligations of Parties and Attorneys. Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name. The initial pleading shall state the current number of his registration issued to him by the Supreme Court. The attorney's address and that of the party shall also be stated. A party who is not represented by an attorney shall sign his pleadings and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading is not signed it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader. If the current registration number of the attorney is not included with his signature, the clerk of the court shall request from the attorney the registration number. If the attorney is unable to furnish the court with a registration number, that fact shall be reported to the clerk of the Supreme Court, but the clerk shall nevertheless accept the filing. If a pleading is signed in violation of this Rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, including a reasonable attorney's fee, provided, however, that failing to be registered shall be governed by Rule 227.

Reasonable expenses, including a reasonable attorney's fee, shall not be assessed if, after filing, a voluntary dismissal or withdrawal is filed as to any claim, action or defense, within a reasonable time after the attorney or party filing the pleading knew, or reasonably should have known, that he would not prevail on said claim, action, or defense.

(b) Limited Representation. An attorney may undertake to provide limited representation in accordance with Colo.RPC 1.2 to a pro se party involved in a court proceeding. Pleadings or papers filed by the pro se party that were prepared with the drafting assistance of the attorney shall include the attorney's name, address, telephone number and registration number. The attorney shall advise the pro se party that such pleading or other paper must contain this statement. In helping to draft the pleading or paper filed by the pro se party, the attorney certifies that, to the best of the attorney's knowledge, information and belief, this pleading or paper is (1) well-grounded in fact based upon a reasonable inquiry of the pro se party by the attorney, (2) is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and (3) is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. The attorney in providing such drafting assistance may rely on the pro se party's representation of facts, unless the attorney has reason to believe that such representations are false or materially insufficient, in which instance the attorney shall make an independent reasonable inquiry into the facts. Assistance by an attorney to a pro se party in filling out pre-printed and electronically published forms that are issued through the judicial branch for use in court are not subject to the certification and attorney name disclosure requirements of this Rule 11(b).

Limited representation of a pro se party under this Rule 11(b) shall not constitute an entry of appearance by the attorney for purposes of C.R.C.P. 121, section 1-1 or C.R.C.P. 5(b), and does not authorize or require the service of papers upon the attorney. Representation of the pro se party by the attorney at any proceeding before a judge, magistrate, or other judicial officer on behalf of the pro se party constitutes an entry of an appearance pursuant to C.R.C.P. 121, section 1-1. The attorney's violation of this Rule 11(b) may subject the attorney to the sanctions provided in C.R.C.P. 11(a).

Source: Entire rule amended and adopted June 17, 1999, effective July 1, 1999.

Cross references: For stating defenses and form of denials, particularly general denials, see C.R.C.P. 8(b); for requirement of verification or affidavit in depositions to perpetuate testimony, see C.R.C.P. 27(a)(1), in injunctions, see C.R.C.P. 65, in certiorari, see C.R.C.P. 106(a)(4), in civil contempt, see C.R.C.P. 107(c), in motion for service by mail or publication, see C.R.C.P. 4(g), and, in motion for an order authorizing sale under power or in response thereto, see C.R.C.P. 120.

ANNOTATION

Law reviews. For article, "Pleadings, Rules 7 to 25", see 28 Dicta 368 (1951). For article, "Pleadings and Motions: Rules 7-16", see 23 Rocky Mt. L. Rev. 542 (1951). For article, "Standard Pleading Samples to Be Used in Quiet Title Litigation", see 30 Dicta 39 (1953). For article "Van Cise on Rule Eleven", see 31 Dicta 14 (1954). For note, "One Year Review of Colorado Law — 1964", see 42 Den. L. Ctr. J. 140 (1965). For article, "Rule 11 as a Litigation Tool", see 12 Colo. Law. 1242 (1983). For article, "Lawyers' Liability for Attorney's Fees Awarded Against Clients", see 12 Colo. Law. 1638 (1983). For article, "The Expanding Liability of Colorado Lawyers for Sanctions and Malpractice Claims", see 22 Colo. Law. 1701 (1993). For article, "Recovery of Attorney Fees and Costs in Colorado", see 23 Colo. Law. 2041 (1994). For article, "Discrete Task Representation a/k/a Unbundled Legal Services", see 29 Colo. Law. 5 (January 2000). For article, "Combating Bad-Faith Litigation Tactics With Claims for Abuse of Process", see 38 Colo. Law. 31 (December 2009).

Annotator's note. For cases construing verification of pleadings as required by § 67 of the former Code of Civil Procedure, which was supplanted by this rule in 1941, see Martin v. Hazzard Powder Co., 2 Colo. 596 (1875); Nichols v. Jones, 14 Colo. 61, 23 P. 89 (1890); Speer v. Craig, 16 Colo. 478, 27 P. 891 (1891); Tulloch v. Belleville Pump & Skein Works, 17 Colo. 579, 31 P. 229 (1892); Perras v. Denver & R. G. R. R., 5 Colo. App. 21, 36 P. 637 (1894); Hill Brick & Tile Co. v. Gibson, 43 Colo. 104, 95 P. 293 (1908); Rice v. Van Why, 49 Colo. 7, 111 P. 599 (1910); Johnson v. Johnson, 78 Colo. 187, 240 P. 944 (1925); Prince Hall Grand Lodge v. Hiram Grand Lodge, 86 Colo. 330, 282 P. 193 (1929). For cases construing § 66 of the former Code of Civil Procedure, which was supplanted in part by this rule in 1941, concerning sham answers, see Glenn v. Brush, 3 Colo. 26 (1876); Rhodes v. Hutchins, 10 Colo. 258, 15 P. 329 (1887); Patrick v. McManus, 14 Colo. 65, 23 P. 90 (1890); Johnson v. Tabor, 4 Colo. App. 183, 35 P. 199 (1893); Cochrane v. Parker, 5 Colo. App. 527, 39 P. 361 (1895); Sylvester v. Case Threshing Mach. Co., 21 Colo. App. 464, 122 P. 62 (1912); Eastenes v. Adams, 93 Colo. 258, 25 P.2d 741 (1933); Hertz Drive-Ur-Self Sys. v. Doak, 94 Colo. 200, 29 P.2d 625 (1934); Greagor v. Wilson, 103 Colo. 329, 86 P.2d 265 (1938).

The rule imposes the following independent duties on an attorney or litigant who signs a pleading: (1) Before a pleading is filed, there must be a reasonable inquiry into the facts and the law; (2) based on this investigation, the signer must reasonably believe that the pleading is well grounded in fact; (3) the legal theory asserted in the pleading must be based on existing legal principles or a good faith argument for the modification of existing law; and (4) the pleading must not be filed for the purpose of causing delay, harassment, or an increase in the cost of litigation. Maul v. Shaw, 843 P.2d 139 (Colo. App. 1992).

The standard established by this rule focuses on what should have been done before a pleading was filed, and trial court's award of attorney fees to person wrongfully sued, even though the case was dismissed, was not abuse of discretion where the plaintiffs were not prevented from conducting additional investigation to establish whether they were suing the correct party. Switzer v. Giron, 852 P.2d 1320 (Colo. App. 1993).

Inquiry under section (a) of this rule does not turn on the outcome of the case; instead, it turns on whether attorney met the reasonable inquiry and proper purpose threshold in preparing and signing the pleading. The rule's explicit application to the signing attorney or pro se party signing the pleading is clear and unambiguous. While pleadings may identify other attorneys who may have had some role in the case, the signature requirement is designed to hold only the signing attorney responsible for the required certification. If more than one attorney signs a pleading, each one who has signed the pleading is responsible for the certification. People v. Trupp, 51 P.3d 985 (Colo. 2002).

Section (a) requires a signature and holds the signing attorney responsible for the certificate. Certification by signature requirement vindicates rule's purpose: To deter the filing of frivolous actions and pleadings. It personalizes the responsibility of the person who has undertaken to certify the pleading. Here, only the attorney who signed complaint and amended complaint at issue is answerable to the motion for sanctions. Presiding disciplinary judge erred

by ordering attorney whose name appeared in the signature block on both pleadings, but who did not sign either of the pleadings, to respond to motion for sanctions. People v. Trupp, 51 P.3d 985 (Colo. 2002).

Abuse of discretion for presiding disciplinary judge to hold that assistant attorney regulation counsel violated rule when she advanced claim that attorney had violated C.R.P.C. 8.4(c). No evidence that assistant attorney regulation counsel failed to investigate either the facts or the law and she did not misrepresent them in the complaint. People v. Trupp, 92 P.3d 923 (Colo. 2004).

Compliance with this rule should be had in all pleadings. Lewis v. Buckskin Joe's, Inc., 156 Colo. 46, 396 P.2d 933 (1964).

Even though C.R.P.C. 1.2(c) allows unbundling of legal services, an attorney remains obligated to comply with section (b) of this rule. In re Merriam, 250 Bankr. 724 (Bankr. D. Colo. 2000).

This rule is applicable to motions and other papers pursuant to C.R.C.P. 7(b)(2), and sanctions may be imposed for violation. An attorney or litigant who signs a motion or other paper has the same obligation as the signer of a pleading to ensure that the document is factually and legally justified. Jensen v. Matthews-Price, 845 P.2d 542 (Colo. App. 1992).

Sanctions are improper where allegations set forth in response brief were based on statements made during witness' deposition. Jensen v. Matthews-Price, 845 P.2d 542 (Colo. App. 1992).

Trial court abused its discretion when, as a sanction for filing a disclosure certificate signed by plaintiff's former attorney's paralegal rather than the plaintiff herself, the court limited the witnesses the plaintiff could call to the defendant and herself. Defendants did not suffer any prejudice as a result of the improper signing of the certificate since the filing served its purpose of timely informing them of the evidence plaintiff intended to present at trial. Keith v. Valdez, 934 P.2d 897 (Colo. App. 1997).

This rule contemplates an answer that speaks the truth. Lewis v. Buckskin Joe's, Inc., 156 Colo. 46, 396 P.2d 933 (1964).

Where none of the specific denials has any foundation in fact, a general denial should not be filed. Lewis v. Buckskin Joe's, Inc., 156 Colo. 46, 396 P.2d 933 (1964).

This rule grants authority for subjecting an attorney to appropriate disciplinary action. Nelson v. District Court, 136 Colo. 467, 320 P.2d 959 (1957).

Court may impose appropriate sanctions for violation of rule, including reasonable expenses incurred because of the filing of the pleadings. Schmidt Const. Co. v. Becker-Johnson Corp., 817 P.2d 625 (Colo. App. 1991).

Assessment of costs should await final judgment and become a part thereof, thus subject to review. Nelson v. District Court, 136 Colo. 467, 320 P.2d 959 (1957).

To warrant the trial court's exercise of discretion in ordering sanctions against a client under the rule, the trial court must find and the record must confirm some nexus between the proscribed conduct and a specific undertaking by or knowledge of the client that the rule is being violated. Maul v. Shaw, 843 P.2d 139 (Colo. App. 1992); Domenico v. Sw. Props. Venture, 914 P.2d 390 (Colo. App. 1995).

Trial court's discretion. Whether attorney fees are awarded under this rule is within the trial court's discretion and will not be disturbed unless the discretion is abused. Findings of the trial court that the plaintiff bank's claims of fraud were not groundless or frivolous were supported by the record, and the trial court did not abuse its discretion in denying the motion for sanctions. First Interstate Bank v. Berenbaum, 872 P.2d 1297 (Colo. App. 1993).

A state court cannot impose sanctions under this rule for the conduct of an attorney during a federal court proceeding even if the proceeding is part of a single litigation that also includes state law claims heard by the state court, because the decision to impose such sanctions is necessarily a matter within the jurisdiction of the court in which the conduct occurred. Boulder County Bd. of County Comm'rs v. Kraft Bldg. Contractors, 122 P.3d 1019 (Colo. App. 2005).

Award of attorney fees against plaintiff's attorney appropriate use of trial court's discretion given attorney's allegations as to the personal conduct of individuals who had not been joined in the action, insistence on relitigating issues when the court had made it clear that those issues were moot, reckless allegations of wrongdoing by individuals and attorneys without a showing of competent investigation or facts to support the allegations, and a request for fines or imprisonment without any showing to support such a request. Carder, Inc. v. Cash, 97 P.3d 174 (Colo. App. 2003).

Trial court was not obligated to assess attorney fees as a sanction for a violation of this rule when the attorney presented a rational argument, based on documentary evidence and established principles of contract interpretation, in support of his position. E-470 Pub. Hwy. Auth. v. Jagow, 30 P.3d 798 (Colo. App. 2001), aff'd on other grounds, 49 P.3d 1151 (Colo. 2002).

Sanctions are for the benefit of a party and not a nonparty. Roberts-Henry v. Richter, 802 P.2d 1159 (Colo. App. 1990).

Victim of a frivolous lawsuit has a duty to mitigate attorney fees incurred in defending

the lawsuit by taking reasonable measures to extricate himself or herself from the frivolous lawsuit at the earliest possible time. Consequently, trial court should not have awarded attorney fees incurred in pursuing defendant's counterclaims after plaintiff dismissed its original complaint against defendants. Boulder County Bd. of County Comm'rs v. Kraft Bldg. Contractors, 122 P.3d 1019 (Colo. App. 2005).

This rule imposes sanctions upon those who violate its provisions, it does not preclude relief under C.R.C.P. 60(b)(1). Domenico v. Sw. Props. Venture, 914 P.2d 390 (Colo. App. 1995).

The failure to sign a complaint is not jurisdictional, but is subject to correction upon being called to the attention of the court. Harris v. Mun. Court, 123 Colo. 539, 234 P.2d 1055 (1951).

Failure of attorney representing county department of social services to sign verified dependency petition held to be harmless. People in Interest of A.M., 786 P.2d 476 (Colo. App. 1989).

County attorney not immune from award of fees under this rule when filing petition for temporary guardianship under § 26-3.1-104. Stepanek v. Delta County, 940 P.2d 364 (Colo. 1997).

Omission of party's address does not warrant dismissal. The original failure to comply with this rule by omitting the address of the party does not warrant dismissal of an action. Glickman v. Mesigh, 200 Colo. 320, 615 P.2d 23 (1980).

An independent claim based upon an alleged violation of this rule may not be asserted in a proceeding separate from the underlying cause of action. Henry v. Kemp, 829 P.2d 505 (Colo. App. 1992).

Defendant in legal malpractice action entitled to hearing on his or her claim for sanctions under this rule and § 13-17-102. When a party requests a hearing regarding the award of attorney fees and costs under § 13-17-102, the trial court must conduct an evidentiary hearing. Because the trial court denied the motion without conducting a hearing on defendant's motion for sanctions, remand is required for a hearing. Brown v. Silvern, 141 P.3d 871 (Colo. App. 2005).

Applied in People v. Breazeale, 190 Colo. 17, 544 P.2d 970 (1975); Caldwell v. District Court, 644 P.2d 26 (Colo. 1982); Pietrafeso v. D.P.I., Inc., 757 P.2d 1113 (Colo. App. 1988).

Rule 12. Defenses and Objections — When and How Presented — by Pleading or Motion — Motion for Judgment on Pleadings

(a) When Presented. A defendant shall file his answer or other response within 21 days after the service of the summons and complaint on him. If, pursuant to special order, a copy of the complaint is not served with the summons, or if the summons is served without the state, or by publication, a defendant shall file his answer or other response within 35 days after the service thereof on him. A party served with a pleading stating a cross claim against him shall file an answer or other response thereto within 21 days after the service upon him. The plaintiff shall file his reply to a counterclaim in the answer within 21 days after the service of the answer. If reply is made to any affirmative defense such reply shall be filed within 21 days after service of the pleading containing such affirmative defense. If a pleading is ordered by the court, it shall be filed within 21 days after the entry of the order, unless the order otherwise directs. The filing of a motion permitted under this Rule alters these periods of time, as follows: (1) If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleadings shall be filed within 14 days after notice of the court's action; (2) if the court grants a motion for a more definite statement, or for a statement in separate counts or defenses, the responsive pleadings shall be filed within 14 days after the service of the more definite statement or amended pleading.

(b) How Presented. Every defense, in law or in fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) Lack of jurisdiction over the subject matter; (2) lack of jurisdiction over the person; (3) insufficiency of process; (4) insufficiency of service of process; (5) failure to state a claim upon which relief can be granted; (6) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or with any other motion permitted under Rule 12 or Rule 98. If a pleading sets

forth a claim for relief to which the adverse party is not required to file a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (5) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) Preliminary Hearings. The defenses specifically enumerated in subsections (1)-(6) of section (b) of this Rule, whether made in a pleading or by motion, and the motion for judgment mentioned in section (c) of this Rule, shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) Motion for Separate Statement, or for More Definite Statement. Before responding to a pleading or, if no responsive pleading is permitted by these rules, within 21 days after the service of the pleading upon him, a party may file a motion for a statement in separate counts or defenses, or for a more definite statement of any matter which is not averred with sufficient definiteness or particularity to enable him properly to prepare his responsive pleading. If the motion is granted and the order of the court is not obeyed within 14 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion to Strike. Upon motion filed by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion filed by a party within 21 days after the service of any pleading, motion, or other paper, or upon the court's own initiative at any time, the court may order any redundant, immaterial, impertinent, or scandalous matter stricken from any pleading, motion, or other paper. The objection that a responsive pleading or separate defense therein fails to state a legal defense may be raised by motion filed under this section (f).

(g) Consolidation of Defenses in Motion. A party who makes a motion under this Rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this Rule but omits therefrom any defense or objection then available to him which this Rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in section (h)(2) of this Rule on any of the grounds there stated.

(h) Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, insufficiency of process, or insufficiency of service of process is waived: (A) If omitted from a motion in the circumstances described in section (g); or (B) if it is neither made by motion under this Rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

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

Cross references: For pleadings allowed and form of motions, see C.R.C.P. 7; for pleadings genereally, see C.R.C.P. 8; for joinder of persons needed for just adjudication, see C.R.C.P. 19; for summary judgments, see C.R.C.P. 56; for motions relating to venue, see C.R.C.P. 98.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, "Notes on Proposed Amendments to Colorado Rules of Civil Procedure", see 27 Dicta 165 (1950). For article, "Pleadings, Rules 7 to 25", see 28 Dicta 368 (1951). For article, "Pleadings and Motions: Rules 7-16", see 23 Rocky Mt. L. Rev. 542 (1951). For article, "One Year Review of Civil Procedure", see 34 Dicta 69 (1957). For article, "One Year Review of Civil Procedure and Appeals", see 37 Dicta 21 (1960). For article, "One Year Review of Civil Procedure and Appeals", see 38 Dicta 133 (1961). For article, "One Year Review of Civil Procedure and Appeals", see 40 Den. L. Ctr. J. 66 (1963). For article, "Plaintiff's Advantageous Use of Discovery, Pre-Trial and Summary Judgment", see 40 Den. L. Ctr. J. 192 (1963). For note, "One Year Review of Civil Procedure", see 41 Den. L. Ctr. J. 67 (1964). For article, "A Litigator's Guide to Summary Judgments", see 14 Colo. Law. 216 (1985). For article, "Recent Developments in Governmental Immunity: Post-Trinity Broadcasting", see 25 Colo. Law. 43 (June 1996).

If the plaintiff fails to establish that the trial court has subject matter jurisdiction, the court must dismiss the matter. Any other order or judgment entered by the court would be void and unenforceable. Adams County Dept. of Soc. Serv. v. Huynh, 883 P.2d 573 (Colo. App. 1994); City of Boulder v. Pub. Serv. Co. of Colo., 996 P.2d 198 (Colo. App. 1999).

Applied in Posey v. Intermountain Rural Elec. Ass'n, 41 Colo. App. 7, 583 P.2d 303 (1978); Kraft v. District Court, 197 Colo. 10, 593 P.2d 321 (1979); Burrows v. Greene, 198 Colo. 167, 599 P.2d 258 (1979); SaBell's, Inc. v. Flens, 42 Colo. App. 421, 599 P.2d 950 (1979); City of Sheridan v. City of Englewood, 199 Colo. 348, 609 P.2d 108 (1980); Ricci v. Davis, 627 P.2d 1111 (Colo. 1981); State Dept. of Hwys. v. District Court, 635 P.2d 889 (Colo. 1981); Christensen v. Hoover, 643 P.2d 525 (Colo. 1982); In re George, 650 P.2d 1353 (Colo. App. 1982); Creditor's Serv., Inc. v. Shaffer, 659 P.2d 694 (Colo. App. 1982); People ex rel. MacFarlane v. Alpert Corp., 660 P.2d 1295 (Colo. App. 1982); Anchorage Joint Venture v. Anchorage Condo. Ass'n, 670 P.2d 1249 (Colo. App. 1983); Seigneur v. Motor Vehicle Div., 674 P.2d 967 (Colo. App. 1983); Wing v. JMB Prop. Mgmt. Corp., 714 P.2d 916 (Colo. App. 1985); Nat'l Sur. Corp. v. Citizens State Bank, 734 P.2d 663 (Colo. App. 1986).

II. WHEN PRESENTED.

Law reviews. For article, "Mandamus and Other Writs", see 18 Dicta 333 (1941).

Court has discretion to grant dismissal motion where pleadings not timely filed. Where a motion to dismiss is made because a reply is not filed in time, it is within the sound discretion of the court to grant it. Munro v. Eshe, 113 Colo. 19, 156 P.2d 700 (1944).

The court lacks authority to enter a final judgment prior to the expiration of the time fixed in the summons and by this rule for defendant to appear, and where such a judgment is entered, it is void. Erickson v. Groomer, 139 Colo. 32, 336 P.2d 296 (1959).

A judgment by default entered before the expiration of the time allowed to plead or answer is premature, and in a direct proceeding to review a judgment shown to have been so entered prematurely, a reversal for error must be granted. Netland v. Baughman, 114 Colo. 148, 162 P.2d 601 (1945).

Party's right to notice prior to entry of default, under C.R.C.P. 55(b)(2), is not extinguished by the fact that his appearance in the action was not made within the time required for an answer under section (a) of this rule. Carls Constr., Inc. v. Gigliotti, 40 Colo. App. 535, 577 P.2d 1107 (1978).

Issues concerning subject matter jurisdiction may be raised at any time. Sanchez v. State, 730 P.2d 328 (Colo. 1986); People in

Interest of Clinton, 742 P.2d 946 (Colo. App. 1987).

A defendant may seek dismissal for failure to state a claim at any stage in the proceedings prior to the entry of judgment. Colo. Land & Res., Inc. v. Credithrift of Am., Inc., 778 P.2d 320 (Colo. App. 1989).

Court order extending time must conform to this rule. Order of court extending the time within which the defendant might answer or plead, which is entered pursuant to authority expressly granted to the court by C.R.C.P. 6(b), does not derogate from the requirements of section (a) of this rule. Oldland v. Gray, 179 F.2d 408 (10th Cir.), cert. denied, 339 U.S. 948, 70 S. Ct. 803, 94 L. Ed. 1362 (1950).

Where defendants did not interpose a motion to dismiss until nearly one year after the filing of the complaint, there was no abuse of discretion in denying the motion. Hoy v. Leonard, 13 Colo. App. 449, 59 P. 229 (1899) (decided under former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941).

Applied in Carls Constr., Inc. v. Gigliotti, 40 Colo. App. 535, 577 P.2d 1107 (1978).

III. HOW PRESENTED.

A. In General.

Law reviews. For article, "Use of Summary Judgments and the Discovery Procedure", see 24 Dicta 193 (1947). For note, "Comments on Last Clear Chance — Procedure and Substance", see 32 Dicta 275 (1955). For article, "Another Decade of Colorado Conflicts", see 33 Rocky Mt. L. Rev. 139 (1961). For article, "'Trinity' Hearings: Understanding Colorado Governmental Immunity Act Motions to Dismiss", see 33 Colo. Law. 91 (December 2004).

This rule is patterned after F.R.C.P. 12(b). Treadwell v. District Court, 133 Colo. 520, 297 P.2d 891 (1956); Bd. of County Comm'rs v. District Court, 172 Colo. 311, 472 P.2d 128 (1970).

Like its federal counterpart, this rule is based on the theory that the quick presentation of defenses and objections should be encouraged and that successive motions which prolong such presentation should be carefully limited. Bd. of County Comm'rs v. District Court, 172 Colo. 311, 472 P.2d 128 (1970).

In this rule there is no provision for a "special" appearance. Treadwell v. District Court, 133 Colo. 520, 297 P.2d 891 (1956).

Section (b) of this rule did away with "general" and "special" appearances. At Home Magazine v. District Court, 194 Colo. 331, 572 P.2d 476 (1977).

The trial court must determine if under any theory of law plaintiff would be entitled to relief, for if relief could be granted under such circumstances, then the complaint is sufficient. Denver & R. G. W. R. R. v. Wood, 28 Colo. App. 534, 476 P.2d 299 (1970).

A trial court is not required to make findings of fact or conclusions of law when ruling on a motion to dismiss under section (b) of this rule. Jamison v. People, 988 P.2d 177 (Colo. App. 1999).

Although there exists no procedural rule specifically designed to address dismissal or transfer of a case on the basis of a forum selection clause, subsections (b)(1) and (b)(5) are not appropriate mechanisms for addressing such clause. Edge Telecom, Inc. v. Sterling Bank, 143 P.3d 1155 (Colo. App. 2006).

For a discussion of the appropriate method of evaluation of a motion to dismiss based on a forum selection clause, see Edge Telecom, Inc. v. Sterling Bank, 143 P.3d 1155 (Colo. App. 2006).

Plaintiff must have remedial interest which is recognized and can be enforced. In order to withstand a challenge, the plaintiff must have, in the claim asserted, a remedial interest which the law of the forum can recognize and enforce. Nelson v. Nelson, 31 Colo. App. 63, 497 P.2d 1284 (1972).

Plaintiff has the burden to prove jurisdiction. Reynolds v. State Bd. for Cmty. Colls., 937 P.2d 774 (Colo. App. 1996).

A plaintiff has the burden of proving that the trial court has jurisdiction to hear the case. Pfenninger v. Exempla, Inc., 12 P.3d 830 (Colo. App. 2000).

Where claims contain allegations which, if established upon trial, would entitle one to relief, a motion to dismiss would be erroneous to grant. Colo. Nat'l Bank v. F. E. Biegert Co., 165 Colo. 78, 438 P.2d 506 (1968).

When one pleads ultimate facts which, if supported by adequate proof, would justify a recovery, then he is entitled to his day in court to attempt to prove his allegations. McDonald v. Lakewood Country Club, 170 Colo. 355, 461 P.2d 437 (1969).

The supreme court will not consider waived defenses in an original proceeding. The supreme court will not subvert the theory underlying section (b) of this rule and the clear language of sections (g) and (h)(1) of this rule by considering the matter of defenses in an original proceeding for writ of prohibition when those defenses were clearly waived. Bd. of County Comm'rs v. District Court, 172 Colo. 311, 472 P.2d 128 (1970).

A trial judge, in denying a motion under this rule, did not grant relief from the waiver imposed by section (h)(1) of this rule, by granting 20 days "to answer or otherwise plead", as this language cannot be stretched into permission to file another motion under section (b) of this rule, since such a motion is not a pleading.

Bd. of County Comm'rs v. District Court, 172 Colo. 311, 472 P.2d 128 (1970).

Dismissal of judgment debtor's action to enforce settlement agreement error. Judgment debtor's action to enforce settlement agreement against judgment creditor's wife was not collateral attack on judgment and therefore could be enforced by separate action for specific performance. Tripp v. Parga, 764 P.2d 369 (Colo. App. 1988).

Applied in Wright v. Creative Corp., 30 Colo. App. 575, 498 P.2d 1179 (1972); Commercial Indus. Const., Inc. v. Anderson, 683 P.2d 378 (Colo. App. 1984).

B. Lack of Jurisdiction.

In testing the jurisdictional limit of courts the body of the complaint must be looked to to determine the amount in controversy and not the "ad damnum" clause. If the allegations of the complaint showed that the amount that could have been recovered was within the jurisdiction of the court, the fact that plaintiff's damage was alleged in a greater amount would not defeat the jurisdiction. Sams Automatic Car Coupler Co. v. League, 25 Colo. 129, 54 P. 642 (1898) (decided under section 56 of the former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941).

With respect to a motion to dismiss for lack of subject matter jurisdiction, the plaintiff has the burden to prove jurisdiction, and an appellate court reviewing a trial court's decision uses a mixed standard of review under which the trial court's evidentiary findings are reviewed under the clear error standard, and the trial court's legal conclusions are reviewed de novo. Bazemore v. Colo. State Lottery Div., 64 P.3d 876 (Colo. App. 2002).

Trial court erred in treating plaintiff's alleged lack of capacity to sue as a lack of subject matter jurisdiction. Ashton Props., Ltd. v. Overton, 107 P.3d 1014 (Colo. App. 2004).

The defenses of insufficiency of process and lack of jurisdiction over the person are defenses which may be made by motion under section (b) of this rule. Bd. of County Comm'rs v. District Court, 172 Colo. 311, 472 P.2d 128 (1970).

Although the lack of jurisdiction is not raised by the parties, an appellate court may take note of this lack of jurisdiction on its own motion. Moschetti v. Liquor Licensing Auth., 176 Colo. 281, 490 P.2d 299 (1971).

A motion to quash is a proper method of raising the question of jurisdiction over the person of the defendant where the statutory requirements providing for service of process on nonresident motorists were not met, and where, in any event, such service was improper because defendant was not a nonresident at the time of the accident out of which the action arose. Carlson v. District Court, 116 Colo. 330, 180 P.2d 525 (1947).

A party may appear generally and still raise objections to jurisdiction of the person. Treadwell v. District Court, 133 Colo. 520, 297 P.2d 891 (1956).

Such a motion must be filed in apt time, and the question cannot be raised after answers and other motions as to the merits have been filed. Treadwell v. District Court, 133 Colo. 520, 297 P.2d 891 (1956).

If a motion to quash for lack of jurisdiction of a person is made before answer, then the jurisdiction of the court over the person is properly raised and stands in question until the motion is disposed of. Treadwell v. District Court, 133 Colo. 520, 297 P.2d 891 (1956).

In determining proper jurisdiction as between district court and probate court, the court must look at the facts alleged, the claims asserted, and the relief requested. Here, where the complaints were premised upon defendant's alleged legal malpractice in the drafting of the estate instruments, the estate planning, and the implementation of the estate plan, the complaints were not considered probate claims, and, therefore, jurisdiction lay with the district court not the probate court. Levine v. Katz, 192 P.3d 1008 (Colo. App. 2006).

Probate court lacks subject matter jurisdiction over claims of legal malpractice where plaintiff does not seek to recover assets of the estate. Levine v. Katz, 167 P.3d 141 (Colo. App. 2006).

Generally, the issue of immunity under the Governmental Immunity Act is a question of subject matter jurisdiction to be decided pursuant to subsection (b)(1). Kittinger v. City of Colo. Springs, 872 P.2d 1265 (Colo. App. 1993); Fogg v. Macaluso, 892 P.2d 271 (Colo. 1995); Armstead v. Memorial Hosp., 892 P.2d 450 (Colo. App. 1995); DiPaolo v. Boulder Valley Sch. Dist., 902 P.2d 439 (Colo. App. 1995); Sanchez v. Sch. Dist. 9-R, 902 P.2d 450 (Colo. App. 1995); Hallam v. City of Colo. Springs, 914 P.2d 479 (Colo. App. 1995); Norsby v. Jensen, 916 P.2d 555 (Colo. App. 1995); Johnson v. Reg'l Transp. Dist., 916 P.2d 619 (Colo. App. 1995); Reynolds v. State Bd. for Cmty. Colls., 937 P.2d 774 (Colo. App. 1996); Harris v. Reg'l Transp. Dist., 15 P.3d 782 (Colo. App. 2000); Wark v. Bd. of County Comm'rs, 47 P.3d 711 (Colo. App. 2002).

Standing treated as a question of subject matter jurisdiction under subsection (b)(1). Grand Valley Citizens' Alliance v. Colo. Oil & Gas Conservation Comm'n, __ P.3d __ (Colo. App. 2010).

The trial court is the fact finder and may hold an evidentiary hearing to resolve any factual dispute upon which the existence of its subject matter jurisdiction under the Govern-

mental Immunity Act may turn. Lyons v. City of Aurora, 987 P.2d 900 (Colo. App. 1999).

Where a plaintiff has sued a governmental entity and that entity interposes a motion to dismiss for lack of subject matter jurisdiction, the plaintiff has the burden of demonstrating that governmental immunity has been waived. However, because there is no presumption against state court jurisdiction and because the court must construe statutes that grant governmental immunity narrowly, the plaintiff should be afforded the reasonable inferences of this evidence. When the alleged jurisdictional facts are in dispute, the trial court should conduct an evidentiary hearing and enter findings of fact. When there is no evidentiary dispute, the trial court may rule without a hearing. Tidwell v. City & County of Denver, 83 P.3d 75 (Colo. 2003).

Motion brought under subsection (b)(1) is not the proper vehicle to decide questions of first amendment immunity. A defendant's claim that he has immunity under the first amendment invokes the court's authority to adjudicate the case; the court is considering whether the defendant is immune from an improperly instigated suit, not whether it has the authority to decide the case. Accordingly, summary judgment is the appropriate procedure to employ in this context. Krystkowiak v. W.O. Brisben Cos., 90 P.3d 859 (Colo. 2004).

State court lacked subject matter jurisdiction to issue writ of mandamus to federal officer. Hansen v. Long, 166 P.3d 248 (Colo. App. 2007).

Tribal sovereign immunity is properly raised in a motion to dismiss. The state bears the burden of establishing by a preponderance of the evidence that the trial court has subject matter jurisdiction over defendants. Cash Advance & Pref. Cash Loans v. State, 242 P.3d 1099 (Colo. 2010).

Trial court erred in attempting to resolve the various material questions of fact presented to it without holding an evidentiary hearing to resolve those issues. Werth v. Heritage Int'l Holdings, PTO, 70 P.3d 627 (Colo. App. 2003).

Trial court may determine jurisdictional issue without an evidentiary hearing if it accepts all of plaintiffs assertions of fact as true. In such cases, the jurisdictional issue may be determined as a matter of law, and the appellate court reviews the trial court's ruling de novo. Hansen v. Long, 166 P.3d 248 (Colo. App. 2007); Asphalt Specialties, Co. v. City of Commerce City, 218 P.3d 741 (Colo. App. 2009).

Notice issues arising under the Governmental Immunity Act must be decided pursuant to subsection (b)(1), rather than by summary judgment and, depending on the case, the trial court may allow limited discovery and conduct an evidentiary hearing before deciding the notice issue. Capra v. Tucker, 857 P.2d 1346 (Colo. App. 1993); Norsby v. Jensen, 916 P.2d 555 (Colo. App. 1995).

Sovereign immunity issues concern subject matter jurisdiction and are determined in accordance with this section. Any factual dispute upon which the existence of jurisdiction may turn is for the district court to resolve, and an appellate court will not disturb the factual findings of the district court unless they are clearly erroneous. Swieckowski v. City of Fort Collins, 934 P.2d 1380 (Colo. 1997); Mason v. Adams, 961 P.2d 540 (Colo. App. 1997).

A C.R.C.P. 12(b)(1) motion to dismiss on grounds of immunity under the Colorado Governmental Immunity Act raises a jurisdictional issue. The plaintiff has the burden of demonstrating jurisdiction. When the alleged jurisdictional facts are in dispute, trial court should conduct an evidentiary hearing before ruling on the jurisdictional issue. Where there is no evidentiary dispute, governmental immunity or waiver of immunity is a matter of law, and trial court may rule on the jurisdictional issue without a hearing. Padilla ex rel. Padilla v. Sch. Dist. No. 1, 25 P.3d 1176 (Colo. 2001).

A motion to compel arbitration is a motion to dismiss for lack of subject matter jurisdiction which cannot be resolved by the presumptive truthfulness of the complaint but which must be determined in a factual hearing. Eychner v. Van Vleet, 870 P.2d 486 (Colo. App. 1993).

If the defendant answers as to the merits of the allegations of the complaint without embodying the motion to quash, then the jurisdictional question is thereby waived. Treadwell v. District Court, 133 Colo. 520, 297 P.2d 891 (1956).

Two-pronged test for standing. First, the plaintiff must have suffered an injury in fact, and second, this harm must have been to a legally protected interest. Grand Valley Citizens' Alliance v. Colo. Oil & Gas Conservation Comm'n, __ P.3d __ (Colo. App. 2010).

Procedural injury, as well as substantive injury, may confer standing. Procedural injury consists of harm to an intangible or noneconomic interest such as a citizen's interest in ensuring that governmental units conform to the state constitution. Such injuries may exist solely by virtue of statutes creating legal rights. Grand Valley Citizens' Alliance v. Colo. Oil & Gas Conservation Comm'n, __ P.3d __ (Colo. App. 2010).

For purposes of standing, substantive injury may consist of the risk of environmental injuries to places used by plaintiff. Therefore, persons who owned or used land three miles from potential natural gas drilling activity were entitled to challenge a denial of their right to a hearing on the issuance of permits. Grand Valley Citizens' Alliance v. Colo. Oil & Gas Con-

servation Comm'n, __ P.3d __ (Colo. App. 2010).

Allegation of harm to a protected interest is sufficient to confer standing. A civil plaintiff claiming to have been injured by a defendant's actions has standing to sue even if a court, upon reaching the merits, ultimately determines that the defendant committed no wrong. Grand Valley Citizens' Alliance v. Colo. Oil & Gas Conservation Comm'n, __ P.3d __ (Colo. App. 2010).

A party may move to dismiss an action under this rule by asserting the applicability of the doctrine of "forum non conveniens" as a ground for refusal by the court to exercise jurisdiction over a transitory cause of action which arose outside the state. Allison Drilling Co. v. Kaiser Steel Corp., 31 Colo. App. 355, 502 P.2d 967 (1972).

The doctrine of "forum non conveniens" must be applied with restraint and only after a proper showing has been made. What constitutes a proper showing must, of necessity, turn on the particular facts of each case. Allison Drilling Co. v. Kaiser Steel Corp., 31 Colo. App. 355, 502 P.2d 967 (1972).

The doctrine of "forum non conveniens" is founded upon the equitable power of a court to refuse, in its sound discretion, to exercise jurisdiction over a transitory cause of action when, after a consideration of all relevant factors, the ends of justice strongly indicate that the action may be more appropriately tried in a different forum. Allison Drilling Co. v. Kaiser Steel Corp., 31 Colo. App. 355, 502 P.2d 967 (1972).

Among the relevant factors which a court should consider in reaching its determination of "forum non conveniens" are: The relative availability of sources of evidence and the burden of defense and prosecution in one forum rather than another, the relative availability and accessibility of an alternative forum, the availability of compulsory process for attendance of unwilling witnesses and the cost of obtaining attendance of willing witnesses, the interest of the state in providing a forum for its residents, and the interest of the state in the litigation measured by the extent to which the defendant's activities within the state gave rise to the cause of action, as well as factors of public interest. Allison Drilling Co. v. Kaiser Steel Corp., 31 Colo. App. 355, 502 P.2d 967 (1972).

The thrust of "forum non conveniens" is not to determine the perfect forum but to provide a vehicle for choice between two or more alternative forums to avoid the hardship and expense of the one that is clearly inconvenient. Allison Drilling Co. v. Kaiser Steel Corp., 31 Colo. App. 355, 502 P.2d 967 (1972).

A plaintiff need only make a prima facie showing of threshold jurisdiction, which may be determined from the allegations of the complaint, to withstand defendant's motion to dismiss under subsection (b)(2) of this rule. Pioneer Astro Indus., Inc. v. District Court, 193 Colo. 409, 566 P.2d 1067 (1977).

If a subsection (b)(2) jurisdictional challenge is decided on documentary evidence alone, the trial court's role is to determine whether the plaintiff successfully asserted a prima facie case of personal jurisdiction over each defendant. In making that assessment, any disputed issues of material jurisdictional fact must be resolved in favor of the plaintiff. Archangel Diamond Corp. v. Lukoil, 123 P.3d 1187 (Colo. 2005); Goettman v. North Fork Valley Rest., 176 P.3d 60 (Colo. 2007).

If the court determines that plaintiff made a prima facie showing of personal jurisdiction over each defendant, the trial court may still hold an evidentiary hearing to resolve the issue fully prior to trial or proceed to trial. Archangel Diamond Corp. v. Lukoil, 123 P.3d 1187 (Colo. 2005); Goettman v. North Fork Valley Rest., 176 P.3d 60 (Colo. 2007).

A trial court must not weigh and resolve disputed facts raised in subsection (b)(2) motion unless it conducts an evidentiary hearing. Archangel Diamond Corp. v. Lukoil, 123 P.3d 1187 (Colo. 2005); First Horizon Merch. Servs., Inc. v. Wellspring Capital Mgmt., LLC, 166 P.3d 166 (Colo. App. 2007); Goettman v. North Fork Valley Rest., 176 P.3d 60 (Colo. 2007).

Defenses not raised by motion are waived. Subsections (g) and (h)(1) of this rule make it expressly clear that if a party makes a motion under section (b) of this rule and, in doing so, omits the defense of lack of jurisdiction over the person or insufficiency of process, and such defenses were available to him at the time the motion was made, then the omitted defenses are waived, and the defendant may not raise them by subsequent motion or in his answer. Bd. of County Comm'rs v. District Court, 172 Colo. 311, 472 P.2d 128 (1970).

Clearly erroneous standard must be followed in appellate review of trial court determination regarding subject matter jurisdiction. DiPaolo v. Boulder Valley Sch. Dist., 902 P.2d 439 (Colo. App. 1995); Norsby v. Jensen, 916 P.2d 555 (Colo. App. 1995); Lyon v. Amoco Prod. Co., 923 P.2d 350 (Colo. App. 1996); Reynolds v. State Bd. for Cmty. Colls., 937 P.2d 774 (Colo. App. 1996); Lyons v. City of Aurora, 987 P.2d 900 (Colo. App. 1999).

A reviewing court may apply subsection (b)(1) to the record without a remand if the court is satisfied that all relevant evidence has been presented to the trial court. DiPaolo v. Boulder Valley Sch. Dist., 902 P.2d 439 (Colo. App. 1995); Norsby v. Jensen, 916 P.2d 555 (Colo. App. 1995).

If the court is satisfied that all the relevant evidence has been presented to the trial

court, it may apply subsection (b)(1) to the record before it without remanding the case for an evidentiary hearing. Capra v. Tucker, 857 P.2d 1346 (Colo. App. 1993); Norsby v. Jensen, 916 P.2d 555 (Colo. App. 1995).

The statements that gave rise to plaintiff's claims of slander were issued within the constitutionally protected context of the first amendment of the U.S. Constitution because they occurred during a church meeting concerning whether to terminate the plaintiff as the church's pastor. The Colorado supreme court has recognized that the courts have no authority to determine claims that directly concern a church's choice of minister and, therefore, the trial court properly refused to exercise jurisdiction. Seefried v. Hummel, 148 P.3d 184 (Colo. App. 2005).

Court lacks subject matter jurisdiction over minister's claim against church for compensation not paid where resolution of the claim would require the court to determine whether the minister adequately performed his ecclesiastical duties. Jones v. Crestview S. Baptist Church, 192 P.3d 571 (Colo. App. 2008).

Colorado state courts have jurisdiction over private actions under the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227, under the supremacy clause of the United States Constitution, and the TCPA does not limit this jurisdiction, even assuming congress could do so. When congress created a private right of action that could be prosecuted in state courts, it was acknowledging that the states could apply their own rules of procedure to such an action, but it did not intend to require that any state adopt a further law or rule of court to allow the prosecution of such actions in its courts. The supremacy clause requires the exercise of such jurisdiction as the state court possesses. Consumer Crusade, Inc. v. Affordable Health Care Solutions, Inc. v. 121 P.3d 350 (Colo. App. 2005).

"If otherwise permitted" phrase under TCPA provisions creating a private right of action is merely an acknowledgment by congress that states have the right to structure their own court systems and that state courts are not obligated to change their procedural rules to accommodate TCPA claims. Under this view, no state can refuse to entertain a private TCPA action, but a state is not compelled to adopt a special procedural rule for such actions. Consumer Crusade, Inc. v. Affordable Health Care Solutions, Inc., 121 P.3d 350 (Colo. App. 2005).

C. Insufficiency of Process.

The defenses of insufficiency of process and lack of jurisdiction over the person are defenses which may be made by motion under section (b) of this rule. Bd. of County Comm'rs v. District Court, 172 Colo. 311, 472 P.2d 128 (1970).

Denial of motion to quash service of process is error. Denial of a party's motion to quash service of process under this rule is error if party has not been properly served under C.R.C.P. 4(e)(5) and (f)(2). Pioneer Astro Indus., Inc. v. District Court, 193 Colo. 409, 566 P.2d 1067 (1977).

There was no waiver of defense of insufficiency of service of process, raised by motion to quash, where the court did not rule on the question on previous motion to quash. Pioneer Astro Indus., Inc. v. District Court, 193 Colo. 409, 566 P.2d 1067 (1977).

A party who seeks to set aside a judgment and plead to the merits has thereby entered a general appearance and waived the right to question a summons. Wells Aircraft Parts Co. v. Allan J. Kayser Co., 118 Colo. 197, 194 P.2d 326 (1947).

D. Failure to State a Claim upon which Relief can be Granted.

Federal jurisprudence under Fed. R. Civ. P. 12(b)(6) is persuasive, since the federal rule is identical to subsection (b)(5) of this rule. Yadon v. Lowry, 126 P.3d 332 (Colo. App. 2005); Walker v. Van Laningham, 148 P.3d 391 (Colo. App. 2006).

A subsection (b)(5) motion to dismiss tests the sufficiency of the complaint. In assessing such a motion a court must accept all matters of material fact in the complaint as true and view the allegations in the light most favorable to the plaintiff and may grant the motion only if the plaintiff's factual allegations cannot support a claim as a matter of law. Asphalt Specialties, Co. v. City of Commerce City, 218 P.3d 741 (Colo. App. 2009).

The primary difference between subsection (b)(1) and subsection (b)(5) is that under subsection (b)(1) the trial court is permitted to make findings of fact. Under subsection (b)(5) it is not; it must take the allegation of the complaint as true and draw all inferences in favor of the plaintiff. Medina v. State, 35 P.3d 443 (Colo. 2001); Schwindt v. Hershey Food Corp., 81 P.3d 1144 (Colo. App. 2003).

To the extent that the trial court's conclusion that a tow truck was merely an extension of the vehicle being pushed by it was a finding of fact, such a finding could not be made in the context of a motion under subsection (b)(5). Titan Indem. Co. v. Sch. Dist. No. 1, 129 P.3d 1075 (Colo. App. 2005).

Generally, the issue of immunity under the Governmental Immunity Act is a question of subject matter jurisdiction to be decided pursuant to subsection (b)(1). Kittinger v. City of Colo. Springs, 872 P.2d 1265 (Colo. App. 1993); Fogg v. Macaluso, 892 P.2d 271 (Colo.

1995); Armstead v. Memorial Hosp., 892 P.2d 450 (Colo. App. 1995); DiPaolo v. Boulder Valley Sch. Dist., 902 P.2d 439 (Colo. App. 1995); Sanchez v. Sch. Dist. 9-R, 902 P.2d 450 (Colo. App. 1995); Norsby v. Jensen, 916 P.2d 555 (Colo. App. 1995); Reynolds v. State Bd. for Cmty. Colls., 937 P.2d 774 (Colo. App. 1996); Medina v. State, 17 P.3d 178 (Colo. App. 2000), aff'd, 35 P.3d 443 (Colo. 2001).

A motion to dismiss pursuant to subsection (b)(5) tests the sufficiency of a plaintiff's complaint. Such a motion is looked on with disfavor and should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts that would entitle him or her to relief. The court must accept all averments of material fact as true, and all the allegations in the complaint must be viewed in the light most favorable to the plaintiff. The court reviews the trial court's ruling de novo. Verrier v. Colo. Dept. of Corr., 77 P.3d 873 (Colo. App. 2003); Sweeney v. United Artists Theater Circuit, Inc., 119 P.3d 538 (Colo. App. 2005); Allen v. Steele, 252 P.3d 476 (Colo. 2011).

Motions to dismiss for failure to state a claim are viewed with disfavor and are rarely granted under "notice pleadings". Davidson v. Dill, 180 Colo. 123, 503 P.2d 157 (1972); Dunlap v. Colo. Springs Cablevision, Inc., 829 P.2d 1286 (Colo. 1992); Story v. Bly, 217 P.3d 872 (Colo. App. 2008), aff'd, 241 P.3d 529 (Colo. 2010); Denver Post Corp. v. Ritter, 255 P.3d 1083 (Colo. 2011).

A motion to dismiss for failure to state a claim is viewed with disfavor, and should be granted only if it clearly appears that the plaintiff would not be entitled to any relief under the facts pleaded. Nat'l Sur. Corp. v. Citizens State Bank, 41 Colo. App. 580, 593 P.2d 362 (1978), aff'd, 199 Colo. 497, 612 P.2d 70 (1980).

Whether a claim is stated must be determined solely from the complaint. In passing on a motion to dismiss a complaint for failure to state a claim, the court must consider only those matters stated within the four corners thereof. Dillinger v. North Sterling Irrigation Dist., 135 Colo. 100, 308 P.2d 608 (1957); McDonald v. Lakewood Country Club, 170 Colo. 355, 461 P.2d 437 (1969); Dunlap v. Colo. Springs Cablevision, Inc., 829 P.2d 1286 (Colo. 1992); Fluid Tech., Inc. v. CVJ Axles, Inc., 964 P.2d 614 (Colo. App. 1998); Kratzer v. Colo. Intergovernmental Risk Share Agency, 18 P.3d 766 (Colo. App. 2000).

A motion to dismiss for failure to state a claim must be decided solely on the basis of allegations stated in the complaint. Foster Lumber Co. v. Weston Constructors, Inc., 33 Colo. App. 436, 521 P.2d 1294 (1974); Nat'l Camera, Inc. v. Sanchez. 832 P.2d 960 (Colo. App. 1991).

Upon review of a grant of a motion to dismiss under subsection (b)(5) of this rule, it must be assumed that the material allegations of the complaint are true. Schmaltz v. St. Luke's Hosp., 33 Colo. App. 351, 521 P.2d 787 (1974), modified, 188 Colo. 353, 534 P.2d 781 (1975).

A motion to dismiss for failure to state a claim must be considered on its merits like a motion for summary judgment and cannot be deemed confessed by a failure to respond. Therefore, trial court erred in failing to consider the merits of plaintiffs' claims for relief as required by section (b)(5) in resolving defendant's motion to dismiss. Hemmann Mgmt. Servs. v. Mediacell, Inc., 176 P.3d 856 (Colo. App. 2007).

"Matters outside the pleadings", consideration of which requires the court to convert a motion for dismissal into a motion for summary judgment, does not include a document referred to in the complaint, notwithstanding that the document is not formally incorporated by reference or attached to the complaint. Yadon v. Lowry, 126 P.3d 332 (Colo. App. 2005); Walker v. Van Laningham, 148 P.3d 391 (Colo. App. 2006).

The same is true of counterclaims and cross claims. Whether or not counterclaims and cross claims state a claim upon which relief could be granted, the court must look to the four corners of the pleading in question to determine whether a claim is stated. Colo. Nat'l Bank v. F. E. Biegert Co., 165 Colo. 78, 438 P.2d 506 (1968).

Although a court primarily considers the pleadings, certain matters of public record may also be taken into account, and matters that are properly the subject of judicial notice may be considered without converting the motion for dismissal into a motion for summary judgment. Walker v. Van Laningham, 148 P.3d 391 (Colo. App. 2006).

When deciding a motion to dismiss for failure to state a claim on the basis of issue preclusion or claim preclusion, a court may judicially notice prior pleadings, orders, judgments, and other items appearing in the court records of the prior litigation. Bristol Bay Prods., LLC v. Lampack, __ P.3d __ (Colo. App. 2011).

Upon a motion to dismiss for failure to state a claim, the facts of the complaint should be taken as true. Denver & R. G. W. R. R. v. Wood, 28 Colo. App. 534, 476 P.2d 299 (1970).

In ruling on a motion to dismiss for failure to state a claim, the trial court must accept the facts of the complaint as true and determine whether, under any theory of law, plaintiff is entitled to relief. If relief could be granted under such circumstances, the complaint is sufficient. Schlitters v. State, 787 P.2d 656 (Colo. App. 1989); Chidester v. Eastern Gas & Fuel Assoc., 859 P.2d 222 (Colo. App. 1992); Rosenthal v. Dean Witter Reynolds, Inc., 908

P.2d 1095 (Colo. 1995); Flatiron Linen, Inc. v. First Amer. State Bank, 1 P.2d 244 (Colo. App. 1999), rev'd on other grounds, 23 P.3d 1209 (Colo. 2001); W.O. Brisben Co., Inc. v. Krystkowiak, 66 P.3d 133 (Colo. App. 2002), aff'd on other grounds, 90 P.3d 859 (Colo. 2004); Dotson v. Dell L. Bernstein, P.C., 207 P.3d 911 (Colo. App. 2009).

Material allegations must be taken as admitted. When deciding whether a complaint is sufficient to state a claim upon which relief can be granted, the material allegations of the complaint must be taken as admitted. Nelson v. Nelson, 31 Colo. App. 63, 497 P.2d 1284 (1972); Saunders v. Bankston, 31 Colo. App. 551, 506 P.2d 1253 (1972).

On appeal from the dismissal of a complaint for failure to state a claim upon which relief could be granted, the material allegations of the complaint must be taken as admitted. Fort v. Holt, 508 P.2d 792 (Colo. App. 1973).

When reviewing a motion to dismiss, the court must accept the material allegations of the complaint as true and the complaint cannot be dismissed unless it appears that the non-moving party is entitled to no relief under any statement of facts which may be proved in support of the claims. Douglas County Nat. Bank v. Pfeiff, 809 P.2d 1100 (Colo. App. 1991).

Trial court is not required to accept complaint's legal conclusions or factual claims at variance with the express terms of documents attached to the complaint. When documents are attached to a complaint, the legal effect of the documents is determined by their contents rather than by allegations in the complaint. Thus, trial court need not consider the allegations of the complaint as true and in the light most favorable to plaintiffs, if such consideration would conflict with the attached documents. Stauffer v. Stegemann, 165 P.3d 719 (Colo. App. 2006).

Court is not required to accept as true legal conclusions that are couched as factual allegations. Denver Post Corp. v. Ritter, 255 P.3d 1083 (Colo. 2011).

Since under the present rules a motion to dismiss is treated as a demurrer, it must be assumed that the allegations of a petition are true. Nielsen v. Nielsen, 111 Colo. 344, 141 P.2d 415 (1943).

A motion for failure to state a claim is not identical to a demurrer. While motion under section (b) of this rule, for "failure to state a claim upon which relief can be granted", may in some cases serve the purpose of a demurrer and is analogous to it in some respects, it is not an identical attack. People ex rel. Bauer v. McCloskey, 112 Colo. 488, 150 P.2d 861 (1944).

A party's capacity to sue may not be raised by motion to dismiss. A party who wishes to raise the issue of capacity must do so by specific negative averment. Ashton Props., Ltd. v. Overton, 107 P.3d 1014 (Colo. App. 2004).

In a complaint, a plaintiff need not set forth the underlying facts giving rise to the claim with precise particularity, especially as to those matters reasonably unknown to him and within the cognizance of the defendants. Shockley v. Georgetown Valley Water & San. Dist., 37 Colo. App. 434, 548 P.2d 928 (1976).

When it appears on the face of the complaint, or is admitted, that the complaint does not state a claim upon which relief can be granted, the claim is barred, the court has no jurisdiction of the subject matter, and the court can, for that reason, grant a motion to dismiss on this ground. Fort Collins-Loveland Water Dist. v. City of Fort Collins, 174 Colo. 79, 482 P.2d 986 (1971).

Want of merit may consist of an absence of substantive law to support a claim of the type alleged. Nelson v. Nelson, 31 Colo. App. 63, 497 P.2d 1284 (1972).

A complaint will not be dismissed unless it appears to a certainty that plaintiff would be entitled to no relief under any state of facts which could be proved in support of claim. People ex rel. Bauer v. McCloskey, 112 Colo. 488, 150 P.2d 861 (1944); Nelson v. Nelson, 31 Colo. App. 63, 497 P.2d 1284 (1972).

Where complaint against a partner in a limited liability partnership lacks any factual allegations explaining how limited partner could be individually liable for alleged retaliatory discharge, the complaint is deficient in stating a claim. Middlemist v. BDO Seidman, LLP, 958 P.2d 486 (Colo. App. 1997).

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Davidson v. Dill, 180 Colo. 123, 503 P.2d 157 (1972); Kratzer v. Colo. Intergovernmental Risk Share Agency, 18 P.3d 766 (Colo. App. 2000).

It is error to dismiss a complaint if plaintiff can be granted relief under any state of facts which may be proved in support of the claim. Fort v. Holt, 508 P.2d 792 (Colo. App. 1973).

Where a plaintiff in his complaint states a case entitling him to some relief, a motion to dismiss the action should not be granted. Stapp v. Carb-Ice Corp., 122 Colo. 526, 224 P.2d 935 (1950); Dillinger v. North Sterling Irrigation Dist., 135 Colo. 100, 308 P.2d 608 (1957).

It is error to grant a motion to dismiss for failure to state a claim upon which relief can be granted if in fact a "relievable" claim is stated. Gold Uranium Mining Co. v. Chain O'Mines Operators, Inc., 128 Colo. 399, 262 P.2d 927 (1953).

Where payee of checks and its insurer pled that bank paid checks payable to corporation upon forged endorsements, the plaintiffs prop-

erly stated a cause of action for conversion against the bank, and the trial court therefore erred in granting the bank's motion to dismiss under section (b)(5). Citizens State Bank v. Nat'l Sur. Corp., 199 Colo. 497, 612 P.2d 70 (1980).

A court errs in granting a defendant's motion to dismiss under subsection (b)(5) of this rule, when claims are sufficient statements of a cause of action for which relief may be granted. Wright v. Creative Corp., 30 Colo. App. 575, 498 P.2d 1179 (1972).

Only where a complaint fails to give defendants notice of the claims asserted is dismissal under subsection (b)(5) proper. Shockley v. Georgetown Valley Water & San. Dist., 37 Colo. App. 434, 548 P.2d 928 (1976).

Denial of a motion to dismiss for failure to state a claim is not prejudicial to movant where claim was included in a stipulated trial management order, giving movant sufficient notice that the claim would be tried. People ex rel. Suthers v. Mandatory Poster, 260 P.3d 9 (Colo. App. 2009).

Failure to specifically request relief under a particular claim, where complaint included a general request for relief, is not sufficient grounds to dismiss claim on a motion to dismiss for failure to state a claim. People ex rel. Suthers v. Mandatory Poster, 260 P.3d 9 (Colo. App. 2009).

Failure to state claim where special damages in libel "per quod" action are not pleaded results in dismissal of complaint. Since special damages are an essential element of an action for libel "per quod", plaintiff is required to specifically plead them, and if the plaintiff fails to do so, the trial court can then dismiss the plaintiff's complaint under subsection (b)(5) of this rule for failure to state a claim upon which relief could be granted. Bernstein v. Dun & Bradstreet, Inc., 149 Colo. 150, 368 P.2d 780 (1962).

Where it is clear that plaintiffs have no standing to assert a claim upon which relief can be granted, the action is properly dismissed under subsection (b)(5) of this rule. Clark v. City of Colo. Springs, 162 Colo. 593, 428 P.2d 359 (1967).

Individual shareholders were not entitled to relief where no injury suffered. Where the complaint alleged only that the individual plaintiffs were shareholders of the corporation and that the corporation sustained damages as a result of defendants' actions, plaintiffs, as individual shareholders, suffered no individually redressable injury thereby, and their complaint was properly dismissed because it stated no claim upon which they were entitled to relief. Northwest Dev., Inc. v. Dunn, 29 Colo. App. 364, 483 P.2d 1361 (1971).

Permission to amend should be given where there is possibility of adequate statement of claim. While a judgment of dismissal for failure to state a claim upon which the relief can be granted may be entered upon a motion for summary judgment, such judgment must specifically disclose the inadequacy of the complaint as the ground therefor, and permission to amend should be given where there is a possibility by amendment of an adequate statement of claim. Smith v. Mills, 123 Colo. 11, 225 P.2d 483 (1950).

When a person has been acquitted of a crime and denied the return of the arrest record without justification, a suit by the person alleging violation of the right to privacy is not to be dismissed for failure to state a claim upon which relief could be granted. Davidson v. Dill, 180 Colo. 123, 503 P.2d 157 (1972).

Discovery not required. If a challenged complaint sufficiently states a claim for relief, the trial court may not require the plaintiff to undertake discovery merely to withstand a motion to dismiss. Shockley v. Georgetown Valley Water & San. Dist., 37 Colo. App. 434, 548 P.2d 928 (1976).

It is appropriate for a trial court to treat a motion for failure to state a claim upon which relief can be granted as a motion for summary judgment when it is necessary to consider the factual circumstances and the party against whom the motion is filed is accorded an opportunity to respond with evidence and counter-affidavits. Brannan Sand & Gravel v. F.D.I.C., 928 P.2d 1337 (Colo. App. 1996), rev'd on other grounds, 940 P.2d 393 (Colo. 1997).

Order granting summary judgment where a motion to dismiss for failure to state a claim upon which relief can be granted must be affirmed if the pleadings, together with any affidavits filed in support of the motion, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Alexander v. Morrison-Knudsen Co., 166 Colo. 118, 444 P.2d 397 (1968), cert. denied, 393 U.S. 1063, 89 S. Ct. 715, 21 L. Ed. 2d 706 (1969); Fort Collins Motor Homes, Inc. v. City of Ft. Collins, 30 Colo. App. 445, 496 P.2d 1074 (1972).

Where statute provided defendant with only qualified immunity, and plaintiff's allegations, if accepted as true, adequately asserted "willful and wanton" misconduct abrogating such immunity, dismissal was not proper. Holland v. Bd. of County Comm'rs, 883 P.2d 500 (Colo. App. 1994).

Employee's allegation that his demotion was in violation of the policies and procedures of the employer and therefore constituted a breach of contract was sufficient to survive a motion to dismiss, but the employee's allegation that the demotion constituted extreme and outrageous conduct failed to state a cogni-

zable claim. Salimi v. Farmers Ins. Group, 684 P.2d 264 (Colo. App. 1984).

Employee's mere allegation of termination from employment because of compliance with the employer's safety policy, rather than any allegation of breach of contract for failure of the employer to comply with its own discharge procedures or a termination for cause provision specified in any handbook distributed to the employee, was insufficient to state a claim upon which relief could be granted. Corbin v. Sinclair Marketing, Inc., 684 P.2d 265 (Colo. App. 1984).

In considering a motion to dismiss a damages claim by an employee against a co-employee based upon a defense or immunity provided by § 8-41-104, the county court erred in not considering matters outside the pleadings where issues regarding the defense were absent from the pleadings and in not treating the motion as one for summary judgment under C.R.C.P. 56. Popovich v. Irlando, 811 P.2d 379 (Colo. 1991).

In reviewing a motion to dismiss a complaint, the appellate court can consider only matters stated therein and must not go beyond the confines of the pleading, for in reviewing the action of the trial court in dismissing a complaint for failure to state a claim, the appellate court is in the same position as the trial judge. McDonald v. Lakewood Country Club, 170 Colo. 355, 461 P.2d 437 (1969).

In evaluating such motions, trial courts and appellate courts apply the same standards. Van Wyk v. Pub. Serv. Co. of Colo., 996 P.2d 193 (Colo. App. 1999), aff'd in part and rev'd in part on other grounds, 27 P.3d 377 (Colo. 2001).

The appellate court reviews a trial court's determination on a motion to dismiss de novo, and, like the trial court, must accept all averments of material fact contained in the complaint as true. Fluid Tech., Inc. v. CVJ Axles, Inc., 964 P.2d 614 (Colo. App. 1998).

Because the substance, rather than the name or denomination of a pleading determines its character and sufficiency, a ruling on a motion made in limine that sought to dismiss a claim for failure of pleading was properly reviewed de novo, not under an abuse of discretion standard. People ex rel. Suthers v. Mandatory Poster, 260 P.3d 9 (Colo. App. 2009).

Both courts must view complaint's allegations favorable to plaintiff. When ruling upon a motion to dismiss a complaint for failure to state a claim, a trial court and a reviewing court must view the allegations of the complaint in a light most favorable to the plaintiff. Bell v. Arnold, 175 Colo. 277, 487 P.2d 545 (1971); Halverson v. Pikes Peak Fam. Counseling, 795 P.2d 1352 (Colo. 1990); Nat'l Camera, Inc. v. Sanchez, 832 P.2d 960 (Colo. App. 1991); Story v. Bly, 217 P.3d 872 (Colo. App. 2008), aff'd, 241 P.3d 529 (Colo. 2010).

In so testing all matters well pleaded will be assumed to be true. Colo. Nat'l Bank v. F. E. Biegert Co., 165 Colo. 78, 438 P.2d 506 (1968).

In determining whether a motion to dismiss for failure to state a claim is to be granted, all matters well pleaded must be considered to be true, and the trial court can consider only those matters stated in the complaint. Abts v. Bd. of Educ., 622 P.2d 518 (Colo. 1980).

A motion to dismiss based on the exclusivity provisions of the Workers' Compensation Act does not go to the subject matter jurisdiction of the court, therefore, an evidentiary hearing is neither required nor appropriate. The trial court did not err in ruling on employer's motion without such a hearing. Schwindt v. Hershey Food Corp., 81 P.3d 1144 (Colo. App. 2003).

Colorado state courts have jurisdiction over private actions under the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227, under the supremacy clause of the United States Constitution, and the TCPA does not limit this jurisdiction, even assuming congress could do so. When congress created a private right of action that could be prosecuted in state courts, it was acknowledging that the states could apply their own rules of procedure to such an action, but it did not intend to require that any state adopt a further law or rule of court to allow the prosecution of such actions in its courts. The supremacy clause requires the exercise of such jurisdiction as the state court possesses. Consumer Crusade, Inc. v. Affordable Health Care Solutions, Inc., 121 P.3d 350 (Colo. App. 2005).

"If otherwise permitted" phrase under TCPA provisions creating a private right of action is merely an acknowledgment by congress that states have the right to structure their own court systems and that state courts are not obligated to change their procedural rules to accommodate TCPA claims. Under this view, no state can refuse to entertain a private TCPA action, but a state is not compelled to adopt a special procedural rule for such actions. Consumer Crusade, Inc. v. Affordable Health Care Solutions, Inc., 121 P.3d 350 (Colo. App. 2005).

Trial court properly granted dismissal of state law claims under subsection (b)(5) on grounds that such claims were preempted by federal Employee Retirement Income Security Act of 1974 (ERISA) legislation. Fact that former employees were not entitled to bring a cause of action under ERISA did not mean that state law claims could not be preempted. Houdek v. Mobil Oil Corp., 879 P.2d 417 (Colo. App. 1994).

Question not before district court was not before supreme court. Where the question as to whether the complaint failed to state facts on which a claim of relief could be based was not placed before the district court by motion under this rule, a fortiori, it was not before the supreme court. Allen v. Evans, 193 Colo. 61, 562 P.2d 752 (1977).

Party was properly dismissed based upon holding that an employer or business may not recover against a third party for economic losses it suffered as a result of the third party's tortious injury to its employee. Gonzalez v. Yancey, 939 P.2d 525 (Colo. App. 1997).

Motion to dismiss was properly granted where there was no evidence that petitioner could have proffered regarding the importance of assisted suicide to his belief system that would exempt him, or his designated third persons, on first amendment grounds from the provisions of § 18-3-104. Sanderson v. People, 12 P.3d 851 (Colo. App. 2000).

Defendant's actions do not constitute either a taking or a damaging of plaintiffs' property, and, therefore, the complaint, even when viewed in the light most favorable to the plaintiffs, cannot sustain a claim for inverse condemnation. Therefore, the district court properly dismissed plaintiffs' inverse condemnation claim pursuant to defendant's subsection (b)(5) motion. Pub. Serv. Co. of Colo. v. Van Wyk, 27 P.3d 377 (Colo. 2001).

Plaintiff's takings claim was improperly dismissed based on a ruling that claim was not ripe. Even though final condemnation proceedings had not been instituted, plaintiffs alleged that they had already been harmed, and those allegations must be viewed in the light most favorable to the plaintiffs. Therefore, the claim was ripe. G & A Land, LLC v. City of Brighton, 233 P.3d 701 (Colo. App. 2010).

With regard to plaintiffs' claim for trespass, the complaint does not allege specific physical damage to their property resulting from the intangible intrusions of which they complained. Because plaintiffs have not alleged physical damage, plaintiffs cannot prove trespass based on the alleged intangible intrusions. Nor have plaintiffs alleged any tangible intrusions upon their property to support a claim of trespass. Therefore, the complaint, when viewed in the light most favorable to the plaintiffs, cannot support a cause of action for trespass and was properly dismissed by the district court. Pub. Serv. Co. of Colo. v. Van Wyk, 27 P.3d 377 (Colo. 2001).

Respondent failed to state a claim for intentional interference with contractual relations against petitioner. Under the Nonprofit Corporation Act, neighborhood association could not individually bind its members, including petitioner, to a contract its president signed. At all times, individual members of the neighborhood association, including petitioner, were free to disassociate from the association and to express their own views about the proposed development. Respondent's complaint failed to allege petitioner's first amendment rights were limited by the settlement agreement. The complaint essentially pointed to the fact petitioner exercised his or her first amendment rights without alleging that the exercise of such rights was improper. Further, there is no allegation that petitioner's exercise of his constitutional rights persuaded, intimated, or intentionally made it impossible for the association to perform its contract. Krystkowiak v. W.O. Brisben Cos., 90 P.3d 859 (Colo. 2004).

Plaintiffs' complaint satisfies both of the requirements necessary to allege a nuisance. Thus, the nuisance section of plaintiffs' complaint sufficiently states a nuisance claim, and the district court improperly dismissed the nuisance claim. Pub. Serv. Co. of Colo. v. Van Wyk, 27 P.3d 377 (Colo. 2001).

Motion to dismiss should have been denied on the basis that a joint venturer cannot shield itself from liability on the grounds that the joint venture was prohibited by the Colorado rules of professional conduct. Bebo Constr. Co. v. Mattox & O'Brien, 998 P.2d 475 (Colo. App. 2000).

Motion to dismiss is properly granted when plaintiffs lack standing because the complaint does not show actual injury to a legally protected right. Kreft v. Adolph Coors Co., 170 P.3d 854 (Colo. App. 2007).

Motion to dismiss was properly granted under subsection (b)(5) where plaintiff claimed undercharges resulted in defendant's unjust enrichment. There is nothing unjust about retaining a benefit conferred gratuitously. Berenergy Corp. v. Zab, Inc., 94 P.3d 1232 (Colo. App. 2004), aff'd on other grounds, 136 P.3d 252 (Colo. 2006).

Motion to dismiss was properly granted as a matter of law when the allegations in the complaint were too vague, insubstantial, and attenuated to support plaintiff's legal malpractice claims. Bristol Co., LP v. Osman, 190 P.3d 752 (Colo. App. 2007).

Trial court properly dismissed complaint under subsection (b)(5) alleging city council's use of anonymous ballot procedure to fill city council vacancies and to appoint municipal judge was prohibited under Colorado open meetings law (COML). COML does not impose specific voting procedures on local public bodies let alone one that prohibits the use of anonymous ballots. COML is silent as to whether the votes taken need to be recorded in a way that identifies which elected official voted for which candidate. Rather, COML only requires that the public have access to meetings of local public bodies and be able to observe the

decision-making process. Henderson v. City of Fort Morgan, __ P.3d __ (Colo. App.2011).

E. Failure to Join Parties.

Where defendants contended that the failure to join all the children of a deceased as his heirs constituted a failure to join indispensable parties under subsection (b)(6) of this rule in a creditor's action on a deed of trust executed to deceased and defendant, the deceased's children were held not indispensable parties, inasmuch as, when deceased died, there was no estate probated, no personal representative appointed, and no determination of heirship. Greco v. Pullara, 166 Colo. 465, 444 P.2d 383 (1968).

Failure to name all stockholders as parties plaintiff does not render the complaint fatally defective for failure to join an indispensable party, since the stockholders are neither necessary nor proper parties in an action filed by a corporation. Northwest Dev., Inc. v. Dunn, 29 Colo. App. 364, 483 P.2d 1361 (1971).

Pleading a defense of failure to state a claim upon which relief can be granted is sufficient to raise the issue of failure of plaintiff to join an indispensable party. Cold Springs Ranch v. Dept. of Nat. Res., 765 P.2d 1035 (Colo. App. 1988).

Trial court did not abuse its discretion by denying county's motion to dismiss under subsections (b)(5) and (b)(6) of this rule and C.R.C.P. 19(a) for failure to join landowners as indispensable parties. A finding that county land use department abused its discretion by refusing to perform ministerial task of accepting application of fire protection district in no way implicated landowner's interests as to make them indispensable parties. Nor did fire protection district's request for a declaration that project could proceed absent an amendment to the planned unit development (PUD). At root, question presented involved which process the district was required to employ in order to build a fire station. This determination did not impair the landowners' ability to protect their interests because, whether the court required a location and extent review, as the district sought, or an amendment to the PUD, which the county believed to be required, the landowners would have had the opportunity to be heard and protect their interests through the applicable statutory processes. Hygiene Fire Prot. Dist. v. Bd. of County Comm'rs, 205 P.3d 487 (Colo. App. 2008), aff'd on other grounds, 221 P.3d 1063 (Colo. 2009).

F. Statute of Limitations.

Laches and the statute of limitations cannot be raised by motion to dismiss or strike. McPherson v. McPherson, 145 Colo. 170, 358 P.2d 478 (1960).

The statute of limitations is not ground for a motion to dismiss for failure to state a claim upon which relief can be granted. McPherson v. McPherson, 145 Colo. 170, 358 P.2d 478 (1960).

The statute of limitations is not ground for motion to dismiss for failure to state a claim upon which relief can be granted under section (b) of this rule, since under C.R.C.P. 8(c), that is a defense which must be set forth affirmatively by answer. Smith v. Kent Oil Co., 128 Colo. 80, 261 P.2d 149 (1953); Davis v. Bonebrake, 135 Colo. 506, 313 P.2d 982 (1957); Fort Collins-Loveland Water Dist. v. City of Fort Collins, 174 Colo. 79, 482 P.2d 986 (1971).

The statute of limitations is not a basis for dismissal on motion on the ground that it appears from the complaint that the claim is barred for failure to timely file suit, for the reason that in the absence of an affirmative defense based on the statute such defense is waived, and the assertion or waiver of the defense can only be determined from the answer. Furthermore, even if pleaded, the running of the statute may have been tolled, and plaintiff in his complaint is not required to anticipate the defense. Smith v. Kent Oil Co., 128 Colo. 80, 261 P.2d 149 (1953).

Statute of limitations may be raised by motion to dismiss. The statute authorizing forfeiture for a public nuisance is penal in nature. In an action premised on a penal statute as opposed to a civil claim, the statute of limitations is jurisdictional in nature, in that it specifies the time period during which a cause of action exists. Since the statute of limitations is jurisdictional, it may be raised at any stage of the proceeding, including a motion to dismiss. People v. Steinberg, 672 P.2d 543 (Colo. App. 1983).

Appellate review of order granting motion to dismiss on statute of limitations grounds is de novo. Meyerstein v. City of Aspen, __ P.3d __ (Colo. App. 2011).

G. Other Grounds.

The constitutionality of an act may be raised and considered on motion to dismiss. Flank Oil Co. v. Tennessee Gas Transmission Co., 141 Colo. 554, 349 P.2d 1005 (1960) (unfair practices act).

Courts should be wary of dismissing a case where the pleadings show that an alleged violation of a constitutional right is at issue, since fundamental rights and important public policy questions are necessarily involved. Davidson v. Dill, 180 Colo. 123, 503 P.2d 157 (1972).

In an order denying the motion to dismiss where the issues involved are purely questions of law and no good purpose would be served in requiring the filing of individual claims before an administrative agency, whose presumed expertise would not be helpful in resolving legal as distinguished from factual issues, a dismissal is not appropriate. Hamilton v. City & County of Denver, 176 Colo. 6, 490 P.2d 1289 (1971).

A complaint may be dismissed on motion if it is clearly without any merit. Nelson v. Nelson, 31 Colo. App. 63, 497 P.2d 1284 (1972).

To sustain the defense of "res judicata" facts in support of it must be affirmatively shown either by the evidence adduced at the trial under C.R.C.P. 8(c), or by way of uncontroverted facts properly presented in a motion for summary judgment, or by a motion to dismiss under section (b) of this rule where the court, on the basis of facts properly presented outside of the pleadings, is enabled to treat the same as a motion for summary judgment under C.R.C.P. 56. Ruth v. Dept. of Hwys., 153 Colo. 226, 385 P.2d 410 (1963).

Where prior case is decided in same court where a second case is filed and records of prior case are before court for consideration, that court may properly treat a motion to dismiss as one for summary judgment and consider defense of "res judicata" on its merits. Saunders v. Bankston, 31 Colo. App. 551, 506 P.2d 1253 (1972).

Affirmative defenses may be considered on motion for summary judgment. Lin Ron, Inc. v. Mann's World of Arts & Crafts, Inc., 624 P.2d 1343 (Colo. App. 1981).

Venue motions shall be filed together. C.R.C.P. 98(e)(1), when read together with this rule, requires that all venue motions except those based on C.R.C.P. 98(c)(3), (f)(2), and (g) must be filed together. Bd. of Land Comm'rs v. District Court, 191 Colo. 185, 551 P.2d 700 (1976).

The granting of a motion to dismiss a complaint is not in and of itself a final and reviewable order of judgment to which a writ of error will lie. District 50 Metro. Recreation Dist. v. Burnside, 157 Colo. 183, 401 P.2d 833 (1965).

Motion to dismiss converted to motion for summary judgment. Following a hearing on plaintiffs' motion for preliminary injunction, the court heard and granted defendants' motion to dismiss. With consent of all parties, the evidence presented in the injunction hearing was considered by the court in ruling on the dismissal motion. Under section (b) of this rule this consideration of matters outside the pleadings made the motion one for summary judgment. Kolwicz v. City of Boulder, 36 Colo. App. 142, 538 P.2d 482 (1975).

IV. MOTION FOR JUDGMENT ON THE PLEADINGS.

Law reviews. For article, "Again — How Many Times?", see 21 Dicta 62 (1944).

Judgment on the pleadings is appropriate if, from the pleadings, the moving party is entitled to judgment as a matter of law. Trip v. Parga, 847 P.2d 165 (Colo. App. 1992); City & County of Denver v. Qwest Corp., 18 P.3d 748 (Colo. 2001).

Motion to dismiss for failure to state a claim upon which relief can be granted treated as motion for summary judgment. Enger v. Walker Field, Colo. Pub. Airport Auth., 181 Colo. 253, 508 P.2d 1245 (1973).

Where the trial court, in ruling upon a motion to dismiss for failure to state a claim, considered affidavit submitted by the parties, the motion should have been treated as one for summary judgment. Foster Lumber Co. v. Weston Constructors, Inc., 33 Colo. App. 436, 521 P.2d 1294 (1974).

A judgment of dismissal for failure to state a claim upon which relief can be granted may be entered upon a motion for summary judgment. Van Schaack v. Phipps, 38 Colo. App. 140, 558 P.2d 581 (1976).

Where the record before the trial court, which it considered in ruling on the motion to dismiss, contained substantial material in the form of depositions and deposition exhibits and in argument on the motion, counsel quoted from the said depositions and deposition exhibits, and the court considered all relevant material contained in the exhibits or depositions, the action taken by the court must be considered a ruling on the motion for summary judgment under section (c) of this rule, which can be made at any time. Van Schaack v. Phipps, 38 Colo. App. 140, 558 P.2d 581 (1976).

Judgment must disclose no genuine issue as to material fact regarding complaint's adequacy. A judgment of dismissal for failure to state a claim upon which relief can be granted must specifically disclose that there is no genuine issue as to any material fact relating to the adequacy of the complaint. Van Schaack v. Phipps, 38 Colo. App. 140, 558 P.2d 581 (1976).

Allegations construed strictly against movant. In considering a motion for judgment on the pleadings, the court must construe the allegations of the pleadings strictly against the movant. Strout Realty, Inc. v. Snead, 35 Colo. App. 204, 530 P.2d 969 (1975).

In considering on appeal a motion for judgment on the pleadings, the court must construe the allegations of the pleadings strictly against the movant and must consider the allegations of the opposing party's pleadings as true. Abts v. Bd. of Educ., 622 P.2d 518 (Colo. 1980).

Allegations of opposing parties' pleadings considered true. In considering a motion for

judgment on the pleadings, the court must consider the allegations of the opposing parties' pleadings as true. Strout Realty, Inc. v. Snead, 35 Colo. App. 204, 530 P.2d 969 (1975).

A motion for judgment on the pleadings should not be sustained unless it appears that pleadings are such that no amendment could be made. Lammon v. Zamp, 81 Colo. 90, 253 P. 1056 (1927); Kingsbury v. Vreeland, 58 Colo. 212, 144 P. 887 (1914); McLaughlin v. Niles Co., 88 Colo. 202, 294 P. 954 (1930).

Where, after the pleadings in a case are settled, there is no issue of law or fact left for determination, judgment on the pleadings is properly entered. Atterbury v. Nat'l Union Fire Ins. Co., 94 Colo. 518, 31 P.2d 489 (1934).

It is immaterial whether the court considers the judgment of dismissal proper under this rule or as a summary judgment under C.R.C.P. 56 if the defendant is entitled to judgment under either thereof. Haigler v. Ingle, 119 Colo. 145, 200 P.2d 913 (1948).

Second amended complaint sufficient. A second amended complaint plainly asserting an allegation not contained in earlier amended complaint was sufficient to survive a motion for dismissal notwithstanding similarity of wording to earlier amended complaint. Chappell v. Bonds, 677 P.2d 955 (Colo. App. 1983).

A motion to dismiss based on the fact that the complaint facially established a jurisdictional defect because of a violation of the statute of limitations has the effect of a motion for judgment on the pleadings, as averments of time will be considered in determining the sufficiency of the pleadings. People v. Steinberg, 672 P.2d 543 (Colo. App. 1983).

Criteria for determining reversible error in granting motion applied. Where a ruling on a motion to dismiss is considered a ruling on a motion for summary judgment, whether the court committed reversible error in granting the motion for dismissal must be tested against the legal criteria for granting a motion for summary judgment. Van Schaack v. Phipps, 38 Colo. App. 140, 558 P.2d 581 (1976).

Court's ruling that the issue of paternity could not be raised in the child support proceeding because it had been previously litigated was based on undisputed facts, and was tantamount to a partial judgment on the pleadings or a partial summary judgment. McNeece v. McNeece, 39 Colo. App. 160, 562 P.2d 767 (1977).

Appellate court shall review complaint as trial court does. In reviewing the action of a trial court in dismissing a complaint for failure to state a claim, an appellate court is in the same position as the trial judge and must consider only matters stated within the four corners of the pleading. Espinoza v. O'Dell, 633 P.2d 455 (Colo. 1981).

V. MOTION FOR SEPARATE, OR MORE DEFINITE, STATEMENT.

Law reviews. For article, "Use of Summary Judgments and the Discovery Procedure", see 24 Dicta 193 (1947).

Granting of motion for bill of particulars is in court's discretion. Whether to grant or deny a motion for a bill of particulars in accordance with section (e) of this rule calls into play the sound discretion of the court. Morgan v. Brinkhoff, 145 Colo. 78, 358 P.2d 43 (1960).

Even prior to the adoption of this rule a motion to require a complaint to be made more specific was addressed to the sound legal discretion of the trial court. Mulligan v. Smith, 32 Colo. 404, 76 P. 1063 (1904); Hall v. Cudahy, 46 Colo. 324, 104 P. 415 (1909); Louden Irrigating Canal & Reservoir Co. v. Neville, 75 Colo. 536, 227 P. 562 (1924) (decided under section 69 of the former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941).

Bills of particulars ordinarily should not be utilized to unduly expand the pleadings where discovery is the proper method for obtaining information falling outside the category of ultimate facts. Morgan v. Brinkhoff, 145 Colo. 78, 358 P.2d 43 (1960).

After denial of a motion to dismiss, the trial court has the discretion to allow the plaintiff an opportunity to supply an essential allegation by a more definite statement and is not bound to dismiss the complaint in the first instance for failure to plead such. Bernstein v. Dun & Bradstreet, Inc., 149 Colo. 150, 368 P.2d 780 (1962).

Plaintiff allowed to supply essential allegation of special damages by a more definite statement. In an action for damages for libel "per quod", the trial court had discretion to allow the plaintiff the opportunity of supplying the essential allegation of special damages by a more definite statement; it was not bound to dismiss the complaint entirely under the circumstances. Bernstein v. Dun & Bradstreet, Inc., 149 Colo. 150, 368 P.2d 780 (1962).

VI. MOTION TO STRIKE.

Law reviews. For article, "The Federal Rules from the Standpoint of the Colorado Code", see 17 Dicta 170 (1940). For article, "Comments on the Rules of Civil Procedure", see 22 Dicta 154 (1945).

Annotator's note. Since section (f) of this rule is similar to § 66 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Where a complaint contains redundant matter, advantage cannot be taken thereof on

motion to require the complaint to be made more specific; rather, the proper remedy is by motion to strike. Commonwealth Co. v. Nunn, 17 Colo. App. 117, 67 P. 342 (1902).

It is not error to refuse to strike out pleas which are merely cumulative and which tender the same issue as an objectionable plea subsequently filed. Glenn v. Brush, 3 Colo. 26 (1876).

It is not error to strike out allegations that are simply a recital of the motives of defendant in doing the acts complained of by plaintiff, which add nothing to the cause of action stated. Equitable Sec. Co. v. Montrose & Delta Canal Co., 20 Colo. App. 465, 79 P. 747 (1905).

On a motion to strike on the ground that a pleading is a sham, it is not the province of the court to determine the veracity of the respective parties, for that is a question of fact to be determined on the trial; rather, the duty of the court is to determine whether an issue of fact is presented, not to try that issue. Midwest Fuel & Timber Co. v. Steele, 111 Colo. 458, 142 P.2d 1011 (1943); Kullgren v. Navy Gas & Supply Co., 112 Colo. 331, 149 P.2d 653 (1944).

Once a pleading is accepted for filing, the striking of a pleading is not a proper sanction for failure to pay a docket fee. Miller v. Charnes, 694 P.2d 348 (Colo. App. 1984).

The court can on its own motion amend by striking out. Elzroth v. Murphy, 75 Colo. 5, 223 P. 760 (1923).

VII. CONSOLIDATION OF DEFENSES.

This rule makes it expressly clear that if a party makes a motion under section (b) of this rule and, in doing so, omits the defense of lack of jurisdiction over the person or insufficiency of process, and such defenses were available to him at the time the motion was made, then the omitted defenses are waived, and defendant may not raise them by subsequent motion or in his answer. Bd. of County Comm'rs v. District Court, 172 Colo. 311, 472 P.2d 128 (1970).

The supreme court will not consider waived defenses in an original proceeding. The supreme court will not subvert the theory underlying section (b) of this rule and the clear language of sections (g) and (h)(1) of this rule by considering the matter of defenses in an original proceeding for writ of prohibition when those defenses were clearly waived. Bd. of County Comm'rs v. District Court, 172 Colo. 311, 472 P.2d 128 (1970).

VIII. WAIVER OR PRESERVATION OF CERTAIN DEFENSES.

Law reviews. For article, "Comments on the Rules of Civil Procedure", see 22 Dicta 154 (1945).

Section (h)(1) of this rule makes it expressly clear that if a party makes a motion under section (b) of this rule, and in doing so omits the defense of lack of jurisdiction over the person or insufficiency of process, and such defenses were available to him at the time the motion was made, then the omitted defenses are waived, and the defendant may not raise them by subsequent motion or in his answer. Bd. of County Comm'rs v. District Court, 172 Colo. 311, 472 P.2d 128 (1970).

The supreme court will not consider waived defenses in an original proceeding. The supreme court will not subvert the theory underlying section (b) of this rule and the clear language of sections (g) and (h)(1) of this rule by considering the matter of defenses in an original proceeding for writ of prohibition when those defenses were clearly waived. Bd. of County Comm'rs v. District Court, 172 Colo. 311, 472 P.2d 128 (1970).

A trial judge did not grant relief from the waiver imposed by this rule, in denying a motion under section (b) of this rule by granting 20 days "to answer or otherwise plead", as this language cannot be stretched into permission to file another motion under section (b) of this rule, since such a motion is not a pleading. Bd. of County Comm'rs v. District Court, 172 Colo. 311, 472 P.2d 128 (1970).

A party may, by its actions, waive the court's lack of in personam jurisdiction, and, even when jurisdiction over the person is raised as an issue, it must be preserved and brought to the attention of the trial court at a reasonable time. Nations Enters., Inc. v. Process Equip. Co., 40 Colo. App. 390, 579 P.2d 655 (1978).

Subsection (h)(2) of this rule cannot be interpreted to mean that a party with the necessary information to make a motion for joinder of an indispensable party at his disposal can sit back and raise it at any point in the proceedings, when the only effect of the motion under the circumstances would be to protect himself and not the person alleged to be indispensable. Such an interpretation would violate the direction of C.R.C.P. 1, that the rules shall be liberally construed to secure the just, speedy, and inexpensive determination of every action. Greco v. Pullara, 166 Colo. 465, 444 P.2d 383 (1968).

The question of jurisdiction may be raised at any stage of an action, and that, too, without an assignment of error on the subject. Peaker v. Southeastern Colo. Water Conservancy Dist., 174 Colo. 210, 483 P.2d 232 (1971).

Failure to raise subject matter jurisdiction objection in court in which action is filed does not waive right to raise the objection in court to which action is transferred. Luebke v. Luebke, 143 P.3d 1088 (Colo. App. 2006).

Defenses and objections not presented as required by the rules of civil procedure are

deemed waived. Maxly v. Jefferson County Sch. Dist. No. R-1, 158 Colo. 583, 408 P.2d 970 (1965).

Under C.R.C.P. 8(c) and section (h) of this rule, a party waives all defenses and objections which he does not present in his answer. Duke v. Pickett, 168 Colo. 215, 451 P.2d 288 (1969).

Laches and waiver must be affirmatively set forth in the answer under C.R.C.P. 8(c) and section (h) of this rule. Duke v. Pickett, 168 Colo. 215, 451 P.2d 288 (1969).

Failure of consideration is an affirmative defense which, if not pleaded, is waived under C.R.C.P. 8(c) and section (h) of this rule. Bernklau v. Stevens, 150 Colo. 187, 371 P.2d 765 (1962).

An affirmative defense cannot be urged for the first time on appeal. Where such a defense is neither pleaded nor raised at any stage of the proceedings in the trial court, it cannot be urged for the first time on appeal. Bernklau v. Stevens, 150 Colo. 187, 371 P.2d 765 (1962); Davis v. Gourdin, 831 P.2d 497 (Colo. App. (1992).

A motion to dismiss which has been previously denied can be renewed before the same judge, and there is no good reason for adopting a contrary view merely because the case is transferred to another judge. Denver Elec. & Neon Serv. Corp. v. Gerald H. Phipps, Inc., 143 Colo. 530, 354 P.2d 618 (1960).

Where a court does not have jurisdiction, the remedy is not change of venue but rather dismissal of the action. Larrick v. District Court, 177 Colo. 237, 493 P.2d 647 (1972).

IX. FORM OF JUDGMENT.

Findings of fact and conclusions of law are not required when ruling on a motion under this rule or under C.R.C.P. 56. United Bank of Denver v. Ferris, 847 P.2d 146 (Colo. App. 1992).

Findings of fact and conclusions of law are unnecessary on decisions under the rule, except those granting involuntary dismissal pursuant to C.R.C.P. 41(b) for failure to prosecute with diligence. Henderson v. Romer, 910 P.2d 48 (Colo. App. 1995).

Rule 13. Counterclaim and Cross Claim

(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of filing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if:

(1) At the time the action was commenced the claim was the subject of another pending action, or

(2) The opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

(b) Permissive Counterclaim. A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(c) Counterclaim Exceeding Opposing Claim. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

(d) [There is no section (d).]

(e) Counterclaim Maturing or Acquired After Pleading. A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

(f) Omitted Counterclaim. When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.

(g) Cross Claim Against Coparty. A pleading may state as a cross claim any claim by one party against a coparty arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross claim may include a claim that the party against whom it is asserted is or may be liable to the cross claimant for all or part of a claim asserted in the action against the cross claimant.

(h) Joinder of Additional Parties. Persons other than those made parties to the original action may be made parties to a counterclaim or cross claim in accordance with the provisions of Rules 19 and 20.

(i) Separate Trials; Separate Judgments. If the court orders separate trials as provided in Rule 42 (b), judgment on a counterclaim or cross claim may be rendered in accordance with the terms of Rule 54 (b) when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.

(j) Claims Against Assignee. Except as otherwise provided by law as to negotiable instruments, any claim, counterclaim, or cross claim which could have been asserted against an assignor at the time of or before notice of an assignment, may be asserted against his assignee, to the extent that such claim, counterclaim, or cross claim does not exceed recovery upon the claim of the assignee.

(k) Claims Against Personal Representative. The death of a person shall not prejudice the rights of a third person to assert a claim, cross claim, or counterclaim surviving death against the personal representative of the deceased in the time and manner provided by law.

(l) Superior Courts. Repealed May 30, 1991, effective July 1, 1991.

Cross references: For application of this rule to replevin actions, see C.R.C.P. 104(p); for claimant having same rights and remedies as a plaintiff where a counterclaim or cross claim is filed, see C.R.C.P. 110(d); for claims for relief, see C.R.C.P. 8(a); for pleadings allowed, see C.R.C.P. 7(a); for joinder of persons needed for just adjudication, see C.R.C.P. 19; for permissive joinder of parties, see C.R.C.P. 20; for jurisdiction of various courts, see title 13, C.R.S.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, "Notes on Proposed Amendments to Colorado Rules of Civil Procedure", see 27 Dicta 165 (1950). For article, "Amendments to the Colorado Rules of Civil Procedure", see 28 Dicta 242 (1951). For article, "Pleadings, Rules 7 to 25", see 28 Dicta 368 (1951). For article, "Pleadings and Motions: Rules 7-16", see 23 Rocky Mt. L. Rev. 542 (1951). For article, "Forms Committee Presents Standard Pleading Samples to Be Used in Divorce Litigation", see 29 Dicta 94 (1952). For article, "Plaintiff's Advantageous Use of Discovery, Pretrial and Summary Judgment", see 40 Den. L. Ctr. J. 192 (1963). For note, "One Year Review of Colorado Law — 1964", see 42 Den. L. Ctr. J. 140 (1965). For article, "Joinder of Claims and Counterclaims in Cases Under the Uniform Dissolution of Marriage Act", see 15 Colo. Law. 1818 (1986).

A counterclaim is a claim presented by a defendant in opposition to or deduction from the claim of the plaintiff. Transport Clearings of Colo., Inc. v. Linstedt, 151 Colo. 166, 376 P.2d 518 (1962).

A counterclaim is a species of setoff or recoupment of a broad and liberal character. Transport Clearings of Colo., Inc. v. Linstedt, 151 Colo. 166, 376 P.2d 518 (1962).

One who seeks relief by cross-bill or counterclaim and actively presses his claim thereby invokes the court's jurisdiction in the case so that he cannot thereafter question the authority of the court to pass upon all questions raised between himself and his adversary. T.L. Smith Co. v. District Court, 163 Colo. 444, 431 P.2d 454 (1967).

One may not claim that he was present only for the limited objectives of his answer and counterclaim. T.L. Smith Co. v. District Court, 163 Colo. 444, 431 P.2d 454 (1967).

There is nothing inherently improper about asserting a counterclaim in a reply to a counterclaim. T.L. Smith Co. v. District Court, 163 Colo. 444, 431 P.2d 454 (1967).

The rules of civil procedure specifically authorize the inclusion of counterclaims in replies to counterclaims, and the analogous federal rules have been so interpreted by the federal courts. T.L. Smith Co. v. District Court, 163 Colo. 444, 431 P.2d 454 (1967).

This rule applies in a court foreclosure action. There is no reason why the rules applicable to responsive pleadings and counterclaims should not apply to court foreclosures as they do to any other civil action not specifically exempted. Torbit v. Griffith, 37 Colo. App. 460, 550 P.2d 350 (1976).

II. COMPULSORY.

Law reviews. For note, "Pleading a Claim Barred by Statute of Limitations by Way of Recoupment", see 7 Rocky Mt. L. Rev. 204 (1935). For article, "Elmer Lumpkin Pinch-Hits

for the Judge on Rule 14", see 19 Dicta 250 (1942). For article, "Comments on the Rules of Civil Procedure", see 22 Dicta 154 (1945).

The purpose of subsection (a) is to prevent a multiplicity of lawsuits arising from one set of circumstances, and a party who fails to plead a compulsory counterclaim is barred from raising the claim in a later action against a person who was a plaintiff or in privity with a plaintiff in the prior action. Grynberg v. Phillips, 148 P.3d 446 (Colo. App. 2006); Allen v. Martin, 203 P.3d 546 (Colo. App. 2008).

An appellate court reviews de novo a trial court's determination that a claim is a compulsory counterclaim. Grynberg v. Phillips, 148 P.3d 446 (Colo. App. 2006); Allen v. Martin, 203 P.3d 546 (Colo. App. 2008).

A "setoff" is embraced in the term "counterclaim". First Nat'l Bank v. Lewis, 57 Colo. 124, 139 P. 1102 (1914) (decided under § 63 of the former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941).

A setoff arising from the same subject matter or occurrence as plaintiff's claim is a compulsory counterclaim which must be affirmatively pleaded. Corbin Douglass, Inc. v. Kelley, 28 Colo. App. 369, 472 P.2d 764 (1970); Grynberg v. Rocky Mountain Natural Gas, 809 P.2d 1091 (Colo. App. 1991).

Counterclaims arising out of events unrelated to the event in the complaint are not compulsory counterclaims. Bohlender v. Oster, 165 Colo. 164, 439 P.2d 999 (1968).

A counterclaim arises out of the same transaction or occurrence as an initial claim if the subject matter of the counterclaim is logically related to the subject matter of the initial claim. Allen v. Martin, 203 P.3d 546 (Colo. App. 2008).

Under this rule the best test of a compulsory counterclaim inquires into the logical relationship between the opposing claims. Visual Factor, Inc. v. Sinclair, 166 Colo. 22, 441 P.2d 643 (1968); Sladek v. dePlomb, 981 F. Supp. 1364 (D. Colo. 1997); In re Estate of Krotiuk, 12 P.3d 302 (Colo. App. 2000).

The logical relationship test inquires, "Is there any logical relation between the claim and the counterclaim?" McCabe v. United Bank, 657 P.2d 976 (Colo. App. 1982).

A counterclaim is "logically" related to the opposing party's claim where separate trials on each of their respective claims would involve a substantial duplication of effort and time by the parties and the courts. Beathune v. Cain, 30 Colo. App. 321, 494 P.2d 603 (1971).

A logical relationship exists when the counterclaim arises from the same "aggregate of operative facts" as the opposing party's claim. McCabe v. United Bank, 657 P.2d 976 (Colo. App. 1982).

Any claim that a party might have against an opposing party which is logically related to the claim brought by the opposing party and which is not within the exceptions stated in the pertinent rule is a compulsory counterclaim. Visual Factor, Inc. v. Sinclair, 166 Colo. 22, 441 P.2d 643 (1968); Beathune v. Cain, 30 Colo. App. 321, 494 P.2d 603 (1971).

A legal malpractice claim is a compulsory counterclaim in an action to collect attorney fees if the malpractice claim arises from the same representation as the collection action. Allen v. Martin, 203 P.3d 546 (Colo. App. 2008).

Even though the evidence needed to establish the opposing claims may differ. A counterclaim may be compulsory where it arises from the same events even though the evidence needed to establish the opposing claims may be quite different. Visual Factor, Inc. v. Sinclair, 166 Colo. 22, 441 P.2d 643 (1968); Grynberg v. Rocky Mountain Natural Gas, 809 P.2d 1091 (Colo. App. 1991); Sladek v. dePlomb, 981 F. Supp. 1364 (D. Colo. 1997).

Where a compulsory counterclaim is not raised in the pleadings or otherwise put into issue, the trial court is precluded from rendering a finding on the matter. Corbin Douglass, Inc. v. Kelley, 28 Colo. App. 369, 472 P.2d 764 (1970).

The failure to assert a compulsory counterclaim bars the assertion of such claim in a subsequent action. Beathune v. Cain, 30 Colo. App. 321, 494 P.2d 603 (1971); Wood v. Jensen, 41 Colo. App. 301, 585 P.2d 309 (1978); Sladek v. dePlomb, 981 F. Supp. 1364 (D. Colo. 1997); In re Estate of Krotiuk, 12 P.3d 302 (Colo. App. 2000).

The purpose of the rule is to avoid multiple lawsuits between the parties to a transaction or occurrence. In re Estate of Krotiuk, 12 P.3d 302 (Colo. App. 2000).

A trial court does not err in granting a motion for summary judgment on the ground that the claim made in the case is compulsory counterclaim which should have been raised in another action and is therefore barred. Visual Factor, Inc. v. Sinclair, 166 Colo. 22, 441 P.2d 643 (1968).

The effect of a voluntary dismissal of a compulsory counterclaim is similar to the failure to file such a claim. The purpose of this rule is to require parties to present all of their existing claims simultaneously to the court or to be forever barred. Therefore, the trial court did not err in ruling that appellant's voluntary dismissal of a compulsory counterclaim in a previous action precluded litigation of that claim in a subsequent case. Grynberg v. Phillips, 148 P.3d 446 (Colo. App. 2006).

A divorce action subsequent to one for separate maintenance is not barred by this rule as a compulsory counterclaim which should have been asserted in the earlier complaint for separate maintenance, inasmuch as C.R.C.P.

81(b) provides that the rules of civil procedure do not govern procedure and practice in actions in divorce or separate maintenance where they may conflict with the procedure and practice provided by the applicable statutes; provided that a decree granting separate maintenance shall not bar either party from "subsequently" bringing and maintaining an action for divorce. Moats v. Moats, 168 Colo. 120, 450 P.2d 64 (1969).

No trial by jury on issues raised by counterclaim. Defendants whose counterclaim raises issues which would properly be matters for jury trial in a separate action are not entitled to a jury trial under C.R.C.P. 38 where plaintiff's action invokes the equity arm of the court, since the character of the action is thereby determined. Miller v. District Court, 154 Colo. 125, 388 P.2d 763 (1964).

Express exception to compulsory counterclaim rule applies where claim has not matured at the time of the pleading, even if it arises from the same transaction or occurrence. In re Estate of Krotiuk, 12 P.3d 302 (Colo. App. 2000); Stone v. Dept. of Aviation, 453 F.3d 1271 (10th Cir. 2006); Allen v. Martin, 203 P.3d 546 (Colo. App. 2008).

If there is no controlling Colorado authority construing the language of C.R.C.P. 13, courts may look to federal precedent construing the almost identical F.R.C.P. 13 for guidance. In re Estate of Krotiuk, 12 P.3d 302 (Colo. App. 2000); Allen v. Martin, 203 P.3d 546 (Colo. App. 2008).

Here, claimant's claim for payment matured at the time he was required to file his answer, and was therefore a compulsory counterclaim in 1991 action. Accordingly, claim should have been raised in the 1991 action, and trial court properly dismissed it and granted summary judgment on that basis. This holding is consistent with the purpose of the compulsory counterclaim rule, i.e., promoting justice by avoiding multiple lawsuits between the parties to a transaction or occurrence. In re Estate of Krotiuk, 12 P.3d 302 (Colo. App. 2000).

A counterclaim that is contingent has not matured for purposes of subsection (a). Allen v. Martin, 203 P.3d 546 (Colo. App. 2008).

The maturity of a noncontingent counterclaim should be measured by the discovery rule, and under the rule a claim matures when the claimant knew or reasonably should have known of the general facts underlying the claim. Allen v. Martin, 203 P.3d 546 (Colo. App. 2008).

Buyer's claim under § 38-35-126 (3) to void installment land contract was an affirmative defense and compulsory counterclaim. As such, defense and claim should have been asserted in buyer's responsive pleading (or amended responsive pleading) or they are waived. Buyer's claim arose out of and related directly to the same contract claim seller sought to enforce against buyer. Buyer's claim was related to seller's claim and, therefore, was a compulsory counterclaim. Dinosaur Park Invs., L.L.C. v. Tello, 192 P.3d 513 (Colo. App. 2008).

Applied in Smith v. Hoyer, 697 P.2d 761 (Colo. App. 1984); Allen v. Martin, 203 P.3d 546 (Colo. App. 2008).

III. PERMISSIVE.

Law reviews. For article, "A Victim of 'Permissive Counterclaims'", see 18 Dicta 83 (1941).

A counterclaim is a "permissive" counterclaim when it does not arise out of the same transaction or occurrence as the original cause of action, and is a separate and distinct claim. T.L. Smith v. District Court, 163 Colo. 444, 431 P.2d 454 (1967).

A claim is not a permissive counterclaim within this rule where the claims arise out of the same transaction. Visual Factor, Inc. v. Sinclair, 166 Colo. 22, 441 P.2d 643 (1968).

A court does not abuse its discretion in declining to consider as permissive counterclaims those counterclaims based on events taking place substantially prior to and unrelated to the event on which the complaint is based. Bohlender v. Oster, 165 Colo. 164, 439 P.2d 999 (1968).

Claim held not to be permissive counterclaim. Visual Factor, Inc. v. Sinclair, 166 Colo. 22, 441 P.2d 643 (1968).

IV. OMITTED.

Compulsory counterclaim which ripens after commencement of action should be allowed in amended pleadings. Bobrick v. Sanderson, 164 Colo. 46, 432 P.2d 242 (1967).

V. CROSS CLAIM.

Law reviews. For article, "Comments on the Rules of Civil Procedure", see 22 Dicta 154 (1945).

This rule provides that the cross claims against coparties may also include a claim that the coparty may be liable to the cross claimant for all or part of the claim asserted in the action against the cross claimant. City of Westminster v. Phillips-Carter-Osborn, Inc., 164 Colo. 378, 435 P.2d 240 (1967).

The wording of this rule is clearly permissive, not compulsory. T.L. Smith Co. v. District Court, 163 Colo. 444, 431 P.2d 454 (1967).

VI. JOINDER OF ADDITIONAL PARTIES.

Annotator's note. Since section (h) of this rule is similar to § 16 of the former Code of

Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Public policy and reason, as well as equity, required that all matters pertaining to the transaction should be adjudicated at the same time. Strang v. Murphy, 1 Colo. App. 357, 29 P. 298 (1871).

The law encourages the determination of all controversies in one action by bringing the either necessary or proper parties. Pollard v. Lathrop, 12 Colo. 171, 20 P. 251 (1888); Haldane v. Potter, 94 Colo. 558, 31 P.2d 709 (1934).

With equal discrimination, the law disapproves of bringing in parties whose presence is neither necessary nor proper. Russell v. Cripple Creek State Bank, 71 Colo. 238, 206 P. 160 (1922); Howard v. Fisher, 86 Colo. 493, 283 P. 1042 (1929); Haldane v. Potter, 94 Colo. 558, 31 P.2d 709 (1934); Tolland Co. v. First State Bank, 95 Colo. 321, 35 P.2d 867 (1934).

Jurisdiction of the subject matter is conferred by law. Davis v. Davis, 70 Colo. 37, 197 P. 241 (1921).

Jurisdiction exists even before a suit is begun. Conroy v. Cover, 80 Colo. 434, 252 P. 883 (1926).

Jurisdiction is not affected by the omission of a party. Conroy v. Cover, 80 Colo. 434, 252 P. 883 (1926).

The court is required to order an indispensable party to be brought in. Day v. McPhee, 41 Colo. 467, 93 P. 670 (1907); Conroy v. Cover, 80 Colo. 434, 252 P. 883 (1926).

This rule authorizes the joinder of parties necessary to the granting of complete relief in the determination of a counterclaim or cross claim, even though their presence is not indispensable to such determination. City of Westminster v. Phillips-Carter-Osborn, Inc., 164 Colo. 378, 435 P.2d 240 (1967).

All who are interested in the subject matter of an action should be made parties thereto, so that complete justice might be done and the rights of all parties in the subject matter of controversy finally determined. Denison v. Jerome, 43 Colo. 456, 96 P. 166 (1908); Buckhorn Plaster Co. v. Consolidated Plaster Co., 47 Colo. 516, 108 P. 27 (1910).

It is an everyday matter on trial to admit a new plaintiff when he appears to have an interest in the case. Dickson v. Retallic, 80 Colo. 78, 249 P. 2 (1926).

Waiver of right shall include other interested parties. Where, for the purpose of a complete determination of all the rights involved, others should have been made parties defendant by virtue of this rule, the failure to do so could not be considered because appellants by answering over, after demurrer on the ground of defect of parties, waived the right to raise the question on appeal. Zang v. Wyant, 25 Colo. 551, 56 P. 565 (1898).

This matter is not applicable where the court could not proceed to judgment without the presence of others who were not parties to the proceedings. McLean v. Farmers' Highline Canal & Reservoir Co., 44 Colo. 184, 98 P. 16 (1908). See Denison v. Jerome, 43 Colo. 456, 96 P. 166 (1908).

Where the defendant wishes to assert a claim against a codefendant and a third party, the correct procedure is to file a cross claim, combined with a motion under section (h) of this rule, to bring in the third party as an additional defendant on the cross claim. City of Westminster v. Phillips-Carter-Osborn, Inc., 164 Colo. 378, 435 P.2d 240 (1967).

A similar combination of a counterclaim and a motion under section (h) of this rule is appropriate where the claim is against the original plaintiff and a third party. City of Westminster v. Phillips-Carter-Osborn, Inc., 164 Colo. 378, 435 P.2d 240 (1967).

VII. CLAIMS AGAINST ASSIGNEE.

Annotator's note. Since section (j) of this rule is similar to § 4 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

An assignee takes no greater right than the assignor had to convey, and his rights and remedies are those of the assignor. Howard v. Fisher, 86 Colo. 493, 283 P. 1042 (1929).

Valid existing defenses may be interposed. Howard v. Fisher, 86 Colo. 493, 283 P. 1042 (1929).

Setoff against an original payee is allowed in a suit upon a promissory note by an assignee, taking it after due. First Nat'l Bank v. Lewis, 57 Colo. 124, 139 P. 1102 (1914).

Irrespective of the number of assignments, the language of this rule is as broad as it could well have been, so that a note assigned after it was due a half dozen times would be subject to any setoff or other defense that the maker had against any one or all of the assignees at the date of assignment, or before notice thereof. First Nat'l Bank v. Lewis, 57 Colo. 124, 139 P. 1102 (1914).

Owner entitled to credit only up to the amount of assignee's claim. The owner of a house was entitled to credit against building contractor's assignee for assignor's liabilities at time of assignment up to amount of assignee's claim. Jones v. Panak, 84 Colo. 62, 268 P. 535 (1928).

Applied in Jackson v. Hamm, 14 Colo. 58, 23 P. 88 (1890).

VIII. CLAIMS AGAINST PERSONAL REPRESENTATIVE.

For cases construing § 64 of the former Code of Civil Procedure from which section (k) of this rule was derived, see Rathvon v. White, 16 Colo. 41, 26 P. 323 (1891); Inland Box & Label Co. v. Richie, 57 Colo. 532, 143 P. 581 (1914).

Rule 14. Third-Party Practice

(a) When Defendant May Bring in Third Party. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than 14 days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third party plaintiff's claim as provided in Rule 12 and his counterclaim against the third-party plaintiff and cross claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaim and cross claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this Rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant.

(b) When Plaintiff May Bring in Third Party. When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this Rule would entitle a defendant to do so.

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

Cross references: For claimant having same rights and remedies as a plaintiff where a third-party claim is filed, see C.R.C.P. 110(d); for presentation of defenses, see C.R.C.P. 12; for counterclaims and cross claims, see C.R.C.P. 13; for amended and supplemental pleadings, see C.R.C.P. 15; for separate trials, see C.R.C.P. 42.

ANNOTATION

I. General Consideration.
II. When Defendant May Bring In.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Elmer Lumpkin Pinch-Hits for the Judge on Rule 14", see 19 Dicta 250 (1942). For article, "Comments on the Rules of Civil Procedure", see 22 Dicta 154 (1945). For article, "Direct Action Against the Liability Insurer Under the Rules of Civil Procedure", see 22 Dicta 314 (1945). For article, "Notes on Proposed Amendments to Colorado Rules of Civil Procedure", see 27 Dicta 165 (1950). For article, "Amendments to the Colorado Rules of Civil Procedure", see 28 Dicta 242 (1951). For article, "Pleadings, Rules 7 to 25", see 28 Dicta 368 (1951). For article, "Pleadings and Motions: Rules 7-16", see 23 Rocky Mt. L. Rev. 542 (1951). For article, "One Year Review of Civil Procedure", see 35 Dicta 3 (1958). For article, "Impleader Under Rule 14(a): Will the Practice in Colorado Ever Catch up to the Theory?", see 17 Colo. Law. 635 (1988).

The provisions of this rule control "third-party" procedure and practice. Susman v. District Court, 160 Colo. 475, 418 P.2d 181 (1966).

This rule permitting third-party impleader is intended to liberalize and simplify procedure. Ashford v. Burnham Aviation Serv., Inc.,

162 Colo. 582, 427 P.2d 875 (1967).

The purpose of this rule is to reduce litigation by having one lawsuit do the work of two. Ashford v. Burnham Aviation Serv., Inc., 162 Colo. 582, 427 P.2d 875 (1967).

The purpose of this rule is to settle as many conflicting interests as possible in one proceeding and thus avoid circuity of action, save time, and expense, as well as eliminate a serious handicap to the defendant of a time difference between the judgment against him and a judgment in his favor against the third-party defendant. Pioneer Mut. Comp. Co. v. Cosby, 125 Colo. 468, 244 P.2d 1089 (1952); Pub. Serv. Co. v. District Court, 638 P.2d 772 (Colo. 1981).

The object of this rule is to facilitate litigation, to save costs, to bring all of the litigants into one proceeding, and to dispose of an entire matter without the expense and the labor of many suits and many trials. Pioneer Mut. Comp. Co. v. Cosby, 125 Colo. 468, 244 P.2d 1089 (1952).

This rule was promulgated not only for the purpose of serving litigants but as a wise exposition of public policy. Pioneer Mut. Comp. Co. v. Cosby, 125 Colo. 468, 244 P.2d 1089 (1952).

The underlying purpose of this rule is to consolidate suits that should be tried together in the interest of saving the time of the courts, parties, and witnesses and avoiding unnecessary expense. Arms Roofing Co. v. Petrie, 136 Colo. 154, 314 P.2d 903 (1957).

Purposes of rule must be balanced against prejudice. The purposes of this rule — including avoiding circuity of actions and inconsistent result — must be balanced against any prejudice the impleaded party or the original plaintiff might suffer in having the matter resolved in the same suit rather than in a separate suit brought by the original defendant. United Bank of Denver Nat'l Ass'n v. Shavlik, 189 Colo. 280, 541 P.2d 317 (1975).

This rule is not intended to be used as a means of trying two separate and distinct causes of action in the same proceeding. Arms Roofing Co. v. Petrie, 136 Colo. 154, 314 P.2d 903 (1957).

Denial of a motion, made on the day of trial, for leave to file third-party complaints is not an abuse of discretion, for the reasons that the motion is not timely made and, if granted, would result in further delay. Harris Park Lakeshore, Inc. v. Church, 152 Colo. 278, 381 P.2d 459 (1963).

Court may dismiss or deny leave to file complaint. The court may properly deny leave to file a third-party complaint, or may dismiss a third-party complaint which has been timely filed, if the claim for liability by the defendant against the third party is doubtful or if the introduction of the third-party claim would unduly complicate the case to the prejudice of the plaintiff. Pub. Serv. Co. v. District Court, 638 P.2d 772 (Colo. 1981).

Applied in Naiman v. Warren A. Flickinger & Assocs., 43 Colo. App. 279, 605 P.2d 63 (1979).

II. WHEN DEFENDANT MAY BRING IN.

Law reviews. For article, "Form of Third-Party Summons Modified by Colorado Supreme Court", see 32 Dicta 230 (1955).

This rule is almost identical to F.R.C.P. 14(a). Arms Roofing Co. v. Petrie, 136 Colo. 154, 314 P.2d 903 (1957).

Third-party proceedings provide for a method whereby a party made a defendant in a law suit brought against it by a plaintiff may bring into court a party who would be liable for the claim being asserted by the plaintiff. Packaging Corp. of Am. v. Indus. Comm'n, 173 Colo. 212, 477 P.2d 367 (1970).

It is a suit to substitute a third party for the claim being brought by the plaintiff. Packaging Corp. of Am. v. Indus. Comm'n, 173 Colo. 212, 477 P.2d 367 (1970).

Third-party practice, and particularly the practice provided for in this rule, is procedural. Pioneer Mut. Comp. Co. v. Cosby, 125 Colo. 468, 244 P.2d 1089 (1952).

This rule does not abridge, enlarge, or modify the substantive rights of any litigant. Pioneer Mut. Comp. Co. v. Cosby, 125 Colo. 468, 244 P.2d 1089 (1952).

It creates no substantive rights. Pioneer Mut. Comp. Co. v. Cosby, 125 Colo. 468, 244 P.2d 1089 (1952); Pub. Serv. Co. v. District Court, 638 P.2d 772 (Colo. 1981).

Unless there is some substantive basis for the third-party plaintiff's claim, he cannot utilize the procedure of this rule. Pioneer Mut. Comp. Co. v. Cosby, 125 Colo. 468, 244 P.2d 1089 (1952).

The third-party plaintiff must assert a substantive basis upon which the third party may be held liable to it for all or part of the plaintiff's claim. Pub. Serv. Co. v. District Court, 638 P.2d 772 (Colo. 1981).

This rule does not establish a right of reimbursement, indemnity, or contribution. Pioneer Mut. Comp. Co. v. Cosby, 125 Colo. 468, 244 P.2d 1089 (1952).

Where there is a basis for such right, this rule expedites the presentation and in some cases accelerates the accrual, of such right. Pioneer Mut. Comp. Co. v. Cosby, 125 Colo. 468, 244 P.2d 1089 (1952).

Granting leave to interplead a third-party defendant is a matter of judicial discretion, but only up to the point where facts exist upon which this rule was intended to operate. Arms Roofing Co. v. Petrie, 136 Colo. 154, 314 P.2d 903 (1957).

Discretion of the court in determining whether to grant or deny a motion to interplead a third party is limited to those cases where a finding is made that the third party may be liable to the original defendant for all or part of a plaintiff's claim. Arms Roofing Co. v. Petrie, 136 Colo. 154, 314 P.2d 903 (1957).

The test to determine when a third-party defendant may be impleaded under this rule is whether the third party "is or may be liable to [the defendant] for all or part of the plaintiff's claim against [the defendant]". Pub. Serv. Co. v. District Court, 638 P.2d 772 (Colo. 1981); Weston v. Mincomp. Corp., 698 P.2d 274 (Colo. App. 1985).

This rule does not permit impleading when there are separate and independent controversies between a defendant and his desired third-party defendant. Arms Roofing Co. v. Petrie, 136 Colo. 154, 314 P.2d 903 (1957).

The cases in which impleading a third-party defendant has been allowed have been cases where the third-party is liable as a guarantor, surety, insurer, or indemnifier of the principal defendant, and those in which the third-party defendant may be liable for causing the damage to the plaintiff, it being a factual question which of two people is responsible for a given injury. Arms Roofing Co. v. Petrie, 136 Colo. 154, 314 P.2d 903 (1957).

Pleadings are subsidiary and serve the ends of justice by giving notice of the issues to be litigated. Ashford v. Burnham Aviation Serv., Inc., 162 Colo. 582, 427 P.2d 875 (1967).

There is no jurisdiction over third-party defendants where rule is not complied with. Where it appears that provisions of section (a) of this rule and C.R.C.P. 4(c) concerning the essential content of summons have not been complied with, the trial court has no jurisdiction over third-party defendants, and a special appearance and motion to quash filed on behalf of them should be sustained. Susman v. District Court, 160 Colo. 475, 418 P.2d 181 (1966).

It is not necessary for plaintiff to amend his complaint to include third-party defendant. It was not essential to the validity of the judgment entered against the third-party defendant that the original plaintiff should have formally entered an amendment to his complaint to include a claim against him. Ashford v. Burnham Aviation Serv., Inc., 162 Colo. 582, 427 P.2d 875 (1967).

Where the third-party defendant not only answered the third-party complaint, but in a separate pleading undertook to answer the original complaint categorically and asserted all of the defenses he could have asserted had the plaintiff amended his complaint and alleged a claim against the third party, such an answer amounts to a waiver of amendment. Ashford v. Burnham Aviation Serv., Inc., 162 Colo. 582, 427 P.2d 875 (1967).

Where the parties litigated the issues between them just as if there had been actual notice through an amendment to the complaint stating in terms the plaintiff's claim against the third-party defendant, an amendment including the third-party defendant in the original complaint was unnecessary. Ashford v. Burnham Aviation Serv., Inc., 162 Colo. 582, 427 P.2d 875 (1967).

Retrial on third-party complaint concerning indemnity does not require retrial of original complaint. Where defendant's liability to plaintiff has been properly determined but defendant's third-party complaint was erroneously dismissed, retrial of issues under the third-party complaint does not entitle defendant to a contemporaneous retrial of the issues between himself and the plaintiff under the original complaint where the matter of the third-party complaint is one of indemnity and not that of a joint tort-feasor. Jacobson v. Dahlberg, 171 Colo. 42, 464 P.2d 298 (1970).

Leave to file third-party complaint denied. The court did not abuse its discretion in denying leave to file a third-party complaint when the third-party claims may have unduly complicated the case to the prejudice of the plaintiffs, and the third-party claims would be better handled in a separate action. Elijah v. Fender, 674 P.2d 946 (Colo. 1984).

Even though defendant may assert claim against third party who may be liable to defendant for all or part of plaintiff's claim, he may not file separate and independent claims against the third party. Martinez v. Denver Transformer Sales, 780 P.2d 49 (Colo. App. 1989).

Principal may join agent. A principal being sued by a third party for the negligent act of his agent is entitled to join the agent as a party to the suit. Schledewitz v. Consumer's Oil Co-op., Inc., 144 Colo. 518, 357 P.2d 63 (1960).

Parent may join his child who caused auto accident for contribution. Since liability of automobile owner for accident caused by his minor offspring is based upon the family purpose doctrine, where liability is predicated on a principal-agent or master-servant theory, and not wrongdoing on the part of the parent himself where there would be no contribution between joint tort-feasors, it is permissible for a parent to join his child in order to recover from him the damages for which the parent is held liable, and therefore it is error to dismiss a parent's fourth-party claim which demands that the liability, if any, be made a joint one with contribution to be ordered. Schledewitz v. Consumer's Oil Co-op., Inc., 144 Colo. 518, 357 P.2d 63 (1960).

If an insurance company has by its policy agreed to insure against liability on the part of a defendant, then a third-party procedure is justified and the third-party plaintiffs are

only seeking to compel the insurance company to do that which it contracted to do. Pioneer Mut. Comp. Co. v. Cosby, 125 Colo. 468, 244 P.2d 1089 (1952).

If the policy were one of indemnity rather than of liability, then this procedure would not be applicable, the insurer not being liable until an actual loss is sustained. Pioneer Mut. Comp. Co. v. Cosby, 125 Colo. 468, 244 P.2d 1089 (1952).

Where an employee asserts his own claim against the state compensation insurance fund, third-party proceedings are not provided in section (a) of this rule for such a claim. Packaging Corp. of Am. v. Indus. Comm'n, 173 Colo. 212, 477 P.2d 367 (1970).

An employer cannot maintain a third-party action against industrial commission regardless of whether former employee, who brought common-law tort action against the employer for injuries sustained in an altercation with another employee in connection with his discharge from employment, was an employee at time of the altercation. Packaging Corp. of Am. v. Indus. Comm'n, 173 Colo. 212, 477 P.2d 367 (1970) (decided prior to abolition of industrial commission).

An employer's claim against the state compensation insurance fund for attorney fees is not properly a third-party claim under Rule 14(a), C.R.C.P., so dismissal without prejudice of the employer's third-party action against industrial commission would not bar such employer from bringing a separate suit against the industrial commission for attorney fees if liability therefor should arise. Packaging Corp. of Am. v. Indus. Comm'n, 173 Colo. 212, 477 P.2d 367 (1970) (decided prior to abolition of industrial commission).

The makers of a promissory note when sued by a holder in due course may not file a third-party complaint under this rule against the original payee who transferred the note before maturity without recourse, since a claim for damages by the makers against the original payee is independent and apart from the claim of the holder in due course and cannot affect such holder's right to a judgment against the makers. Arms Roofing Co. v. Petrie, 136 Colo. 154, 314 P.2d 903 (1957).

Applied in Taylor v. Peterson, 133 Colo. 218, 293 P.2d 297 (1956).

Rule 15. Amended and Supplemental Pleadings

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is filed or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it any time within 21 days after it is filed. Otherwise, a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 14 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment: (1) Has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

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

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, "Pleadings, Rules 7 to 25", see 28 Dicta 368 (1951). For article, "Pleadings and Motions: Rules 7-16", see 23 Rocky Mt. L. Rev. 542 (1951). For article, "Pre-Trial Procedure — Should It Be Abolished in Colorado?", see 30 Dicta 371 (1953). For article, "One Year Review of Civil Procedure and Appeals", see 38 Dicta 133 (1961). For note on current developments, "Civil Procedure Application of 'Indispensable Party' Provision of Colo. R. Civ. P. 19 — the 'Procedural Phantom' Still Stalks in Colorado", see 46 U. Colo. L. Rev. 609 (1974-75). For article, "Federal Practice and Procedure", which discusses a recent Tenth Circuit decision dealing with John Doe pleadings, see 62 Den. U. L. Rev. 220 (1985).

When an issue is tried before a court without timely objection or motion, the issue shall be deemed properly before the court despite any defect in the pleading. Butler v. Behaeghe, 37 Colo. App. 282, 548 P.2d 934 (1976).

Amended and supplemental pleadings differ in that the former relate to matters occurring before the filing of the original pleading and entirely replace the original pleading, while the latter concern events subsequent to the original pleading and constitute only additions to the earlier pleading. Eagle River Mobile Home Park v. District Court, 647 P.2d 660 (Colo. 1982).

Applied in Tumbarello v. Byers, 37 Colo. App. 61, 543 P.2d 1278 (1975); Central City Opera House Ass'n v. Brown, 191 Colo. 372, 553 P.2d 64 (1976); People in Interest of A.A.T., 191 Colo. 494, 554 P.2d 302 (1976); Woodruff World Travel, Inc. v. Indus. Comm'n, 38 Colo. App. 92, 554 P.2d 705 (1976); Buena Vista Bank & Trust Co. v. Lee, 191 Colo. 551, 554 P.2d 1109 (1976); Mansfield Dev. Co. v. Centennial Enters., Inc., 38 Colo. App. 36, 554 P.2d 1362 (1976); People in Interest of C.R., 38 Colo. App. 252, 557 P.2d 1225 (1976); Fischer v. District Court, 193 Colo. 24, 561 P.2d 1266 (1977); Robertson v. Bd. of Educ., 39 Colo. App. 462, 570 P.2d 19 (1977); In re Heinzman, 40 Colo. App. 262, 579 P.2d 638 (1977); Shepard v. Wilhelm, 41 Colo. App. 403, 591 P.2d 1039 (1978); In re Heinzman, 198 Colo. 36, 596 P.2d 61 (1979); SaBell's, Inc. v. Flens, 42 Colo. App. 421, 599 P.2d 950 (1979); Fitzgerald v. Edelen, 623 P.2d 418 (Colo. App. 1980); Espinoza v. O'Dell, 633 P.2d 455 (Colo. 1981); In re Rominiecki v. McIntyre Livestock Corp., 633 P.2d 1064 (Colo. 1981); Graefe & Graefe, Inc. v. Beaver Mesa Exploration Co., 635 P.2d 900 (Colo. App. 1981); Concerned Citizens v. Bd. of County Comm'rs, 636 P.2d 1338 (Colo. App. 1981); Turley v. Ball Assocs., 641 P.2d 286 (Colo. App. 1981); Nelson v. Lake Canal Co., 644 P.2d 55 (Colo. App. 1981); King v. W.R. Hall Transp. & Storage Co., 641 P.2d 916 (Colo. 1982); Law Offices of Bernard D. Morley, P.C. v. MacFarlane, 647 P.2d 1215 (Colo. 1982); In re Boyd, 643 P.2d 804 (Colo. App. 1982); Parry v. Walker, 657 P.2d 1000 (Colo. App. 1982); Creditor's Serv., Inc. v. Shaffer, 659 P.2d 694 (Colo. App. 1982); Memorial Gardens, Inc. v. Olympian Sales & Mgt. Consultants, Inc., 661 P.2d 296 (Colo. App. 1982); Isbill Assocs. v. City & County of Denver, 666 P.2d 1117 (Colo. App. 1983); Emrich v. Joyce's Submarine Sandwiches, 751 P.2d 651 (Colo. App. 1987); Harris v. Reg'l Transp. Dist., 155 P.3d 583 (Colo. App. 2006).

II. AMENDMENTS.

A. In General.

Law reviews. For note, "One Year Review of Colorado Law — 1964", see 42 Den. L. Ctr. J. 140 (1965).

Annotator's note. Since section (a) of this rule is similar to §§ 59 and 81 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing those sections have been included in the annotations to this rule.

This rule is clear and unequivocal. Renner v. Chilton, 142 Colo. 454, 351 P.2d 277 (1960).

An amendment is a defensive weapon offered one whose defective pleading is assailed. Lamar Bldg. & Loan Ass'n v. Truax, 95 Colo. 77, 33 P.2d 978 (1934).

No exceptions to these rights to amend are provided. Renner v. Chilton, 142 Colo. 454, 351 P.2d 277 (1960).

Amendment provision of section (a) has no counterpart in county court rules. Abts v. Bd. of Educ., 622 P.2d 518 (Colo. 1980).

Amended pleadings supersede the originals. Handy Ditch Co. v. Greeley & Loveland Irrigation Co., 86 Colo. 197, 280 P. 481 (1929); Kalish v. Brice, 130 Colo. 220, 274 P.2d 600 (1954).

Amended pleadings become the pleadings which defendant is called upon to answer. Kalish v. Brice, 130 Colo. 220, 274 P.2d 600 (1954).

Notice is essence of rule. Spiker v. Hoogeboom, 628 P.2d 177 (Colo. App. 1981).

This rule assumes a service of an amendment on the other party to the action, since, otherwise, that portion of the rule providing that a responsive pleading shall be within 10 days after service of the amended pleading would be meaningless. Myers v. Myers, 110 Colo. 412, 135 P.2d 235 (1943); Holman v. Holman, 114 Colo. 437, 165 P.2d 1015 (1946).

Where plaintiff has been permitted to amend the complaint without notice to the defendant, it is error for the court to deny the latter's motion — interposed before the decree becomes final — to set aside the decree and permit him to answer. Myers v. Myers, 110 Colo. 412, 135 P.2d 235 (1943); Holman v. Holman, 114 Colo. 437, 165 P.2d 1015 (1946).

A defendant brought into the cause by an amended complaint appears generally. Wyoming Nat'l Bank v. Shippey, 23 Colo. App. 225, 130 P. 1021 (1896).

Whether an amended complaint should be stricken rested in the sound discretion of the court. Youngberg v. Orlando Canal & Reservoir Co., 98 Colo. 111, 53 P.2d 651 (1935).

The striking of an amended complaint and dismissal of the action was held not to be an abuse of discretion where no permission to file the amendment was obtained, the stricken amendment was plaintiff's third attempt to make his pleading unobjectionable, and the dismissal was without prejudice. Burson v. Adamson, 87 Colo. 451, 288 P. 623 (1930).

Matter of amendment cannot be raised for first time on appeal. Where no oral or written motion requesting amendment of the written complaint is made by plaintiff at the trial level and the matter of the amendment is not raised in plaintiff's motion for new trial, the plaintiff is therefore precluded from raising this question in the supreme court for the first time. Fladung v. City of Boulder, 165 Colo. 244, 438 P.2d 688 (1968).

Generalized statement that "even if the court were to decide that the complaint lacks some level of specificity, the court should allow the plaintiffs to amend their complaint" was not sufficiently specific to constitute a valid motion for leave to amend the complaint. Kreft v. Adolph Coors Co., 170 P.3d 854 (Colo. App. 2007).

Mere amendment of pleadings cannot accomplish ends which are inconsistent with statutory procedures. Trustees of Mtg. Trust of Am. v. District Court, 621 P.2d 310 (Colo. 1980).

Limitations period in § 38-22-110 applies to joinder of additional parties by amendment. In the ordinary mechanic's lien case, the six-month limitations period set down in § 38-22-110 applies to joinder of additional parties by amendment. Trustees of Mtg. Trust of Am. v. District Court, 621 P.2d 310 (Colo. 1980).

Absence of authorization for amendment in § 22-42-111 reflects section's legislative intent. The absence of authorization for amendment in § 22-42-111 reasonably can be construed to reflect legislative intent that prompt resolution of election disputes must be achieved in order that the machinery of government not be slowed any more than strictly necessary to permit such disputes to be fairly resolved. Abts v. Bd. of Educ., 622 P.2d 518 (Colo. 1980).

Applied in Fischer v. District Court, 193 Colo. 24, 561 P.2d 1266 (1977).

B. Purpose and Object of Amendment.

Amendments to pleadings should be granted in accordance with overriding purposes of rules of civil procedure — to secure the just, speedy, and inexpensive determination of every action. Varner v. District Court, 618 P.2d 1388 (Colo. 1980); Eagle River Mobile Home Park v. District Court, 647 P.2d 660 (Colo. 1982).

Originals not to be treated as sacrosanct. As with most pleadings and writings in the nature of pleadings, the purpose of justice is best served not by treating originals as sacrosanct, but rather by permitting the parties to

ensure that the issues, as ultimately framed, represent the parties' true positions. Brown v. Schumann, 40 Colo. App. 336, 575 P.2d 443 (1978); K-R Funds, Inc. v. Fox, 640 P.2d 257 (Colo. App. 1981); Zavorka v. Union Pacific R. Co., 690 P.2d 1285 (Colo. App. 1984).

Leave to amend shall be freely given when justice so requires. Zertuche v. Montgomery Ward & Co., Inc., 706 P.2d 424 (Colo. App. 1985); Lutz v. District Court, 716 P.2d 129 (Colo. 1986).

Motions to amend should be freely permitted when the interests of justice would be served thereby. In re Estate of Blacher, 857 P.2d 566 (Colo. App. 1993).

Under this rule leave to amend should be freely granted. Platte Valley Motor Co. v. Wagner, 130 Colo. 365, 278 P.2d 870 (1954); Van Schaack v. Phipps, 38 Colo. App. 140, 558 P.2d 581 (1976); H.W. Houston Constr. Co. v. District Court, 632 P.2d 563 (Colo. 1981).

Provision is made in this rule that leave to amend shall be freely given when justice so requires. Lerner v. Stone, 126 Colo. 589, 252 P.2d 533 (1952); Coffman v. Tate, 151 Colo. 533, 379 P.2d 399 (1963).

Section (a) reflects a liberal policy of amendment and encourages trial courts to look favorably on a request to amend. Nelson v. Elway, 971 P.2d 245 (Colo. App. 1998).

Substantial rights should never be sacrificed to mere forms. Sellar v. Clelland, 2 Colo. 532 (1875); Green v. Davis, 67 Colo. 52, 185 P. 369 (1919).

The rationale behind this rule is that a substantial right should never be sacrificed to mere form. Van Schaack v. Phipps, 38 Colo. App. 140, 558 P.2d 581 (1976).

Since the object of this rule is to permit amendments freely with the thought of making disposition of causes expeditious. Patrick v. Crowe, 15 Colo. 543, 25 P. 985 (1890); Seymour v. Fisher, 16 Colo. 188, 27 P. 240 (1891); Saint v. Guerrerio, 17 Colo. 448, 30 P. 335, 31 Am. St. R. 320 (1892); McCracken v. Montezuma Water & Land Co., 25 Colo. App. 280, 137 P. 903 (1914).

Where the effect of an amendment is to interpose a purely legal obstruction to the enforcement of a just demand, the party making the application should be allowed only what the letter of the law gives. People ex rel. Republican Publishing Co. v. Barton, 4 Colo. App. 455, 36 P. 299 (1894).

To allow an amendment without cause shown therefor as required is a violation of this provision. Collins v. Bailey, 22 Colo. App. 149, 125 P. 543 (1912).

After a judgment has been reversed by the supreme court upon appeal and the cause remanded for a new trial, the trial court might permit the pleadings to be amended whenever the ends of justice would be subserved thereby. Horn v. Reitler, 15 Colo. 316, 25 P. 501 (1890).

Rule prescribes liberal policy of amendment and encourages the courts to look favorably on requests to amend. Varner v. District Court, 618 P.2d 1388 (Colo. 1980); Eagle River Mobile Home Park v. District Court, 647 P.2d 660 (Colo. 1982).

The rule emphasizes liberality in its application. Platte Valley Motor Co. v. Wagner, 130 Colo. 365, 278 P.2d 870 (1954).

Amendments at all times should be liberally allowed when they do not lead to surprise or injury. Sellar v. Clelland, 2 Colo. 532 (1875); Green v. Davis, 67 Colo. 52, 185 P. 369 (1919).

Since this rule states no exceptions, contention that claims dismissed for lack of subject matter jurisdiction cannot be amended is rejected. Stuart v. Frederick R. Ross Inv. Co., 773 P.2d 1107 (Colo. App. 1988).

C. When Permitted as a Matter of Right.

This rule permits a party to amend his pleading once as a matter of course at any time before a responsive pleading is filed. Kalish v. Brice, 136 Colo. 179, 315 P.2d 829 (1957); Renner v. Chilton, 142 Colo. 454, 351 P.2d 277 (1960); Fladung v. City of Boulder, 165 Colo. 244, 438 P.2d 688 (1968).

Otherwise, amendments may be made only by leave of court or with consent of the adverse party. Fladung v. City of Boulder, 165 Colo. 244, 438 P.2d 688 (1968).

Party may amend pleading within 20 days if there is no responsive pleading. Renner v. Chilton, 142 Colo. 454, 351 P.2d 277 (1960); Fladung v. City of Boulder, 165 Colo. 244, 438 P.2d 688 (1968).

Where no responsive pleading has been filed in these instances, no final judgment should be entered in the absence of a showing of record that plaintiff waived the right to file an amended complaint and elected to stand upon the allegations of the complaint to which the motion to dismiss was addressed. Passe v. Mitchell, 161 Colo. 501, 423 P.2d 17 (1967).

Where the defendant merely files a motion to dismiss for failure to state a claim without an answer, plaintiff then would be entitled to amend his complaint as a matter of right. Fladung v. City of Boulder, 165 Colo. 244, 438 P.2d 688 (1968).

The court erred in overruling a plaintiff's motion to amend his complaint following an order sustaining a motion to dismiss, since plaintiff is entitled to one such amendment as a matter of right under section (a) of this rule. Renner v. Chilton, 142 Colo. 454, 351 P.2d 277 (1960); Davis v. Paolino, 21 P.3d 870 (Colo.

App. 2001); Grear v. Mulvihill, 207 P.3d 918 (Colo. App. 2009).

The trial court cannot enter its judgment of dismissal until plaintiff has had at least an opportunity to amend his complaint. Sprott v. Roberts, 154 Colo. 252, 390 P.2d 465 (1964); Passe v. Mitchell, 161 Colo. 501, 423 P.2d 17 (1967).

With the filing of defendant's answer, the right to amend as a matter of course is lost. Bd. of County Comm'rs v. Bullock, 122 Colo. 218, 220 P.2d 877 (1950).

Plaintiff reserves the right to amend the complaint with respect to any defendants who have not filed a responsive pleading in a case where there are multiple defendants and some, but not all, have filed a responsive pleading. Grear v. Mulvihill, 207 P.3d 918 (Colo. App. 2009).

Where a party sought to prevent an amendment of his adversary's pleading by filing a motion for judgment on the pleadings, the court held that the right of amendment could not thus be cut off. Cornett v. Smith, 15 Colo. App. 53, 60 P. 953 (1900); Jones v. Ceres Inv. Co., 60 Colo. 562, 154 P. 745 (1916); Jackisch v. Quine, 62 Colo. 72, 160 P. 186 (1916); Colo. Inv. & Realty Co. v. Riverview Drainage Dist., 83 Colo. 468, 266 P. 501 (1928).

If final judgment is entered before a responsive pleading is filed, the absolute right to amend the complaint is lost and leave to amend becomes a matter of discretion for the court. Wilcox v. Reconditioned Office Sys., 881 P.2d 398 (Colo. App. 1994).

Once a final judgment is entered, a court should not allow the plaintiff to amend the complaint unless the judgment is set aside or vacated under C.R.C.P. 60. Since the plaintiff could have asserted the additional claims and added additional defendants during the three months before the court entered default judgment, there were no grounds for vacating the judgment, and the trial court did not abuse its discretion in denying leave to amend the original complaint. Wilcox v. Reconditioned Office Sys., 881 P.2d 398 (Colo. App. 1994).

D. Amendment at Discretion of Court.

Amendment after a responsive pleading is within the discretion of the trial court. Bd. of County Comm'rs v. Bullock, 122 Colo. 218, 220 P.2d 877 (1950); Coon v. Guido, 170 Colo. 125, 459 P.2d 282 (1969).

Amendment of a pleading after a responsive pleading has been filed is within the discretion of the trial court. Conyers v. Lee, 32 Colo. App. 337, 511 P.2d 506 (1973).

After responsive pleadings have been filed, amendments may be made only by the leave of court. Van Schaack v. Phipps, 38 Colo. App. 140, 558 P.2d 581 (1976).

The granting of a motion to amend a complaint is within the discretion of the trial court. H.W. Houston Constr. Co. v. District Court, 632 P.2d 563 (Colo. 1981).

The trial court does not abuse its discretion when it denies a motion to amend which is futile. Conrad v. Imatni, 724 P.2d 89 (Colo. App. 1986); Bristol Co., LP v. Osman, 190 P.3d 752 (Colo. App. 2007).

The decision to grant or deny a motion to amend a complaint is committed to the sound discretion of the court and will not be reversed on review without a showing of abuse of discretion. In re Estate of Blacher, 857 P.2d 566 (Colo. App. 1993).

After issues are joined and a cause has been set for trial, a court may in the exercise of reasonable discretion and in the interest of justice permit the filing of an amended answer pleading additional defenses. Flanders v. Kochenberger, 118 Colo. 104, 193 P.2d 281 (1948).

Although a motion to amend is entitled to a lenient examination, such leniency is not without limits. Polk v. Denver Dist. Court, 849 P.2d 23 (Colo. 1993); Ajay Sports, Inc. v. Casazza, 1 P.3d 267 (Colo. App. 2000).

Court was within its discretion to deny a motion to amend the answer 62 days before trial, more than 100 days after the cut-off date for amendment of pleadings, and after defendant had sought and obtained one continuance of the trial. Ajay Sports, Inc. v. Casazza, 1 P.3d 267 (Colo. App. 2000).

Although leave to amend should generally be freely granted pursuant to section (a) of the rule, the trial court does not abuse its discretion in refusing to permit a futile amendment. Henderson v. Romer, 910 P.2d 48 (Colo. App. 1995).

In ruling on a motion to amend, the court must consider the totality of the circumstances by balancing the policy favoring the amendment of pleadings against the burden which granting the amendment may impose on the other parties. Polk v. Denver Dist. Court, 849 P.2d 23 (Colo. 1993).

In denying a motion to amend, the trial court did not abuse its discretion where: (1) The plaintiff knew of the basis for his counterclaims when filing the original pleading almost three years before and has offered no reasonable excuse for the delay in bringing the counterclaims; (2) the defendant would be prejudiced in addressing the counterclaims by requiring it to conduct additional and unanticipated discovery long after the case was filed; and (3) the motion to amend was made almost three years after filing the original answer and only five months before trial, resulting in yet another

postponement of a trial date. Polk v. Denver Dist. Court, 849 P.2d 23 (Colo. 1993).

Whether amendment adding parties to action is proper is within district court's discretion. It is within the discretion of the district court to make a determination whether amendment of a complaint adding parties to a pending action is proper. Trustees of Mtg. Trust of Am. v. District Court, 621 P.2d 310 (Colo. 1980); Meyer v. Landmark Universal, Inc., 692 P.2d 1129 (Colo. App. 1984).

Courts have authority to grant leave to amend any time before final judgment, so long as they retain jurisdiction of the cause. Johnson v. Johnson, 30 Colo. 402, 70 P. 692 (1902).

Amendment to a pleading is not allowed under section (a) once final judgment is entered unless the judgment is set aside or vacated. Estate of Hays v. Mid-Century Ins. Co., 902 P.2d 956 (Colo. App. 1995).

When all claims for relief have been decided on appeal and the case is remanded for the sole purpose of awarding costs to the prevailing party, that party cannot amend its complaint to add a new claim for relief as the case is effectively over. Civil Serv. Comm'n v. Carney, 97 P.3d 961 (Colo. 2004) (Carney II).

Where the appellate court remands a case to the trial court to calculate costs to be paid to the prevailing party, this is a post-judgment issue, and motions to amend a complaint to add a new claim for relief, essentially starting the litigation anew, are barred. Civil Serv. Comm'n v. Carney, 97 P.3d 961 (Colo. 2004) (Carney II).

That an amendment is made after verdict is not conclusive against the validity of the order, for so long as the court retains jurisdiction of a cause, and certainly before final judgment, it has authority to grant leave to amend any pleading or proceeding therein. Johnson v. Johnson, 30 Colo. 402, 70 P. 692 (1902).

If a plaintiff files a motion to amend accompanied by an amended complaint pursuant to section (a), and if the motion, amended complaint, and summons are served on a defendant before expiration of the statute of limitations, then the statute of limitations is tolled until the trial court rules on plaintiff's motions. Moore v. Grossman, 824 P.2d 7 (Colo. App. 1991).

Permission to file an amended complaint at the close of the plaintiff's evidence is not prejudicial to the defendants where the matter set forth therein is already before the court, for, in such a situation, nothing new is injected into the case. Davis v. Bonebrake, 135 Colo. 506, 313 P.2d 982 (1957).

Since plaintiffs did not object at trial and further addressed issues not previously raised, plaintiffs consented to the trial on the unpled issues. Kennedy v. Aerr Co. 833 P.2d 807 (Colo. App. 1991).

Delay alone insufficient to grant defendant's motion for summary judgment. Where the plaintiff has delayed in substituting the parties until after the statute of limitations has run, delay alone, without any specifically resulting prejudice or any obvious design to harass, is not sufficient to grant defendants' motion for summary judgment. Spiker v. Hoogeboom, 628 P.2d 177 (Colo. App. 1981); Eagle River Mobile Home Park v. District Court, 647 P.2d 660 (Colo. 1982).

Where the party attempting to amend his pleadings is guilty of delay in seeking an amendment, it is preferable to allow the amendment subject to any conditions necessary to avoid prejudice to the opposing parties. Eagle River Mobile Home Park v. District Court, 647 P.2d 660 (Colo. 1982).

In ruling on motion to amend made long after original pleading and shortly before trial, court should weigh prejudice to opponent in granting motion against prejudice to movant in denying motion, and movant has burden to prove lack of knowledge, mistake, inadvertence, or other reason for not having made the amended claim earlier. Gaybatz v. Marquette Minerals, Inc., 688 P.2d 1128 (Colo. App. 1984).

Denial of amendment appropriate where court or other party prejudiced. Only if the opposing party can demonstrate prejudice to it (other than having the case resolved on its merits) or if the court itself is prejudiced is the denial of a motion to amend an appropriate exercise of discretion. K-R Funds, Inc. v. Fox, 640 P.2d 257 (Colo. App. 1981).

If the opposing party can demonstrate prejudice to it, the denial of a motion to amend is an appropriate exercise of discretion where the motion to amend is filed shortly before the trial date and on the eve of the discovery cut-off date and the amended claim tendered is to be supported by expert testimony which would require additional discovery by the defendant and possibly the presentation by it of independent expert testimony, the defendant demonstrates prejudice and the trial court acts within its discretion in offering the plaintiff the option of proceeding with trial as scheduled or filing the additional claim and continuing the trial date. Werkmeister v. Robinson Dairy, Inc., 669 P.2d 1042 (Colo. App. 1983).

No abuse of discretion in denial by district court of motion to amend to substitute new party as petitioner. Amendment would have been unduly prejudicial to respondents, would not have cured deficiencies in petition regarding statutory pre-filing requirements, and would have unnecessarily increased respondents' costs. Akin v. Four Corners Encampment, 179 P.3d 139 (Colo. App. 2007).

Court may properly deny leave to amend because of resulting delay, undue expense, or

other demonstrable prejudice to the opposing party. Varner v. District Court, 618 P.2d 1388 (Colo. 1980); In re Estate of Blacher, 857 P.2d 566 (Colo. App. 1993).

Court improperly denied motion to amend on the basis of undue delay where: (1) The previous delay in the case was not attributable to the movant; (2) no case management order had entered, the parties had not commenced discovery, mandatory disclosures were not yet due, and no trial date had been set; and (3) the amendments included interpleader claims that were calculated to resolve the merits of the dispute in one lawsuit. Benton v. Adams, 56 P.3d 81 (Colo. 2002).

Concerns about collecting a judgment are not sufficient to support a finding of prejudice to justify denying a motion to amend. Benton v. Adams, 56 P.3d 81 (Colo. 2002).

Although the rules and caselaw prohibit a draconian approach to the amendment of pleadings, unexplained careless or thoughtless mistakes in pleadings on the part of counsel or the parties cannot be excused through amendments and continuances at the expense of fairness to opposing parties and to the judicial process. Polk v. Denver Dist. Court, 849 P.2d 23 (Colo. 1993).

Preservation of trial date insufficient justification to deny amendment. The trial court's desire to preserve the scheduled trial date is not a sufficient justification to deny a motion to amend. Eagle River Mobile Home Park v. District Court, 647 P.2d 660 (Colo. 1982).

Trial court's desire to preserve original trial date, absent a showing of prejudice to opposing party, is not sufficient to warrant court's denial of motion to amend or supplement complaint. Lutz v. District Court, 716 P.2d 129 (Colo. 1986).

Although the desire to preserve a trial date alone is not a sufficient reason to deny a motion to amend, it is still a valid factor to be considered by a trial court in ruling on such motion. Polk v. Denver Dist. Court, 849 P.2d 23 (Colo. 1993).

Trial court abused its discretion when it denied plaintiffs' motion to amend their complaint to add a claim for exemplary damages where amended complaint satisfied the burden of proof set forth in subsection (3)(c)(I). Stamp v. Vail Corp., 172 P.3d 437 (Colo. 2007).

Court did not abuse discretion in granting motion to amend where defendants were on notice of issue raised in amended pleading by virtue of the evidence presented, the proposed jury instructions, and a conference during trial. Anderson v. Dunton Management Co., 865 P.2d 887 (Colo. App. 1993).

A trial court may grant parties leave to amend their pleadings upon remand so long as matters already settled by the appellate court are not relitigated. Union Ins. Co. v. Kjeldgaard, 820 P.2d 1183 (Colo. App. 1991).

District court erred in allowing buyer under section (a) of this rule to amend his answer to raise defense under § 38-35-126 (3) following trial after ruling immediately before trial that he would not be permitted to raise such defense. Where a defense or claim is not pleaded or intentionally and actually tried, a court cannot render a judgment thereon. This rule cannot be circumvented by allowing a party to amend his or her answer after trial where the defense or claim was not tried by express or implied consent. Further, the district court abused its discretion in effectively permitting buyer to amend his answer after trial because seller was clearly prejudiced. Dinosaur Park Invs., L.L.C. v. Tello, 192 P.3d 513 (Colo. App. 2008).

E. Subject of Amendment.

Amendment to substitute new theory is not prejudicial where notice of claim has been given. Where complaint furnishes defendant with complete notice of the circumstances and occurrence of plaintiff's claim, amendment of the complaint during trial to substitute a new theory of recovery is not prejudicial to defendant. Continental Sales Corp. v. Stookesberry, 170 Colo. 16, 459 P.2d 566 (1969).

Where it is contended that an amended complaint merely adds a second cause of action to that already stated in the original complaint, it is within the discretion of the court whether the amendment should be allowed after the defendant's answer, and it is doubtful that this discretion is abused where counsel for both sides subsequently entered into an agreed statement of facts. Bd. of County Comm'rs v. Bullock, 122 Colo. 218, 220 P.2d 877 (1950).

Fact that proposed amendment set forth alternate theories of recovery furnished no reason to withhold permission to amend, especially where those theories were rooted in the very same transaction underlying the original complaint. Varner v. District Court, 618 P.2d 1388 (Colo. 1980).

Where a complaint is amended to provide for a different remedy, the principal consideration is whether the amended pleading will permit an expeditious disposition to be made of the case. Espinoza v. Gurule, 144 Colo. 381, 356 P.2d 891 (1960).

Where the complaint filed constitutes an election of a choice of remedies provided for by contract, an amendment to the complaint which provides for the alternative remedy in the event recovery cannot be had under the original complaint is erroneous to permit, for the plaintiff cannot pursue two inconsistent remedies. Green v. Hertz Drivurself Sys., 130 Colo. 238, 274 P.2d 597 (1954).

Amendment authorized where matter of damages not entirely known at time complaint filed. The trial court correctly authorized amendment of the complaint upon a showing that the nature and extent of plaintiff's damages were not entirely known at the time the original complaint was filed. Hildyard v. Western Fasteners, Inc., 33 Colo. App. 396, 522 P.2d 596 (1974).

An amendment to a complaint dropping equitable issue with consent of defendants and court does not create a right to a jury trial that cannot be denied. Murray v. District Court, 189 Colo. 217, 539 P.2d 1254 (1975).

The court might permit amending the complaint to show residency. Where the complaint in an action for divorce alleged that plaintiff was and had been for more than one year immediately preceding the commencement of the action a bona fide resident and citizen of the state but failed to allege that either party resided in the county in which the action was brought, the court might permit an amendment after verdict inserting in the complaint an allegation of plaintiff's residence in the county where the proof showed such residence. Johnson v. Johnson, 30 Colo. 402, 70 P. 692 (1902).

Matters purely jurisdictional may be made the subject of amendment the same as other matters of substance. Johnson v. Johnson, 30 Colo. 402, 70 P. 692 (1902).

The argument that the complaint could not be amended because the allegation of notice of a claim was "jurisdictional" is without merit, for the office of the complaint is to establish by proper factual averment that the case is within the jurisdiction of the court, and thus a defect in allegations of fact upon which the court's jurisdiction depends can be cured or supplied by amendment. Francisco v. Cascade Inv. Co., 29 Colo. App. 516, 486 P.2d 447 (1971).

It is within the province of the court to permit the striking of allegations, and leave shall be freely given when justice so requires. Barth v. Powell, 127 Colo. 78, 254 P.2d 428 (1953).

Averments stricken from a complaint might be allowed in an amended complaint in the discretion of the court. Rice v. Van Why, 49 Colo. 7, 111 P. 599 (1910).

Filing an amended complaint waives error, if any, in striking an amendment to the complaint and a bill of particulars. Burson v. Adamson, 87 Colo. 451, 288 P. 623 (1930).

Rule does not govern election contest. This rule normally applicable to a civil action does not govern an election contest. Abts v. Bd. of Educ., 622 P.2d 518 (Colo. 1980).

New parties may be added or substituted in action when the new and old parties have such an identity of interests that it can be assumed, or proved, that relation back is not prejudicial. Spiker v. Hoogeboom, 628 P.2d 177 (Colo. App. 1981).

Identity of interest means that the parties are so closely related in their business operations or other activities that the institution of an action against one serves to provide notice of litigation to the other. Such an identity of interest exists between past and present forms of the same enterprise. Spiker v. Hoogeboom, 628 P.2d 177 (Colo. App. 1981).

Amended pleading asserting an interpleader claim is not futile if it alleges facts sufficient to support a reasonable belief that exposure to double or multiple liability may exist. Certainty of exposure to double or multiple liability is not the test; rather, the allegations must meet a minimum threshold of substantiality. Benton v. Adams, 56 P.3d 81 (Colo. 2002).

F. Appellate Review.

An appellate court will not review refusal to grant leave to amend for insufficiency except when an abuse of discretion is shown. Buno v. Gomer, 3 Colo. App. 456, 34 P. 256 (1893); Klippel v. Oppenstein, 8 Colo. App. 187, 45 P. 224 (1896); Cascade Ice Co. v. Austin Bluff Land & Water Co., 23 Colo. 292, 47 P. 268 (1896); Hyman v. Jockey Club Wine, Liquor, & Cigar Co., 9 Colo. App. 299, 48 P. 671 (1897); Gambrill v. Brown Hotel Co., 11 Colo. App. 529, 54 P. 1025 (1898); Wiggington v. Denver & R. G. R. R., 51 Colo. 377, 118 P. 88 (1911); Perry v. Perry, 74 Colo. 106, 219 P. 221 (1923).

Leave to amend is within the discretion of the trial court. Absent an abuse of discretion, the supreme court will not interfere with the trial court's ruling. Polk v. Denver Dist. Court, 849 P.2d 23 (Colo. 1993); Henderson v. Romer, 910 P.2d 48 (Colo. App. 1995).

The decision whether to grant leave to amend lies within the trial court's sound discretion, and its ruling will not be disturbed on review absent a clear abuse of discretion. Lyons v. Teamsters Local Union No. 961, 903 P.2d 1214 (Colo. App. 1995).

Abuse of discretion in denying leave to amend pleadings. Where it was shown to the trial court that the filing of a counterclaim would not delay the trial or cause a postponement, that the other side did not object, and that it was a compulsory counterclaim which if denied foreclosed possible future relief, the trial court abused its discretion in denying petitioners leave to amend their pleadings. Bobrick v. Sanderson, 164 Colo. 46, 432 P.2d 242 (1967).

No error where no abuse of discretion is shown. Where a party fails to point out an abuse of discretion on the part of the trial court in permitting the opposing party to amend his pleading, there is no error. Palmer Park Gardens, Inc. v. Potter, 162 Colo. 178, 425 P.2d 268

(1967); Jenkins v. Glen & Helen Aircraft, Inc., 42 Colo. App. 118, 590 P.2d 983 (1979).

Absent an abuse of discretion, the supreme court will not overrule the trial court. H.W. Houston Constr. Co. v. District Court, 632 P.2d 563 (Colo. 1981).

Generally speaking, allowing pleadings to be amended is a matter within the discretion of a trial court, not to be disturbed unless an abuse thereof is demonstrated. K-R Funds, Inc. v. Fox, 640 P.2d 257 (Colo. App. 1981).

III. TO CONFORM TO THE EVIDENCE.

A. In General.

Law reviews. For note, "Comments on Last Clear Chance — Procedure and Substance", see 32 Dicta 275 (1955). For comment on Carpenter v. Hill appearing below, see 32 Dicta 393 (1955).

Annotator's note. Since section (b) of this rule is similar to § 84 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Section (b) softens apparent rigidity of C.R.C.P. 8(c). The apparent rigidity of C.R.C.P. 8(c), which states that a party shall affirmatively plead all matters constituting an avoidance or affirmative defense, is softened by section (b) of this rule, which provides that when issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Great Am. Ins. Co. v. Ferndale Dev. Co., 185 Colo. 252, 523 P.2d 979 (1974).

Pleadings are subsidiary and serve the ends of justice by giving notice of the issues to be litigated. Ashford v. Burnham Aviation Serv., Inc., 162 Colo. 582, 427 P.2d 875 (1967).

The contradiction which results in an amendment where the plaintiff testifies differently from an allegation in his complaint merely goes to the credibility of the plaintiff, and where the instruction upon credibility sets forth the test to be applied, the weight then to be given plaintiff's testimony is for the jury. Foster v. Feder, 135 Colo. 585, 316 P.2d 576 (1957).

Where the plaintiff files a pleading which is subsequently superseded by amendment, the original pleading is admissible against the pleader in the proceeding in which it is filed as evidence of admission against interest. Foster v. Feder, 135 Colo. 585, 316 P.2d 576 (1957).

Such an admission cannot be withdrawn by amendment. Where the original complaint was an admission which brought the transaction squarely within the terms of the uniform commercial code and an amendment was a withdrawal of this admission and the introduction of an entirely different theory as an effort to escape the effect of the uniform commercial code with the defendant strongly objecting when the amendment was proposed and when it was granted, it was held that its claim of surprise was well founded and that the amendment should not have been allowed. Am. Nat'l Bank v. Etter, 28 Colo. App. 511, 476 P.2d 287 (1970).

Where the parties litigated the issues between them just as if there had been actual notice through an amendment to the complaint stating in terms the plaintiff's claim against the third-party defendant, an amendment including the third-party defendant in the original complaint was unnecessary. Ashford v. Burnham Aviation Serv., Inc., 162 Colo. 582, 427 P.2d 875 (1967).

Surprise or prejudice not found. The defendant cannot claim that either surprise or prejudice resulted from the introduction of evidence regarding a certain issue allegedly not properly pled where the plaintiff's pretrial statement clearly identifies this issue. Andrikopoulos v. Broadmoor Mgt. Co., 670 P.2d 435 (Colo. App. 1983).

Where the third-party defendant not only answered the third-party complaint, but in a separate pleading undertook to answer the original complaint categorically and asserted all of the defenses he could have asserted had the plaintiff amended his complaint and alleged a claim against the third party, such an answer amounts to a waiver of amendment. Ashford v. Burnham Aviation Serv., Inc., 162 Colo. 582, 427 P.2d 875 (1967).

Complainant can recover upon the theory of extrinsic or constructive fraud under this rule where the issue of extrinsic or constructive fraud is in fact tried by express or implied consent of the parties. United States Nat'l Bank v. Barges, 120 Colo. 317, 210 P.2d 600 (1949), cert. denied, 338 U.S. 955, 70 S. Ct. 493, 94 L. Ed. 589 (1950).

Where a foreign court had jurisdiction over the parties and the subject matter, its decree may not be collaterally attacked on the grounds of intrinsic fraud, and the trial court properly denied the motion to amend the return and the answer to include such an allegation of fraud based on the evidence tendered for consideration. Fahrenbruch v. People ex rel. Taber, 169 Colo. 70, 453 P.2d 601 (1969).

Applied in Padilla v. Ghuman, 183 P.3d 653 (Colo. App. 2007).

B. Purpose and Object of Amendment.

The purpose of this rule is to allow litigation to be determined on the merits and not to

be limited to the strict parameters of the pleadings. Am. Nat'l Bank v. Etter, 28 Colo. App. 511, 476 P.2d 287 (1970).

This rule permits amendments to conform to the evidence when issues not raised by the pleadings are tried by express or implied consent of the parties. Haffke v. Linker, 30 Colo. App. 76, 489 P.2d 1047 (1971); Cox v. Bertsch, 730 P.2d 889 (Colo. App. 1986).

This rule directs that amendment of pleadings to conform to the evidence be freely granted. Schwab v. Martin, 165 Colo. 547, 441 P.2d 17 (1968).

Care must be taken not to prejudice the case of either party. Am. Nat'l Bank v. Etter, 28 Colo. App. 511, 476 P.2d 287 (1970).

Amendment should be permitted where the presentation of the merits of the action would be subserved thereby, it cannot be claimed that it would be prejudicial upon the merits, and the granting of the motion would facilitate a fair trial of the actual issues between the litigants. Francisco v. Cascade Inv. Co., 29 Colo. App. 516, 486 P.2d 447 (1971).

Amendments under this rule should be granted after the close of the evidence only in cases where no reasonable doubt remains that the issue raised by the amendment has been intentionally and actually tried, since it is not enough that some evidence has been received germane to the issue sought to be raised. Clemann v. Bandimere, 128 Colo. 24, 259 P.2d 614 (1953); Bill Dreiling Motor Co. v. Shultz, 168 Colo. 59, 450 P.2d 70 (1969).

The same principles are applicable when the motion to amend the pleadings is made during the progress of the trial. Real Equity Diversification v. Covilli, 744 P.2d 756 (Colo. App. 1987).

Amendment to add a new claim should be allowed only when the issue raised by amendment has been intentionally and actually tried. It is not enough that some pertinent evidence has been heard. Pickell v. Arizona Components Co., 902 P.2d 392 (Colo. App. 1994), rev'd on other grounds, 931 P.2d 1184 (Colo. 1997).

Under this rule a liberal provision is made for amendments to conform the pleadings to the evidence. Cady v. Fraser, 122 Colo. 252, 222 P.2d 422 (1950); Underwriters Salvage Co. v. Davis & Shaw Furn. Co., 198 F.2d 450 (10th Cir. 1952).

This rule must be judiciously applied. Am. Nat'l Bank v. Etter, 28 Colo. App. 511, 476 P.2d 287 (1970).

Considerable liberality should be exercised in allowing a complaint to be amended during a trial so as to correspond with the proof. Atchison, T. & S. F. Ry. v. Baldwin, 53 Colo. 426, 128 P. 453 (1912).

C. Amendment at Discretion of Court.

The matter of such an amendment rests in the sound discretion of the court. Fedderson v. Goode, 112 Colo. 38, 145 P.2d 981 (1944); Pickell v. Arizona Components Co., 902 P.2d 392 (Colo. App. 1994), rev'd on other grounds, 931 P.2d 1184 (Colo. 1997).

Wide discretion is given to the trial court under this rule to permit amendment of the pleadings to conform with the evidence. Foster v. Feder, 135 Colo. 585, 316 P.2d 576 (1957).

Amendments "to conform to the proof" should not be allowed when not germane to the case as made. Buchhalter v. Myers, 85 Colo. 419, 276 P. 972 (1929).

It is error where matter constitutes a new cause of action. Where plaintiff asked leave to amend to correspond with the proof, it was held that it was error to permit him to allege matters not legitimately connected with the complaint which constituted a new cause of action and a departure from the issues as made. Buchhalter v. Myers, 85 Colo. 419, 276 P. 972 (1929).

Upon a proper application interposed in apt time it would become the duty of the trial court to permit a complaint to be amended to correspond with the proof, and it is the duty of a court of review to treat the complaint as so amended. English Lumber Co. v. Hireen, 25 Colo. App. 199, 136 P. 475 (1913).

Where at the start of the trial defendant applies for an order amending his answer to a defense which he has failed to plead affirmatively and plaintiff does not object to this request, it is within the discretion of the court to consider this defense under section (a) or (b) of this rule in view of the sweep of the evidence. White v. Widger, 144 Colo. 566, 358 P.2d 592 (1960).

Where the amended complaint did not plead a certain matter, but the record disclosed that the defendant was put on notice of the claim for that matter as early as the pre-trial conference, then the trial court's admission of the evidence and, upon motion of the plaintiffs, grant of leave to amend the complaint to conform to the proof was in conformity with the discretion of section (b) of this rule. Welborn v. Sullivant, 167 Colo. 35, 445 P.2d 215 (1968); Karakehian v. Boyer, 900 P.2d 1273 (Colo. App. 1994).

Where plaintiff establishes a prima facie case, then, under the spirit and intent of section (b) of this rule, the failure to permit the plaintiff to amend his complaint and plead matter not initially pleaded is an abuse of discretion. Martin v. Kennell, 169 Colo. 122, 453 P.2d 797 (1969); Francisco v. Cascade Inv. Co., 29 Colo. App. 516, 486 P.2d 447 (1971); Real Equity

Diversification v. Coville, 744 P.2d 756 (Colo. App. 1987).

Motion to amend pleadings to conform to the proof allowed only in cases where no reasonable doubt remains that the issue raised by the amendment has been intentionally and actually tried. Absent abuse of discretion, trial court's denial of a motion pursuant to this rule will not be disturbed on appeal. Gabel v. Jefferson County Sch. Dist. R-1, 824 P.2d 26 (Colo. App. 1991).

Where parties agree to litigate on a certain theory, the trial court does not abuse its discretion by denying a motion of one of the parties made at the close of its evidence to amend its pleadings to add another claim when the other party objects to such an amendment. Quandary Land Dev. Co. v. Porter, 159 Colo. 8, 408 P.2d 978 (1965).

It is no abuse of discretion in denying motion to amend where evidence conflicting and conditional. Trial court did not abuse its discretion in denying plaintiffs' motion to amend their pleading to conform to the evidence where the evidence was conflicting and conditional. Gorin v. Arizona Columbine Ranch, Inc., 34 Colo. App. 405, 527 P.2d 899 (1974).

D. Determination of Issues Not Pleaded.

Where an issue is completely foreign to the issues in the case and is not tried with the consent of the parties, it cannot be injected into the case by amendment. Haffke v. Linker, 30 Colo. App. 76, 489 P.2d 1047 (1971).

Issues not pleaded may be determined by the trial court by consent, express or implied, where evidence presenting such issues is tendered and received without objection. First Nat'l Bank v. Jones, 124 Colo. 451, 237 P.2d 1082 (1951).

Extraneous issues may not be tried in the absence of amendment of the pleadings where timely objection is made. First Nat'l Bank v. Jones, 124 Colo. 451, 237 P.2d 1082 (1951).

It is the duty of the court to consider issues raised by evidence received without objection even though no formal application is made to amend. Cady v. Fraser, 122 Colo. 252, 222 P.2d 422 (1950); Underwriters Salvage Co. v. Davis & Shaw Furn. Co., 198 F.2d 450 (10th Cir. 1952); Prato v. Minnesota Mut. Life Ins. Co., 40 Colo. App. 1, 572 P.2d 487 (1977).

Parties who acquiesced in trial conducted at variance with the pleadings cannot complain of failure to amend the pleadings. Shively v. Bd. of County Comm'rs, 159 Colo. 353, 411 P.2d 782 (1966).

Where it is apparent from the testimony, the exhibits, and the finding of the court that an issue was tried by implied consent because the record is otherwise silent, one will not be held to have waived his rights because he did not specially plead this matter either by complaint, by answer to intervener's petition, or by motion. Rose v. Rose, 119 Colo. 473, 204 P.2d 1075 (1949).

Where a certain matter is alleged in the complaint, but the evidence shows another matter and throughout the trial it is apparent that the cause is being presented upon the theory of the latter without objection, then, under section (b) of this rule, the judgment entered upon the issue actually tried would be good. United States Nat'l Bank v. Bartges, 122 Colo. 546, 224 P.2d 658 (1950), cert. dismissed, 340 U.S. 957, 71 S. Ct. 575, 95 L. Ed. 689 (1951).

When an application for the enlargement of a specifically-identified dam incorrectly stated the location of the dam but the issue of the discrepancy in location was not raised until nine months after trial, the parties impliedly consented to the trial of the enlargement at the correct location without the need to amend the application. City of Black Hawk v. City of Central, 97 P.3d 951 (Colo. 2004).

Judgment can be entered on different theory than that of pleadings. Issues not raised by the pleadings were nonetheless tried by the express consent of the parties; it is of no legal significance that the trial court entered judgment on a "theory" different from the "theory" pled in the complaint. Ward v. Nat'l Medical Ass'n, 154 Colo. 595, 392 P.2d 162 (1964); Radinsky v. Weaver, 170 Colo. 169, 460 P.2d 218 (1969).

If, under the facts, the substantive law provides relief upon any theory, the cause should proceed to judgment, and, if such be the case, the theory of the pleader is not important. Ward v. Nat'l Medical Ass'n, 154 Colo. 595, 392 P.2d 162 (1964); Radinsky v. Weaver, 170 Colo. 169, 460 P.2d 218 (1969).

While issues may properly be tried even when not pleaded, they must be deliberately presented and knowingly considered by the court. Am. Nat'l Bank v. Etter, 28 Colo. App. 511, 476 P.2d 287 (1970); Maehal Enters., Inc. v. Thunder Mtn. Custom Cycles, Inc., __ P.3d __ (Colo. App. 2011).

E. Applicability.

Before the provisions of this rule apply, a trial court must first determine what are the material issues made by a complaint and if the evidence objected to at a trial is within the issues made by the pleadings. Myrick v. Garcia, 138 Colo. 298, 332 P.2d 900 (1958).

The amendment allowable or "such amendment" refers to situations where issues are not raised by the pleadings and are tried by the express or implied consent of the parties. Barnes v. Wright, 123 Colo. 462, 231 P.2d 794 (1951).

This fact is made clear by the further provision that the amendment may be made "even after judgment". Barnes v. Wright, 123 Colo. 462, 231 P.2d 794 (1951).

In an action to quiet title where defendants did not allege adverse possession, but there was evidence before the court that defendants and their predecessors in interest had occupied the land for more than 60 years prior to the commencement of the action, under section (b) of this rule it became the court's duty to determine the issue so presented as if it had been raised by the pleadings. Hodge v. Terrill, 123 Colo. 196, 228 P.2d 984 (1951).

Equitable relief not precluded. Although the plaintiffs originally sought damages in an action at law, equitable relief was not precluded where a change in circumstances altered the posture of the case and rendered the original relief sought inappropriate. Rice v. Hilty, 38 Colo. App. 338, 559 P.2d 725 (1976).

Where an unpleaded affirmative defense appears as an afterthought following the entry of judgment, although evidence with relation thereto is clearly admissible as bearing upon issues which were framed by the pleadings, the affirmative defense is not tried by express or implied consent. Bill Dreiling Motor Co. v. Shultz, 168 Colo. 59, 450 P.2d 70 (1969).

It is error for court to go beyond pleadings where affirmative defense is not pleaded. Carpenter v. Hill, 131 Colo. 553, 283 P.2d 963 (1955).

Where an election of remedies is made plaintiff may not amend his cause of action to conform to the evidence by alleging the remedy which he did not elect at the outset, inasmuch as no proposition of law is better settled in Colorado than that a plaintiff may not play "fast and loose" with his right of election and, since the remedies are inconsistent, to permit one character of action involving one measure of damages to be pleaded and tried and another character of action involving a different measure of damages substituted at the close of the trial would of necessity be to work injustice instead of justice. Gibraltar Colo. Life Co. v. Brink, 113 Colo. 304, 157 P.2d 134 (1945).

Where a motion to dismiss is filed but neither argued nor ruled upon, an answer thereafter is filed in which the motion to dismiss is not repeated, and the trial proceeds on the issues framed by the complaint and answer without the sufficiency of the complaint being again challenged, an amendment to conform to the proof would have been in order under section (b) of this rule. O. K. Uranium Dev. Co. v. Miller, 140 Colo. 490, 345 P.2d 382 (1959).

It is not necessary for plaintiff to amend his complaint to include third-party defendant. It was not essential to the validity of the judgment entered against the third-party defendant that the original plaintiff should have formally entered an amendment to its complaint to include a claim against him. Ashford v. Burnham Aviation Serv., Inc., 162 Colo. 582, 427 P.2d 875 (1967).

Amendment shall conform to evidence allowed. Niles v. Builders Serv. & Supply, Inc., 667 P.2d 770 (Colo. App. 1983).

F. Objections.

This rule is not controlling where there are objections. This rule is not controlling where the issue presented to the jury is not raised by the pleadings and is not tried by express or implied consent of the parties because of objections to a trial of any issue not presented by the pleadings. W.T. Grant Co. v. Casady, 117 Colo. 405, 188 P.2d 881 (1948); Lininger v. Knight, 123 Colo. 213, 226 P.2d 809 (1951).

It is error to grant plaintiff leave to so amend the complaint over defendant's objection. Barnes v. Wright, 123 Colo. 462, 231 P.2d 794 (1951).

Where attention is called by plaintiff to a defective pleading by timely objections to evidence in support of a matter not pleaded by defendant, the duty of amending the unsatisfactory pleading falls upon the defendant, and unless defendant does so, such matter cannot be litigated and it is error for the court to permit it to be so. Lamar Bldg. & Loan Ass'n v. Truax, 95 Colo. 77, 33 P.2d 978 (1934).

A trial court's qualified ruling initially sustaining objection to the amendment of the complaint does not preclude the court from considering all of the evidence offered and received, without objection, relating to an issue and thereafter concluding that indeed the issue had been submitted to the court for its determination, and the failure to actually amend does not affect the result of the trial of the issue where the court's determination of this issue is without prejudice. Radinsky v. Weaver, 170 Colo. 169, 460 P.2d 218 (1969).

Under this rule when an issue is tried before the court without timely objection or motion, then the issue is before the court regardless of any defect in the pleading. Barbary v. Benz, 169 Colo. 408, 457 P.2d 389 (1969).

Section (b) has been interpreted to provide that when an issue is tried before the court without timely objection or motion, then the issue is deemed properly before the court despite any defect in the pleading. Great Am. Ins. Co. v. Ferndale Dev. Co., 185 Colo. 252, 523 P.2d 979 (1974); Kennedy v. Aerr Co., 833 P.2d 807 (Colo. App. 1991).

By failing to object to evidence introduced on a matter which is not pleaded, a party impliedly consents that the action should be tried in all respects as if the issue had been raised. Toy v. Rogers, 114 Colo. 432, 165 P.2d 1017 (1946).

When issues not raised in the pleadings are tried by express or implied consent of the parties, they shall be treated as if the issues were raised in the pleadings. Kennedy v. Aerr Co., 833 P.2d 807 (Colo. App. 1991).

Counsel is not required to be on the alert to challenge every objectionable question or answer lest it be later made the basis of another claim than that which was intentionally and fairly tendered. Am. Nat'l Bank v. Etter, 28 Colo. App. 511, 476 P.2d 287 (1970).

Where evidence tending to prove a matter is introduced at trial without an objection that it goes to issues beyond the scope of the pleadings, then such matters are properly before the court even though they are not pleaded. Motlong v. World Sav. & Loan Ass'n, 168 Colo. 540, 452 P.2d 384 (1969).

Where pleadings fail to raise an affirmative defense which must be specifically set forth in the pleadings under C.R.C.P. 8(c), but no objection is made to evidence introduced in regard to that issue, such issue may be treated as raised in the pleadings under section (b) of this rule. Metropolitan State Bank, Inc. v. Cox, 134 Colo. 260, 302 P.2d 188 (1956).

In the absence of motion or objection when an issue not pleaded is thus presented, the pleadings become functus officio, and the parties are before the court to present such matter as they desire. Carlson v. Bain, 116 Colo. 526, 182 P.2d 909 (1947).

Where evidence raising an issue is received without objection, the issue is considered as if it had been raised in the pleadings. Craft v. Stumpf, 115 Colo. 181, 170 P.2d 779 (1946).

The issue will be so treated by the supreme court. Since an issue not raised by the pleadings is not fatal when considered in the trial without objection on anyone's part, it will be treated in the supreme court in all respects the same as if it had been raised in the pleadings. Hopkins v. Underwood, 126 Colo. 224, 247 P.2d 1000 (1952).

In the absence of motions or objections, any issue that the parties see fit to present may be considered and determined by the trial court. Carlson v. Bain, 116 Colo. 526, 182 P.2d 909 (1947).

Even where plaintiffs who were advised before trial of a tendered amendment to defendant's answer and counterclaim so as to set forth another defense made no objection thereto and one of the plaintiffs testified with reference to this defense without objection, the trial court erred in refusing to grant leave to defendant to so amend after all of the evidence had been introduced. Rogers v. Funkhouser, 121 Colo. 13, 212 P.2d 497 (1949).

Where the amended complaint did not plead a certain matter, but the record disclosed that the defendant was put on notice of the claim for that matter as early as the pre-trial conference, then the trial court's admission of the evidence and, upon motion of the plaintiffs, grant of leave to amend the complaint to conform to the proof was in conformity with the discretion of section (b) of this rule. Welborn v. Sullivant, 167 Colo. 35, 445 P.2d 215 (1968).

Where the parties appear, cross-examine witnesses, introduce evidence, and fully participate in the hearing, they therefore have notice of the hearing and the issues involved, and by their full participation in the proceedings without objection or request for a continuance waive whatever deficiencies might exist in regards to notice of the hearing. Hassler & Bates Co. v. Pub. Utils. Comm'n, 168 Colo. 183, 451 P.2d 280 (1969).

A judgment based on issues not formed by the pleadings is not error where the issue is embraced in the stipulation of facts upon which the case is tried, and the complaint is not challenged in the trial court, since under section (b) of this rule such an issue must be treated in all respects as if it had been raised in the pleadings. Sinclair Ref. Co. v. Shakespeare, 115 Colo. 520, 175 P.2d 389 (1946).

Trial of an issue without objection constitutes trial by implied consent. To the extent that the issue of the defective condition of the brake system was not raised in the pleadings filed by the employee in a suit for injuries he sustained as he attempted to uncouple a locomotive, admission of evidence bearing on the issue without objection from the railroads constituted trial of the issue by implied consent. Tovrea v. Denver & Rio Grande Western Railroad Co., 693 P.2d 1016 (Colo. App. 1984).

Where special damages are not pleaded as required by C.R.C.P. 9(g), and defendant makes no objection to the evidence on which the court bases its findings as to damages no amendment is necessary, and a judgment giving both actual and special damages would stand. Carlson v. Bain, 116 Colo. 526, 182 P.2d 909 (1947).

G. When Pleading Can be Amended.

Pleadings can be so amended either at trial or subsequent to judgment. Where evidence admitted without objection clearly establishes the right of plaintiffs to their claim, then under this rule plaintiffs can amend their complaint to conform to the proof either at the trial or subsequent to the judgment. Toy v. Rogers, 114 Colo. 432, 165 P.2d 1017 (1946).

The caption of the complaint is properly amended after the trial to read that the defendants were partners where one of the defendants admitted the partnership at that time. Bamford v. Cope, 31 Colo. App. 161, 499 P.2d 639 (1972).

IV. RELATION BACK.

This rule is identical to F.R.C.P. 15(c). Denver & R. G. W. R. R. v. Clint, 235 F.2d 445 (10th Cir. 1956).

Amended petition under this rule relates back to the date of the original petition. Stalford v. Bd. of County Comm'rs, 128 Colo. 441, 263 P.2d 436 (1953).

Amendment relates back to filing of original complaint. Where the claim asserted in the amended complaint arose out of the same conduct and occurrence set forth, or attempted to be set forth, in the original complaint, where the parties were the same, where the occurrence was the same, and where in both pleadings the same negligence was pleaded as the proximate cause of the accident, and where from the beginning plaintiff sought to recover damages, then, under section (c) of this rule, the amendment related back to the time of the filing of the original complaint. Denver & R. G. W. R. R. v. Clint, 235 F.2d 445 (10th Cir. 1956).

Amended complaint which puts forth a contract claim based on the same facts as the original tort claim related back to original complaint and was not barred by the statute of limitation. Roper v. Spring Lake Dev. Co., 789 P.2d 483 (Colo. App. 1990).

Section (c) is not applicable to proceedings to review banking board chartering decisions. Columbine State Bank v. Banking Bd., 34 Colo. App. 11, 523 P.2d 474 (1974).

The doctrine of relation back is not applicable to a petition for further relief because such a petition is not an amended pleading. Subryan v. Regents of Univ. of Colo., 789 P.2d 472 (Colo. App. 1989).

Section (c) applies only to the amendment of a pleading in an ongoing action and not to the filing of a new complaint in a new case. In case where second complaint filed by plaintiff was in fact an original complaint, rather than an amended pleading that related back to the first complaint, plaintiff could not avail himself of the relation-back doctrine, and trial court properly dismissed plaintiff's second complaint as untimely filed. Kelso v. Rickenbaugh Cadillac Co., 262 P.3d 1001 (Colo. App. 2011).

The doctrine of relation back cannot be used to validate an otherwise invalid notice of lis pendens. The validity of a notice of lis pendens is determined when it is recorded. Brossia v. Rick Constr., L.T.D., 81 P.3d 1126 (Colo. App. 2003).

Substituted plaintiff's claim relates back where no prejudice to defendant. If the adverse party has had sufficient notice of the disputed occurrence and related institution of legal action so as to obviate any prejudice which might arise from the assertion of a substituted plaintiff's claim, then the substitution is allowed to relate back. Travelers Ins. Co. v. Gasper, 630 P.2d 97 (Colo. App. 1981).

Whenever an amended pleading or complaint arises out of the conduct, transaction, or occurrence set forth in the original pleading, the amendment relates back to the date of the original pleading. Halliburton v. Pub. Serv. Co., 804 P.2d 213 (Colo. App. 1990).

Relation back did not apply where plaintiff sued an uninsured motorist for negligence and later added the plaintiff's insurer based on a separate transaction or conduct arising from the plaintiff's contract of uninsured motorist coverage. In this situation there was no mistake of identity, only a failure to abide by the applicable statute of limitations. Trigg v. State Farm Mut. Auto. Ins. Co., 129 P.3d 1099 (Colo. App. 2005).

The doctrine of relation back applies to amendments to water applications so long as the requirements of this rule do not conflict with the provisions of the Water Right Determination and Administration Act. City of Thornton v. City of Fort Collins, 830 P.2d 915 (Colo. 1992).

For an amendment to a water application to relate back to the date of the original water application, the claims in the amendment must arise from the conduct, transaction, or occurrence set forth in the original water application in order to insure that interested parties had notice of the claims in the amendment from the date of the original application. City of Thornton v. City of Fort Collins, 830 P.2d 915 (Colo. 1992).

Where the source, amount, and uses of water claimed in the amendments to the original water application were the same as those claimed in the amendment to such water application, the amendment related back to the date of the original water application, even though the amended application requested two water diversions and the original application requested a minimum stream flow. City of Thornton v. City of Fort Collins, 830 P.2d 915 (Colo. 1992).

Amendments made to conditional water rights application found to relate back to original application because the amendments related to the conduct, transaction, or occurrence set forth in original application and all interested parties had notice of the amending party's intent to appropriate a certain amount of water from a river. City of Thornton v. City of Fort Collins, 830 P.2d 915 (Colo. 1992).

Rule inapplicable to certiorari complaint filed under C.R.C.P. 106. Because invoking the relation-back doctrine of section (c) to rescue a certiorari complaint, filed pursuant to C.R.C.P. 106, would undermine the important public policies of expediting resolution of challenges to zoning and annexation proceedings and of removing municipal planning and individual properties from a cloud of uncertainty, when the original complaint fails to state a claim for relief, section (c) of this rule has no

application to the proceedings or to any further pleadings which may be filed. Richter v. City of Greenwood Village, 40 Colo. App. 310, 577 P.2d 776 (1978).

Amended pleading states timely claim for judicial review because of relation back. Although a motion to amend is filed approximately one month after the 30-day period prescribed by § 24-4-106(4) has expired, leave to amend should be granted under section (a) of this rule and because the amended pleading relates back to the date on which the original petition was filed, the pleading, as amended, states a timely claim for judicial review. Cloverleaf Kennel Club, Inc. v. Colo. Racing Comm'n, 620 P.2d 1051 (Colo. 1980).

Where the sole amendment required to bring petitioner's original petition within the State Administrative Procedure Act was the substitution of a reference to § 24-4-106 for the mistaken reference to C.R.C.P. 106(a)(4), and the pleading, if so amended, would state a claim for judicial review identical in all substantive respects to that stated in plaintiff's original petition, the amendment "relates back" to the original petition's filing date. People v. District Court, 200 Colo. 65, 612 P.2d 87 (1980).

An amendment which adds a party plaintiff must meet the requirements of section (c) in order for it to relate back to an earlier pleading. It is only if the addition or change in the identity of the plaintiff constitutes a mere change in the plaintiff's capacity or status, or if it consists of the substitution of a real party in interest to a previously asserted claim, that such an amendment may be deemed to relate back for limitation purposes. Ebrahimi v. E.F. Hutton & Co., Inc. 794 P.2d 1015 (Colo. App. 1989).

Replacing a "John Doe" caption with a party's real name amounts to "changing a party" within the meaning of section (c), and thus will only relate back if all conditions specified in the rule have been satisfied. Marriott v. Goldstein, 662 P.2d 496 (Colo. App. 1983), overruled on other grounds, Dillingham v. Greeley Publishing Co., 701 P.2d 27 (Colo. 1985); Medina v. Schmutz Mfg. Co., 677 P.2d 953 (Colo. App. 1983), overruled on other grounds, Dillingham v. Greeley Publishing Co., 701 P.2d 27 (Colo. 1985).

By holding that replacing a "John Doe" caption with a party's real name amounts to changing a party, it is implicitly held that a "John Doe" pleading allowed by C.R.C.P. 10(a) does not operate to toll the statute of limitations against unidentified defendants. Watson v. Unipress, Inc., 733 F.2d 1386 (10th Cir. 1984).

Replacing "John Doe" caption with parties' real names does not relate back where the defendants were not named as parties within the period provided by law for commencing the action against them. Brown v. Teitelbaum, 830 P.2d 1081 (Colo. App. 1991).

Section (c) is meant to allow changes only where they result from an error such as misnomer or misidentification. Relation back is generally permitted in order to correct a misnomer where the proper party is already before the court and the effect is to merely correct the name under which the party is sued. Accordingly, a plaintiff's ignorance or misunderstanding about who is liable for her injury is not a "mistake" as to the defendant's identity. Lavarato v. Branney, 210 P.3d 485 (Colo. App. 2009).

A complaint in the district court seeking to challenge an administrative ruling concerning attorney fees entered subsequent to a decision on the merits must be filed within 30 days after the ruling and does not relate back if filed more than 30 days after such ruling. Allen Homesite Group v. Colo. Water Quality Control Comm'n, 19 P.3d 32 (Colo. App. 2000).

Notice within the period provided by law for commencing the action in section (c) includes the reasonable time allowed for service of process. Dillingham v. Greeley Publishing Co., 701 P.2d 27 (Colo. 1985); Defelice v. Johnson, 931 P.2d 548 (Colo. App. 1996).

Relation back not to circumvent statute of limitations. The doctrine of relation back in section (c) does not permit a party to maintain a claim for libel filed after the statute of limitations in § 13-80-102 has run. Even v. Longmont United Hosp. Ass'n, 629 P.2d 1100 (Colo. App. 1981).

When a motion to amend is filed after the applicable statute of limitations had run, the petitioner may not claim the benefits of the relation-back provisions of section (c). Church of Jesus Christ of Latter Day Saints v. Tally, 654 P.2d 866 (Colo. App. 1982).

Amended complaint did not relate back to initial, timely complaint where new defendant did not have notice until four months after expiration of statute of limitations. O'Quinn v. Wedco Technology, 752 F. Supp. 984 (D. Colo. 1990).

Amended complaint did not relate back to initial complaint where the new defendants did not receive notice until after the expiration of the statute of limitations. Brown v. Teitelbaum, 830 P.2d 1081 (Colo. App. 1991); Currier v. Sutherland, 215 P.3d 1155 (Colo. App. 2008), aff'd, 218 P.3d 709 (Colo. 2009).

Where plaintiff's first amended complaint was untimely, and the untimeliness was jurisdictional in nature, section (c) of this rule does not supply the necessary "relation back" of the amended complaint to the date on which the initial complaint was filed so as to make the amended complaint timely. Lorenz v. City of Littleton, 38 Colo. App. 16, 550 P.2d 884 (1976).

Filing of an amended complaint that merely reiterates a claim already stated in

the original complaint cannot be used to alter or avoid the requirement of strict compliance with the seven-year adverse possession statute. The alleged separate and distinct claim raised in the amended complaint was supported by the factual claims raised in the original complaint, therefore the amended complaint related back to the original. Peters v. Smuggler-Durant Mining Corp., 930 P.2d 575 (Colo. 1997).

Applied in Shepherd v. Wilhelm, 41 Colo. App. 403, 591 P.2d 1039 (1978); Best v. La Plata Planning Comm'n, 701 P.2d 91 (Colo. App. 1984); Wilson v. Goldman, 699 P.2d 420 (Colo. App. 1985); Maurer v. Young Life, 751 P.2d 653 (Colo. App. 1987).

V. SUPPLEMENTAL PLEADINGS.

Annotator's note. Since section (c) of this rule is similar to § 80 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Facts occurring subsequent to the commencement of an action should be presented by supplemental pleadings and not by amendment to the original proceedings. Sylvester v. Jerome, 19 Colo. 128, 34 P. 760 (1893).

Matters occurring after the issues are made by the original pleadings cannot be considered or embraced in a decree unless brought into the case by supplemental pleadings. Fastenau v. Engel, 129 Colo. 440, 270 P.2d 1019 (1954).

Where leave was granted to file a supplemental petition and a petition was filed in which additional defendants were named, this so-called supplemental petition was partly an amendment to the original because it was not confined to facts which occurred after the action was commenced. Thomas v. Mahin, 76 Colo. 200, 230 P. 793 (1924).

There is no prejudice to the rights of defendant in allowing the allegation to be made by pleading styled an "amendment to the complaint", instead of denominating it a supplemental complaint, where the allegations are sufficient in substance. Macaluso v. Easley, 81 Colo. 50, 253 P. 397 (1927).

An objection that a claim for rent accruing after the commencement of the action could not have been brought into the case by amendment, but only by supplemental complaint, was held insufficient. Macaluso v. Easley, 81 Colo. 50, 253 P. 397 (1927).

Where defendant filed an amendment to an answer, but termed it a "supplemental answer", the court denied leave to file this so-called supplemental answer because a judgment on the pleadings, which had been entered, does not permit amendment of the pleadings. Kingsbury v. Vreeland, 58 Colo. 212, 144 P. 887 (1914); Lamon v. Zamp, 81 Colo. 90, 253 P. 1056 (1927); McLaughlin v. Niles Co., 88 Colo. 202, 294 P. 954 (1930).

One of the reasons for requiring a party to file a supplemental pleading to enable him to rely upon matters that have accrued since the filing of his previous pleading, is that he should enable his adversary to take issue as to such new matters. Macaluso v. Easley, 81 Colo. 50, 253 P. 397 (1927).

This rule provides reasonable notice to the opposite party. Harms v. Harms, 120 Colo. 212, 209 P.2d 552 (1949).

It follows that the opposite party must be afforded an opportunity to tender a pleading and thereby be prepared for the opportunity to meet the issue on the trial and not be surprised to his injury. Harms v. Harms, 120 Colo. 212, 209 P.2d 552 (1949).

Rule 16. Case Management and Trial Management

(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 Rule shall govern case management in all district court civil cases except as provided herein. This Rule shall not apply to domestic relations, juvenile, mental health, probate, water law, forcible entry and detainer, C.R.C.P. 106 and 120, and other similar expedited proceedings, unless otherwise ordered by the court or stipulated by the parties. This Rule 16 also shall not apply to civil actions that are governed by Simplified Procedure under C.R.C.P. 16.1, except as specifically provided in Rule 16.1. The disclosures and information required to be included in both the Case Management and Trial Management Orders interrelate to discovery authorized by these rules. The right of discovery shall not constitute grounds for failing to timely disclose information required by this Rule, nor shall this Rule constitute a ground for failing to timely disclose any information sought pursuant to discovery.

(b) Presumptive Case Management Order. Except as provided in sections (c) - (e) of this Rule, the parties shall not file a Case Management Order and subsections (1) - (10) of this section shall constitute the Case Management Order and shall control the course of

the action from the time the case is at issue until otherwise required pursuant to section (f) of this Rule.

(1) At Issue Date. For the purposes of this Rule, a case shall be deemed at issue at such time as all parties have been served and all pleadings permitted by C.R.C.P. 7 have been filed or defaults or dismissals have been entered against all non-appearing parties, or at such other time as the court may direct.

(2) The Responsible Attorney. For purposes of this Rule, "the responsible attorney" shall mean plaintiff's counsel, if the plaintiff is represented by counsel, or if not, the defense counsel who first enters an appearance in the case. The responsible attorney shall schedule conferences among the parties, prepare and file the certificates of compliance, prepare and submit the proposed Modified Case Management Order, if applicable, and prepare and submit the proposed Trial Management Order.

(3) Meet and Confer. No later than 14 days after the case is at issue, lead counsel for each party and any party who is not represented by counsel shall confer with each other about the nature and basis of the claims and defenses; the matters to be disclosed pursuant to C.R.C.P. 26(a)(1); and whether a Modified Case Management Order is necessary pursuant to subsection (c) of this Rule.

(4) Trial Setting. No later than 42 days after the case is at issue, the responsible attorney shall set the case for trial pursuant to C.R.C.P. 121 §1-6, unless otherwise ordered by the Court.

(5) Disclosures. No later than 35 days after the case is at issue, the parties shall serve their C.R.C.P. 26(a)(1) disclosures. The parties shall disclose expert testimony in accordance with C.R.C.P. 26(a)(2).

(6) Settlement Discussions. No later than 35 days after the case is at issue, the parties shall explore the possibilities of a prompt settlement or resolution of the case.

(7) Certificate of Compliance. No later than 49 days after the case is at issue, the responsible attorney shall file a Certificate of Compliance. The Certificate of Compliance shall state that the parties have complied with all requirements of subsections (b)(3)-(6), inclusive, of this Rule or, if they have not complied with each requirement, shall identify the requirements which have not been fulfilled and set forth any reasons for the failure to comply.

(8) Time to Join Additional Parties and Amend Pleadings. No later than 119 days (17 weeks) after the case is at issue, all motions to amend pleadings and add additional parties to the case shall be filed.

(9) Pretrial Motions. No later than 35 days before the trial date, pretrial motions shall be filed, except for motions pursuant to C.R.C.P. 56, which must be filed no later than 91 days (13 weeks) before the trial and except for motions challenging expert testimony pursuant to C.R.E. 702, which must be filed no later than 70 days (10 weeks) before the trial.

(10) Discovery Schedule. Discovery shall be limited to that allowed by C.R.C.P. 26(b)(2). Except as provided in C.R.C.P. 26(d), discovery may commence 42 days after the case is at issue. The date for completion of all discovery shall be 49 days before the trial date.

(c) Modified Case Management Order. Any of the provisions of section (b) of this Rule may be modified by the entry of a Modified Case Management Order pursuant to this section and section (d) of this Rule. If a trial is set to commence less than 182 days (26 weeks) after the at-issue date as defined in C.R.C.P. 16(b)(1), and if a timely request for a modified case management order is made by any party, the case management order shall be modified to allow the parties an appropriate amount of time to meet case management deadlines, including discovery, expert disclosures, and the filing of summary judgment motions. The amounts of time allowed shall be within the discretion of the court on a case-by-case basis.

(1) Stipulated Modified Case Management Order. No later than 42 days after the case is at issue, the parties may file a Stipulated proposed Modified Case Management Order, supported by a specific showing of good cause for each modification sought including, where applicable, the grounds for good cause pursuant to C.R.C.P. 26(b)(2). Such proposed order only needs to set forth the proposed provisions which would be changed from the presumptive Case Management Order set forth in section (b) of this

Rule. The Court may approve and enter the Stipulated Modified Case Management Order, or may set a case management conference.

(2) Disputed Motions for Modified Case Management Orders. If any party wishes to move for a Modified Case Management Order, lead counsel and any unrepresented parties shall confer and cooperate in the development of a proposed Modified Case Management Order. A motion for a Modified Case Management Order and one form of the proposed Order shall be filed no later than 42 days after the case is at issue. To the extent possible, counsel and any unrepresented parties shall agree to the contents of the proposed Modified Case Management Order but any matter upon which all parties cannot agree shall be designated as "disputed" in the proposed Modified Case Management Order. The proposed Order shall contain specific alternate provisions upon which agreement could not be reached and shall be supported by specific showing of good cause for each modification sought including, where applicable, the grounds for good cause pursuant to C.R.C.P. 26(b)(2). Such motion only needs to set forth the proposed provisions which would be changed from the presumptive case management Order set forth in section (b) of this Rule. The motion for a modified case management order shall be signed by lead counsel and any unrepresented parties, or shall contain a statement as to why it is not so signed.

(d) Case Management Conference. If there is a disputed modified case management order or if any counsel or unrepresented party believes that it would be helpful to conduct a case management conference, a notice to set case management conference shall be filed stating the reasons why such a conference is requested. If a Notice to Set Case Management conference is filed concerning a disputed Modified Case Management Order, or if the Court determines that such a conference should be held, the Court shall set a Case Management Conference. The conference may be conducted by telephone. The court shall promptly enter a Modified Case Management Order containing such modifications as are approved by the Court.

(e) Amendment of the Case Management Order. At any time following the entry of the Case Management Order, a party wishing to amend the presumptive Case Management Order or a Modified Case Management Order shall file a motion stating each proposed amendment and a specific showing of good cause for the timing and necessity for each modification sought including, where applicable, the grounds for good cause pursuant to C.R.C.P. 26(b)(2).

(f) Trial Management Order. No later than 28 days before the trial date, the responsible attorney shall file a proposed Trial Management order with the court. Prior to trial, a Trial Management Order shall be entered by the Court.

(1) Cases with Unrepresented Parties. If any unrepresented party will be participating in the trial, the responsible attorney shall promptly file a Notice to Set Trial Management conference after all disclosures have been served and discovery has been completed and the court shall conduct a Trial Management conference on the record and issue a Trial Management Order pursuant to subsection (f)(4) of this Rule. The responsible attorney shall submit a proposed Trial Management Order prior to the conference by filing the same with the Court and serving a copy thereof on all other parties.

(2) All Parties Represented by Counsel.

(A) If all parties are represented by counsel, lead counsel for each party shall confer with each other to develop jointly a proposed trial management order. Plaintiff's counsel shall be responsible for scheduling conferences among counsel and preparing and filing the proposed trial management order.

(B) Not later than 42 days before the trial date, each counsel shall exchange a draft of the lists of witnesses and exhibits required in subsections (f)(3)(VI)(A) and (B) of this Rule together with a copy of each documentary exhibit to be listed pursuant to subsection (f)(3)(VI)(B) of this Rule.

(C) To the extent possible, counsel shall agree to the contents of the proposed Trial Management Order. Any matter upon which all counsel cannot agree shall be designated as "disputed" in the proposed order and the proposed trial management order shall contain specific alternative provisions upon which agreement could not be reached. The proposed Trial Management Order shall be signed by lead counsel for each party and shall include a place for the court's approval.

(D) If there are any disputed matters or if any counsel believes that it would be helpful to conduct a Trial Management conference, the filing of the proposed Trial Management order shall be accompanied by a Notice to Set Trial Management conference, stating the reasons why such a conference is requested.

(3) Form of Trial Management Order. The proposed Trial Management Order shall contain the following matters under the following captions and in the following order:

I. STATEMENT OF CLAIMS AND DEFENSES. The parties shall set forth a brief description of the nature of the case and a summary identification of the claims and defenses remaining for trial. Any claims or defenses set forth in the pleadings which will not be at issue at trial shall be designated as "withdrawn" or "resolved."

II. STIPULATED FACTS. The parties shall set forth a plain, concise statement of all facts which the trier of fact shall accept as undisputed. If the matter is scheduled for a jury trial, a proposed jury instruction containing these undisputed facts shall be submitted as provided in section (g) of this Rule.

III. PRETRIAL MOTIONS. The parties shall list any pending motions.

IV. TRIAL BRIEFS. The parties shall indicate whether trial briefs will be filed, including a schedule for their filing. Trial briefs shall be filed no later than 14 days before the trial date.

V. ITEMIZATION OF DAMAGES OR OTHER RELIEF SOUGHT. Each claiming party shall set forth a detailed description of the categories of damages or other relief sought and a computation of any economic damages claimed.

VI. IDENTIFICATION OF WITNESSES AND EXHIBITS—JUROR NOTEBOOKS. Each party shall provide the following information:

(A) Witnesses. Each party shall attach to the proposed trial management order separate lists containing the name, address, telephone number and the anticipated length of each witness' testimony, including cross examination, (i) of any person whom the party "will call" and (ii) of any person whom the party "may call" as a witness at trial. When a party lists a witness as a "will call" witness, the party does not have to call the witness to testify, but must ensure that the witness will be available to testify at trial if called by any party without the necessity for any other party to subpoena the witness for the trial. For each expert witness, the list shall also indicate whether the opposing party accepts or challenges the qualifications of a witness to testify as an expert as to the opinions expressed. If there is a challenge, the list shall be accompanied by a resume setting forth the basis for the expertise of the challenged witness. Where appropriate, the court may order the parties to provide written notice to the other parties and to the court of the order in which the parties expect to present their witnesses.

(B) Exhibits. Each party shall attach to the proposed trial management order a list of exhibits including physical evidence which the party intends to introduce at trial. Unless stipulated by the parties, each list shall assign a number (for plaintiff or petitioner) or letter (for defendant or respondent) designation for each exhibit. Proposed excerpted or highlighted exhibits shall be attached. If any party objects to the authenticity of any exhibit as offered, such objection shall be noted on the list, together with the ground therefor. If any party stipulates to the admissibility of any exhibit, such stipulation shall be noted on the list. On or before the trial date, a set of the documentary exhibits shall be provided to the court.

(C) Juror Notebooks. Counsel for each party shall confer about items to be included in juror notebooks as set forth in C.R.C.P. 47(t) and at the Trial Management conference or other date set by the Court make a joint submission to the Court of items to be included in the juror notebook. By agreement of the parties or in the discretion of the Court, important exhibits may be highlighted or excerpted and may be included in juror notebooks.

(D) Deposition and other preserved testimony. If the preserved testimony of any witness is to be presented the proponent of the testimony shall provide the other parties with its designations of such testimony at least 28 days before the trial date. Any other party may provide all other parties with its designations and shall do so at least 14 days before the trial date. The proponent may provide reply designations and shall do so at least 7 days before the trial date. A copy of the preserved testimony to be presented at trial shall be submitted to the court and include the proponent's and opponent's anticipated designa-

tions of the pertinent portions of such testimony or a statement why designation is not feasible at least 3 days before the trial date. If any party wishes to object to the admissibility of the testimony or to any tendered question or answer therein, it shall be noted, setting forth the grounds therefor.

VII. TRIAL EFFICIENCIES AND OTHER MATTERS. If the anticipated length of the trial has changed, the parties shall so indicate. The parties shall also include any other matters which are appropriate under the circumstances of the case or directed by the court to be included in the proposed Trial Management Order. The parties shall confirm that they have considered ways in which the use of technology can simplify the case and make it more understandable. In all cases where a jury trial will be held, the parties shall confer regarding the amount of time requested for juror examination and provide their positions along with their reasons therefor.

(4) Approval of Trial Management Order. If a Notice to Set Trial Management Conference is filed or the Court determines that such a conference should be held, the Court shall set a trial management conference. The conference may be conducted by telephone. The court shall promptly enter the Trial Management Order.

(5) Effect of Trial Management Order. The Trial Management Order shall control the subsequent course of the trial. Modification to or divergence from the Trial Management Order, whether prior to or during trial, shall be permitted upon a demonstration that the modification or divergence could not with reasonable diligence have been anticipated. In the event of any ambiguity in the Trial Management Order, the Court shall interpret the Order in the manner which best advances the interests of justice.

(g) Jury Instructions and Verdict Forms. Counsel for the parties shall confer to develop jointly proposed jury instructions and verdict forms to which the parties agree. No later than 7 days prior to the date scheduled for commencement of the trial or such other time as the court shall direct, a set of the proposed jury instructions and verdict forms shall be filed with the courtroom clerk. The first party represented by counsel to demand a jury trial pursuant to C.R.C.P. 38 and who has not withdrawn such demand shall be responsible for filing the proposed jury instructions and verdict forms. If any jury instruction or verdict form is disputed, the party propounding the instruction or verdict form shall separately file with the courtroom clerk a set of the disputed jury instructions and verdict forms. Each instruction or verdict form shall have attached a brief statement of the legal authority on which the proposed instruction or verdict form is based. Compliance with this Rule shall not deprive parties of the right to tender additional instructions or verdict forms or withdraw proposed instructions or verdict forms at trial. All jury instructions and verdict forms submitted by the parties shall be in final form and reasonably complete. The court shall permit the use of photocopied instructions and verdict forms, without citations, in its submission to the jury.

Source: Entire rule repealed April 14, 1994, effective January 1, 1995; entire rule adopted April 14, 1994, effective January 1, 1995, for all cases filed on or after that date; committee comment approved June 10, 1994; (c)(VI) and (c)(VIII) amended and adopted June 25, 1998, effective January 1, 1999; entire rule amended and adopted February 13, 2002, effective July 1, 2002; entire rule amended and adopted November 6, 2003, effective July 1, 2004; (c) amended and effective June 28, 2007; (b)(9) amended by corrective order, effective November 5, 2007; (f)(3)VII. amended and effective September 16, 2010; (b)(3), (b)(4), (b)(5), (b)(7) to (b)(10), (c), (e), IP(f), (f)(2)(B), (f)(3)IV.,(f)(3)VI.(D), and (g) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Cross references: For disclosure and discovery, see chapter 4 (C.R.C.P. 26 to 37); for dismissal of actions, see C.R.C.P. 41; for amended pleadings, see C.R.C.P. 15; for instructions to jurors, see C.R.C.P. 51; for Colorado jury instructions, see C.R.C.P. 51.1.

COMMITTEE COMMENT

History and Philosophy

Effective differential case management has been a long-term goal of the Bench, Bar, and Public. Adoption by the Colorado Supreme Court of C.R.C.P. 121 and its practice standards in 1983; revised C.R.C.P. 16 in 1988 to require earlier disclosure of matters necessary for trial; and the Colorado Standards for Case Management—Trial Courts in 1989 were a continuing and evolving effort to achieve an orderly, fair and less expensive means of dispute resolution. Those rules and standards were an improvement over prior practice where there was no prescribed means of case management, but problems still remained. There were problems of discovery abuse, late or inadequate disclosure, lack of professionalism, slow case disposition, outrageous expense and failure to achieve an early settlement of those cases that ultimately settled.

In the past several years, a recognition by the organized Bar of increasing unprofessional conduct by some attorneys led to further study of problems in our civil justice system and new approaches to resolve them. New Federal Rules of Civil Procedure were developed to require extensive early disclosure and to limit discovery. The Colorado Bar Association's Professionalism Committee made recommendations concerning improvements of Colorado's case management and discovery rules.

After substantial input through surveys, seminars and Bench/Bar committees, the Colorado Supreme Court appointed a special Ad Hoc Committee to study and make recommendations concerning Colorado's Civil Rules pertaining to case management, disclosure/discovery and motions practice. Reforms of Rules 16, 26, 29, 30, 31, 32, 33, 34, 36, 37, 51, 121 § 1-11, 121 § 1-12, 121 § 1-15, and 121 § 1-19 were developed by this Committee.

The heart of the reform is a totally rewritten Rule 16 which sets forth a new system of case management. Revisions to Rules 26, 29, 30, 31, 32, 33, 34, 36, and 37 are patterned after December 1, 1993, revisions to Federal Rules of the same number, but are not in all respects identical. Colorado Rules 16, 26, 29, 30, 31, 32, 33, 34, 36, and 37 were developed to interrelate with each other to provide a differential case management/early disclosure/limited discovery system designed to resolve difficulties experienced with prior approaches. Changes to C.R.C.P. 121 §§ 1-11, 1-12, 1-15, and 1-19 are designed to interrelate with the case management/disclosure/ discovery reform to improve motions practice. In developing these rules, the Committee paid particular attention to the 1993 revisions of the Federal Rules of Civil Procedure and the work of the Colorado Bar Association regarding professionalism.

Operation

New Rule 16 and revisions of Rules 26, 29, 30, 31, 32, 33, 34, 36, 37, 51, and 121 §§ 1-11, 1-12, 1-15, and 1-19 are designed to accomplish early purposeful and reasonably economical management of cases by the parties with Court supervision. The system is based on communication, including required early disclosure of persons with knowledge and documents relevant to the case, which disclosure should lead in many cases to early evaluation and settlement efforts, and/or preparation of a workable Case Management Order. Lead attorneys for each party are to communicate with each other in the spirit of cooperation in the preparation of both the Case and Trial Management Orders. Court Case Management Conferences are available where necessary for any reasonable purpose. The Rules require a team effort with Court leadership to insure that only appropriate discovery is conducted and to carefully plan for and conduct an efficient and expeditious trial.

Rules 16 and 26 should work well in most cases filed in Colorado District Courts. However, where a case is complex or requires special treatment, the Rules provide flexibility so that the parties and Court can alter the procedure. The importance of economy is encouraged and fostered in a number of ways, including authorized use of the telephone to conduct in-person attorney and Court conferences.

The Committee acknowledges the greater length of the Rules comprising this reformed system. However, these Rules have been developed to describe and to eliminate "hide-the-ball" and "hardball" tactics under previous Disclosure Certificate and Discovery Rules. It is expected that trial judges will assertively lead the management of cases to ensure that justice is served. In the view of the Committee, abuses of the Rules to run up fees, feed egos, bludgeon opponents into submission, force unfair settlements, build cases for sanctions, or belittle others should not be tolerated.

These Rules have been drafted to emphasize and foster professionalism and to de-emphasize sanctions for non-compliance. Adequate enforcement provisions remain. It is expected that attorneys will strive diligently to represent their clients' best interests, but at the same time conduct themselves as officers of the Court in the spirit of the recently adopted Rules of Professional Conduct.

(a)

The purpose and scope of Rule 16 are as set forth in subsection (a). Unless otherwise ordered by the Court or stipulated by the parties, Rule 16 does not mandatorily apply to domestic

relations, juvenile, mental health, probate, water law, forcible entry and detainer, Rule 120, or other expedited proceedings. Provisions of the Rule could be used, however, and Courts involved in those proceedings should consider their possible applicability to particular cases.

(b)

The "Case Management Order" is the central coordinating feature of the Rule 16 case management system. It comes at a relatively early but realistic time in the case. The Case Management Order governs the trial setting; contains or coordinates disclosure; limits discovery and establishes a discovery schedule; establishes the deadline for joinder of additional parties and amendment of pleadings; coordinates handling of pretrial motions; requires a statement concerning settlement; and allows opportunity for inclusion of other provisions necessary to the case.

Lead counsel for each of the parties are required to confer about the nature and bases of their claims and defenses, discuss the matters to be disclosed and explore the possibilities of a prompt settlement or other resolution of the case. As part of the conferring process, lead counsel for each of the parties are required to cooperate in the development of the Case Management Order, which is then submitted to the Court for approval. If there is disagreement about any aspect of the proposed Case Management Order, or if some aspect of the case requires special treatment, the parties are entitled to an expeditious Case Management Conference. If any party is appearing pro se an automatic mandatory Case Management Conference is triggered.

A time line is specified in C.R.C.P. 16(b) for the C.R.C.P. 26(a)(1) disclosures, conferring of counsel and submission of the proposed Case Management Order. The time line in section (b) is triggered by the "at issue" date, which is defined at the beginning of C.R.C.P. 16(b).

Disclosure requirements of C.R.C.P. 26, including the duty to timely supplement and correct disclosures, together with sanction provisions of C.R.C.P. 37 for failure to make disclosure, are incorporated by reference. Because of mandatory disclosure, there should be substantially less need for discovery. Presumptive limitations on discovery are specified in C.R.C.P. 26(b)(2). The limitations contained in C.R.C.P. 26 and Discovery Rules 29, 30, 31, 32, 33, 34, and 36 are incorporated by reference and provision is made for discovery above presumptive limitations if, upon good cause shown (as defined in C.R.C.P. 26(b)(2)), the particular case warrants it. The system established by C.R.C.P. 16(b)(1)(IV) requires the parties to set forth and obtain Court approval of a schedule of discovery for the case, which includes the timing and number of particular forms of discovery requests. The system established by C.R.C.P. 16(b)(1)(IV) also requires lead counsel for each of the parties to set forth the basis of and necessity for all such discovery and certify that they have advised their clients of the expenses and fees involved with each such item of discovery. The purpose of such discovery schedule and expense estimate is to bring about an advanced realization on the part of the attorneys and clients of the expense and effort involved in the schedule so that decisions can be made concerning propriety, feasibility, and possible alternatives (such as settlement or other means of obtaining the information). More stringent standards concerning the necessity of discovery contained in C.R.C.P. 26(b)(2) are incorporated into C.R.C.P. 16(b)(l)(IV). A Court should not simply "rubber-stamp" a proposed discovery schedule even if agreed upon by counsel.

A Court Case Management Conference will not be necessary in every case. It is anticipated that many cases will not require a Court Case Management Conference, but such conference is available should the parties or the Court find it necessary. Regardless of whether there is a Court Case Management Conference, there will always be the Case Management Order which, along with the later Trial Management Order, should effectively govern the course of the litigation through the trial.

(c)

The Trial Management Order is jointly developed by the parties and filed with the Court as a proposal no later than thirty days prior to the date scheduled for the trial (or at such other time as the Court directs). The Trial Management Order contains matters for trial (see specific enumeration of elements to be contained in the Trial Management Order). It should be noted that the Trial Management Order references the Case Management Order and, particularly with witnesses, exhibits, and experts, contemplates prior identification and disclosure concerning them. Except with permission of the Court based on a showing that the witness, exhibit, or expert could not have, with reasonable diligence, been anticipated, a witness, exhibit, or expert cannot be revealed for the first time in the Trial Management Order.

As with the Case Management Order, Trial Management Order provisions of the Rule are designed to be flexible so as to fit the particular case. If the parties cannot agree on any aspect of the proposed Trial Management Order, a Court Trial Management Conference is triggered. The Court Trial Management Conference is mandatory if any party is appearing in the trial *pro se*.

As with the Case Management Order procedure, many cases will not require a Court Trial

Management Conference, but such a conference is available upon request and encouraged if there is any problem with the case that is not resolved and managed by the Trial Management Order.

The Trial Management Order process will force the attorneys to make decisions on which claims or defenses should be dropped and identify legal issues that are truly contested. Both of those requirements should reduce the expenses associated with trial. In addition, the requirement that any party seeking damages define and itemize those damages in detail should facilitate preparation and trial of the case.

Subsection (c)(IV), pertaining to designation of "order of proof," is a new feature not contained in Federal or State Rules. To facilitate scheduling and save expense, the parties are required to specifically identify those witnesses they anticipate calling in the order to be called, indicating the anticipated length of their testimony, including cross-examination.

(d)

Provision is made in the C.R.C.P. 16 case management system for an orderly advanced exchange and filing of jury instructions and verdict forms. Many trial courts presently require exchange and submission of a set of agreed instructions during the trial. C.R.C.P. 16(d) now requires such exchange, conferring, and filing no later than three (3) days prior to the date scheduled for the commencement of the trial (or such other time as the Court otherwise directs).

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, "Pre-Trial in Colorado in Words and at Work", see 27 Dicta 157 (1950). For article, "Some Comments on Pre-Trial", see 28 Dicta 23 (1951). For article, "Pleadings, Rules 7 to 25", see 28 Dicta 368 (1951). For article, "Pleadings and Motions: Rules 7-16", see 23 Rocky Mt. L. Rev. 542 (1951). For article, "Expert Witnesses", see 24 Rocky Mt. L. Rev. 418 (1952). For article, "Pre-Trial Procedure — Should It Be Abolished in Colorado?", see 30 Dicta 371 (1953). For article, "One Year Review of Civil Procedure and Appeals", see 37 Dicta 21 (1960). For article, "One Year Review of Civil Procedure and Appeals", see 40 Den. L. Ctr. J. 66 (1963). For article, "Plaintiff's Advantageous Use of Discovery, Pre-Trial and Summary Judgment", see 40 Den. L. Ctr. J. 192 (1963). For Note, "One Year Review of Civil Procedure", see 41 Den. L. Ctr. J. 67 (1964). For comment on Glisan v. Kurth appearing below, see 36 U. Colo. L. Rev. 568 (1964). For article, "Selecting Cases for Mediation", see 17 Colo. Law. 2007 (1988). For article, "Colorado's New Rules of Civil Procedure, Part I: Case Management and Disclosure", see 23 Colo. Law. 2467 (1994). For article, "Common Pitfalls in Complying with C.R.C.P. 16 and 26 When Drafting Case Management Orders", see 26 Colo. Law. 39 (March 1996). For article, "Rules 16 and 16.2: Reality Check 1998", see 27 Colo. Law. 45 (March 1998). For article, "Civil Rules 16 and 26: Pretrial Procedure and Discovery Revisited and Revised", see 30 Colo. Law. 9 (December 2001). For article, "Comment on the Amendments to C.R.C.P. 16: An Opportunity to Enjoy Practicing Law", see 31 Colo. Law. 23 (April 2002).

Annotator's note. Some of the following annotations refer to cases decided under C.R.C.P. 16 as it existed prior to the 1994 repeal and readoption of that rule, effective January 1, 1995. Former C.R.C.P. 16 provided for pre-trial conferences and pre-trial orders rather than case management orders and trial management orders.

This rule is the authority under which trial courts promulgate local pre-trial rules and hold pre-trial conferences. Glisan v. Kurth, 153 Colo. 102, 384 P.2d 946 (1963).

The rule is not a mere technicality and compliance is mandatory. Danburg v. Realties, Inc., 677 P.2d 439 (Colo. App. 1984).

This rule provides that the court may direct the attorneys to appear before it for a conference to consider certain matters, and having done so, then the court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, which limits the issues for trial to those not disposed of by admissions or agreement of counsel, and such order, when entered, controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. Ferguson v. Hurford, 132 Colo. 507, 290 P.2d 229 (1955).

Effective use of the pre-trial conference can, and does, contribute much in meeting the problems of mounting congestion in the trial courts. Glisan v. Kurth, 153 Colo. 102, 384 P.2d 946 (1963).

To make pre-trial procedure effective, appellate interference with the trial court in this area must be kept at a minimum. Glisan v. Kurth, 153 Colo. 102, 384 P.2d 946 (1963).

In the application of the pre-trial rule, the court must be careful that devotion to the task does not lead it to deprive a litigant of his right to a trial. Glisan v. Kurth, 153 Colo. 102, 384 P.2d 946 (1963).

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

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

Denial of a jury trial for failure to comply with C.R.C.P. 16(d) was not an appropriate remedy and a right to a jury trial may only be lost for the reasons cited in C.R.C.P. 39(a). Wright v. Woller, 976 P.2d 902 (Colo. App. 1999).

Applied in In re Estate of Gardner, 31 Colo. App. 361, 505 P.2d 50 (1972); Clark v. District Court, 668 P.2d 3 (Colo. 1983); Reigel v. SavaSeniorCare L.L.C., __ P.3d __ (Colo. App. 2011).

II. DISCLOSURE.

Liberal policy regarding supplementing disclosure certificate. Just as C.R.C.P. 15 has been held to reflect the policy of liberally allowing amendments to pleadings, so too should a similar policy be followed with respect to supplementing disclosure certificates. Consolidated Hardwoods v. Alexander Const., 811 P.2d 440 (Colo. App. 1991).

Absent a showing of prejudice, a trial court abuses its discretion in not permitting amendment to a disclosure statement where the request is made more than 80 days prior to trial and relates to a matter that was previously known but was erroneously not included in the disclosure certificate. Consolidated Hardwoods v. Alexander Const., 811 P.2d 440 (Colo. App. 1991).

When a trial court's actions substantially tip the balance in an effort to avoid prejudice and delay and as a result unreasonably deny a party his or her day in court, the reviewing court must overturn the decision of the trial court. J.P. v. District Court, 873 P.2d 745 (Colo. 1994).

The district court abused its discretion in denying the petitioner's motions to endorse witnesses and freezing discovery. J.P. v. District Court, 873 P.2d 745 (Colo. 1994).

Trial court abused its discretion when, as a sanction for filing a disclosure certificate signed by plaintiff's former attorney's paralegal rather than the plaintiff herself, the court limited the witnesses the plaintiff could call to the defendant and herself. Defendants did not suffer any prejudice as a result of the improper signing of the certificate since the filing served its purpose of timely informing them of the evidence plaintiff intended to present at trial. Keith v. Valdez, 934 P.2d 897 (Colo. App. 1997).

If one party elicits opinions from another party's expert witness which are beyond the scope of the testimony described in the disclosure statement and are not of the kind which would impeach such testimony, the witness will be considered, for the purposes of the disclosure statement requirements, as the witness of the party eliciting the opinions. Freedman v. Kaiser Fund Health Plan, 849 P.2d 811 (Colo. App. 1992).

An objection on the grounds that a party has not adequately disclosed the basis for and summary of each expert witness opinion must be made within a reasonable time. Perkins v. Flatiron Structures Co. 849 P.2d 832 (Colo. App. 1992).

The purpose of the disclosure mandated by the rule is to provide parties with adequate time to prepare by obtaining relevant evidence. Williams v. Continental Airlines, Inc., 943 P.2d 10 (Colo. App. 1996).

Sanctions for failure to comply with disclosure rules rest in the discretion of the trial court and should not be disturbed absent an abuse of discretion. Such sanctions, which may include witness preclusion, should commensurate with the seriousness of the violation. Williams v. Continental Airlines, Inc., 943 P.2d 10 (Colo. App. 1996).

Applied in People ex rel. Pub. Utils. Comm'n v. Entrup, 143 P.3d 1120 (Colo. App. 2006).

III. CASE MANAGEMENT ORDER.

This rule commands that a trial court shall make an order which recites the action taken at the pre-trial conference, and pursuant thereto, requires the trial court to direct the preparation of an order containing what transpired at the conference, and how the results of such conference shall control the subsequent course of the proceedings. Albright v. District Court, 150 Colo. 487, 375 P.2d 685 (1962).

The pre-trial order controls the subsequent course in the action, unless the court modifies the same at the trial to prevent manifest injustice. Ferguson v. Hurford, 132 Colo. 507, 290 P.2d 229 (1955); Harris Park Lakeshore, Inc. v. Church, 152 Colo. 278, 381 P.2d 459 (1963); Shira v. Wood, 164 Colo. 49, 432 P.2d 243 (1967); Greenlawn Sprinkler Corp. v. Forsberg, 170 Colo. 286, 461 P.2d 22 (1969);

Pub. Serv. Co. v. Bd. of Water Works, 831 P.2d 470 (Colo. 1992).

Order must fully recite any action taken relative to amendments allowed to the pleadings. Gorin v. Arizona Columbine Ranch, Inc., 34 Colo. App. 405, 527 P.2d 899 (1974).

Case reinstated where a delay reduction order required both the filing of a proposed case management order and setting the case for trial within 30 days; held that the issuance of case management order then extended deadline for setting of trial another 30 days. Becker v. District Court for Arapahoe County, 969 P.2d 700 (Colo. 1998).

This rule contains no language limiting its application to the first trial only of an action; accordingly, it will govern second trial in absence of showing that orders and stipulation made at pre-trial conference will work manifest injustice. Harris Park Lakeshore, Inc. v. Church, 152 Colo. 278, 381 P.2d 459 (1963).

Disputed issues should not be resolved. In the absence of agreement or admissions by the parties, the trial court should not resolve disputed issues in a pre-trial order. Cunningham v. Spring Valley Estates, Inc., 31 Colo. App. 77, 501 P.2d 746 (1972), aff'd, 181 Colo. 435, 510 P.2d 336 (1973).

Assent is assumed, absent objection. It is assumed, in the absence of an objection, that a pre-trial order is made in cooperation with, and by assent of, the parties. Ferguson v. Hurford, 132 Colo. 507, 290 P.2d 229 (1955).

In the absence of an objection to the pre-trial order, or the part thereof with which counsel present do not agree, the order precludes any further challenge of the questions determined at the pre-trial conference. Ferguson v. Hurford, 132 Colo. 507, 290 P.2d 229 (1955); Shira v. Wood, 164 Colo. 49, 432 P.2d 243 (1967).

In the absence of an objection, all matters determined at the pre-trial conference have the force and effect of a stipulation of the parties as to the correctness thereof. Ferguson v. Hurford, 132 Colo. 507, 290 P.2d 229 (1955); Shira v. Wood, 164 Colo. 49, 432 P.2d 243 (1967); Greenlawn Sprinkler Corp. v. Forsberg, 170 Colo. 286, 461 P.2d 22 (1969).

Pretrial order, if not objected to, controls introduction of evidence at trial. Great W. Food Packers, Inc. v. Longmont Foods Co., 636 P.2d 1331 (Colo. App. 1981).

The court errs in going beyond remaining issues. Where there is no objection to the pre-trial order, the court itself does not thereafter in any manner "modify" the pre-trial order, and the issue is never injected into the case on the basis of any expressed or implied consent of the parties, the trial court errs in going beyond the issues which according to the pre-trial order are the only issues remaining. Greenlawn Sprinkler Corp. v. Forsberg, 170 Colo. 286, 461 P.2d 22 (1969).

The court errs in giving instructions inconsistent with stipulations of pre-trial order. Where a pre-trial conference order, duly signed and to which no objection is made by either party, stipulates to a certain fact, which dispenses with the necessity of proof, it is error for the trial court to instruct the jury on a fact situation in a manner wholly inconsistent with the stipulation. Allison v. Trustee, 140 Colo. 392, 344 P.2d 1077 (1959).

In the absence of agreement between the parties affected, an issue cannot be resolved against one of them by the order made upon the pre-trial conference. Marsh v. Warren, 126 Colo. 298, 248 P.2d 825 (1952).

Where there is nothing in the pre-trial order which contemplates judgment against certain individuals thought to be jointly and severally liable with the defendant and their liability is never an issue in the case, there is no error in the trial court's failure to enter a joint judgment to include them. Lewis v. Martin, 30 Colo. App. 342, 492 P.2d 877 (1971).

Under this rule witnesses not listed at the pre-trial conference have been permitted to testify, and documents not listed in the pre-trial order have been admitted into evidence where such modifications of the pre-trial order were necessary to prevent injustice. Francisco v. Cascade Inv. Co., 29 Colo. 516, 486 P.2d 447 (1971).

Wide discretion is vested in trial court to allow nonlisted witnesses to testify. As purpose of such pre-trial disclosure of witnesses is to enable all parties to prepare for trial, wide discretion is vested in the trial court to determine whether a witness who has not been listed on the pre-trial order and whose name has not been disclosed to the opposing party may testify. In re Estate of Gardner, 31 Colo. App. 361, 505 P.2d 50 (1972); Wood v. Rowland, 41 Colo. App. 498, 592 P.2d 1332 (1978).

The failure to list surveillance films and the surveillant at the pre-trial stage, or to make them known prior to trial, does not mean that the defendants are conclusively prohibited from having the desired evidence admitted, but are simply taking a risk that the trial court in its discretion might refuse to modify the pre-trial order. Crist v. Goody, 31 Colo. App. 496, 507 P.2d 478 (1972).

Such a modification will be refused unless it is determined by the court to be necessary "to prevent manifest injustice". Crist v. Goody, 31 Colo. App. 496, 507 P.2d 478 (1972).

Where no actual prejudice would result by the admission of additional exhibits, the court should permit a modification of the list of exhibits in the pre-trial order and the admission of the exhibits in evidence in order to prevent manifest injustice. Francisco v. Cascade Inv. Co., 29 Colo. App. 516, 486 P.2d 447 (1971).

Where a document is not within the purview of the pre-trial order, but is in the possession of the defendant before the trial, it would be impossible to conclude that there is any prejudice incident to its reception in evidence. Landauer v. Juey, 143 Colo. 76, 352 P.2d 302 (1960).

A change in counsel is not sufficient in and of itself to justify vitiating a pre-trial conference order. Harris Park Lakeshore, Inc. v. Church, 152 Colo. 278, 381 P.2d 459 (1963).

A "local" rule of a district court relating to pre-trial procedure requiring counsel to approve a pre-trial order as to form and content is neither contrary to, in conflict with, nor in excess of authority granted by this rule. Albright v. District Court, 150 Colo. 487, 375 P.2d 685 (1962).

Provision of local rule does not deny a party due process. The provision of a "local" rule requiring attorneys to approve a pre-trial order as to substance as well as to form does not deny a party due process of law. Albright v. District Court, 150 Colo. 487, 375 P.2d 685 (1962).

The approval of the "substance" of a pre-trial order under a "local" rule of court is neither an approval by counsel of the legal effect of the order nor of the application of substantive law which may appear in said pre-trial order, but rather, is an approval only of a recital of what transpired at the pre-trial conference. Albright v. District Court, 150 Colo. 487, 375 P.2d 685 (1962).

Where the procedures prescribed in a "local" rule of a district court are in lieu of a pre-trial conference, the district court has the same power to modify a list of exhibits and other documents prepared pursuant to the local rule, as it has to modify a pre-trial order. Francisco v. Cascade Inv. Co., 29 Colo. App. 516, 486 P.2d 447 (1971).

The provision of a "local" rule does not preclude review by writ of error of matters duly objected to or reserved matters ruled upon a pre-trial conference. Albright v. District Court, 150 Colo. 487, 375 P.2d 685 (1962).

Trial court did not err in basing its damages award upon a second stipulation between the parties as to the amount of monthly rental loss even though the amount conflicted with amount specified in trial management order where stipulation entered into after entry of order. Razi v. Schmitt, 36 P.3d 102 (Colo. App. 2001).

Applied in Brown v. Hollywood Bar and Cafe, 942 P.2d 1363 (Colo. App. 1997).

IV. TRIAL MANAGEMENT ORDER.

Failure to include a claim for attorney fees in the trial management order is not a waiver of the claim. Attorney fees are neither costs nor damages, but a hybrid of each. Roberts v. Adams, 47 P.3d 690 (Colo. App. 2001).

Rule 16.1. Simplified Procedure for Civil Actions

(a) Purpose and Summary of Simplified Procedure.

(1) Purpose of Simplified Procedure. The purpose of this rule is to provide maximum access to the district courts in civil actions; to enhance the provision of just, speedy, and inexpensive determination of civil actions; to provide the earliest practical trials; and to limit discovery and its attendant expense.

(2) Summary of Simplified Procedure. Under this Rule, Simplified Procedure generally applies to all civil actions, whether for monetary damages or any other form of relief unless expressly excluded by this Rule or the pleadings, or unless a party timely and properly elects to be excluded from its provisions. This Rule normally limits the maximum allowable monetary judgment to $100,000 against any one party. This Rule requires early, full disclosure of persons, documents, damages, insurance and experts, and early, detailed disclosure of witnesses' testimony, whose direct trial testimony is then generally limited to that which has been disclosed. Normally, no depositions, interrogatories, document requests or requests for admission are allowed, although examination under C.R.C.P. 34(a)(2) and 35 is permitted.

(b) Actions Subject to Simplified Procedure. This Rule applies to all civil actions other than:

(1) civil actions that are class actions, domestic relations, juvenile, mental health, probate, water law, forcible entry and detainer, C.R.C.P. 106 and 120, or other similar expedited proceedings, unless otherwise stipulated by the parties; or

(2) civil actions in which any party seeks a monetary judgment from any other party of more than $100,000, exclusive of interest and costs.

(3) Each pleading containing an initial claim for relief in a civil action, other than a domestic relations, probate, water, juvenile, or mental health action, shall be accompanied by a completed Civil Cover Sheet in the form and content of Appendix to Chapters 1 to 17,

Form 1.2 (JDF 601), at the time of filing. Failure to file the cover sheet shall not be considered a jurisdictional defect in the pleading but may result in a clerk's show cause order requiring its filing.

(c) Limitations on Damages. In cases subject to this Rule, a claimant's right to a monetary judgment against any one party shall be limited to a maximum of $100,000, including any attorney fees, penalties or punitive damages, but excluding interest and costs. The $100,000 limitation shall not restrict an award of non-monetary relief. 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.

(d) Election for Exclusion from This Rule. This Rule shall apply unless, no later than 35 days after the case is at issue as defined in C.R.C.P. 16(b)(1), any party files a written notice, signed by the party and its counsel, if any, stating that the party elects to be excluded from the application of Simplified Procedure, set forth in this rule 16.1. The use of a "Notice to Elect Exclusion From C.R.C.P. 16.1 Simplified Procedure" in the form and content of Appendix to Chapters 1 to 17, Form 1.3 (JDF 602), shall comply with this section. In the event a notice is filed, C.R.C.P. 16 shall govern the action.

(e) Election for Inclusion Under This Rule. In actions excluded by subsection (b)(2) of this Rule, within 49 days after the case is at issue, as defined in C.R.C.P. 16(b)(1), the parties may file a stipulation to be governed by this Rule. In such event, they will not be bound by the $100,000 limitation on judgments contained in section (c) of this Rule.

(f) Case Management Orders. In actions subject to Simplified Procedure pursuant to this Rule, the presumptive case management order requirements of C.R.C.P. 16(b)(1), (2), (3), (5) and (6) shall apply.

(g) Trial Setting. No later than 42 days after the case is at issue, the responsible attorney shall set the case for trial pursuant to C.R.C.P. 121, section 1-6, unless otherwise ordered by the court.

(h) Certificate of Compliance. No later than 49 days after the case is at issue, the responsible attorney shall also file a Certificate of Compliance stating that the parties have complied with all the requirements of sections (f) and (g) of this Rule or, if they have not complied with each requirement, shall identify the requirements which have not been fulfilled and set forth any reasons for the failure to comply.

(i) Expedited Trials. Trial settings, motions and trials in actions subject to Simplified Procedure under this Rule should be given early trial settings, hearings on motions and trials.

(j) Case Management Conference. If any party believes that it would be helpful to conduct a case management conference, a notice to set case management conference shall be filed stating the reasons why such a conference is requested. If any party is unrepresented or if the court determines that such a conference should be held, the court shall set a case management conference. The conference may be conducted by telephone.

(k) Simplified Procedure. Simplified Procedure means that the action shall not be subject to C.R.C.P. 16, 26-33, 34(a)(1), 34(c) and 36, unless otherwise specifically provided in this Rule, and shall be subject to the following requirements:

(1) Required Disclosures.

(A) Disclosures in All Cases. Each party shall make disclosures pursuant to C.R.C.P. 26(a)(1), 26(a)(4), 26(b)(5), 26(c), 26(e) and 26(g), no later than 35 days after the case is at issue as defined in C.R.C.P. 16(b)(1). In addition to the requirements of C.R.C.P. 26(g), the disclosing party shall sign all disclosures under oath.

(B) Additional Disclosures in Certain Actions. Even if not otherwise required under subsection (A), matters to be disclosed pursuant to this Rule shall also include, but are not limited to, the following:

(i) ***Personal Injury Actions.*** 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, and shall produce all records from those providers or written waivers allowing the opposing party to obtain those records subject to appropriate protective provisions authorized by C.R.C.P. 26(c). The claimant shall also produce transcripts or tapes of recorded statements, documents, photographs, and video and other

recorded images that address the facts of the case or the injuries sustained. The defending party shall disclose transcripts or tapes of recorded statements, any insurance company claims memos or documents, photographs, and video and other recorded images that address the facts of the case, the injuries sustained, or affirmative defenses. A party need not produce those specific records for which the party, after consultation pursuant to C.R.C.P. 26(c), timely moves for a protective order from the court;

(ii) ***Employment Actions.*** In actions seeking damages for loss of employment, the claimant shall disclose the names and addresses of all persons by whom the claimant has been employed for the ten years prior to the date of disclosure and shall produce all documents which reflect or reference claimant's efforts to find employment since the claimant's departure from the defending party, and written waivers allowing the opposing party to obtain the claimant's personnel files and payment histories from each employer, except with respect to those records for which the claimant, after consultation pursuant to C.R.C.P. 26(c), timely moves for a protective order from the court. The defending party shall produce the claimant's personnel file and applicable personnel policies and employee handbooks;

(iii) ***Requested Disclosures.*** Before or after the initial disclosures, any party may make a written designation of specific information and documentation that party believes should be disclosed pursuant to C.R.C.P. 26(a)(1). The other party shall provide a response and any agreed upon disclosures within 21 days of the request or at the time of initial disclosures, whichever is later. If any party believes the responses or disclosures are inadequate, it may seek relief pursuant to C.R.C.P. 37.

(C) Document Disclosure. Documents and other evidentiary materials disclosed pursuant to C.R.C.P.26 (a)(1) and 16.1(k)(1)(B) shall be made immediately available for inspection and copying to the extent not privileged or protected from disclosure.

(2) Disclosure of Expert Witnesses. The provisions of C.R.C.P. 26(a)(2)(A) and (B), 26(a)(4), 26(a)(6), 26(c), 26(e) and 26(g) shall apply to disclosure for expert witnesses. Written disclosures of experts shall be served by parties asserting claims 91 days (13 weeks) before trial; by parties defending against claims 56 days (8 weeks) before trial; and parties asserting claims shall serve written disclosures for any rebuttal experts 35 days before trial.

(3) Disclosure of Non-expert Trial Testimony. Each party shall serve written disclosure statements identifying the name, address, telephone number, and a detailed statement of the expected testimony for each witness the party intends to call at trial whose deposition has not been taken, and for whom expert reports pursuant to subparagraph (k)(2) of this Rule have not been provided. For adverse party or hostile witnesses, written disclosure of the expected subject matters of the witness's testimony, rather than a detailed statement of the expected testimony, shall be sufficient. Written disclosure shall be served by parties asserting claims 91 days (13 weeks) before trial; by parties defending against claims 56 days (8 weeks) before trial; and parties asserting claims shall serve written disclosures for any rebuttal witnesses 35 days before trial.

(4) Depositions of Witnesses in Lieu of Trial Testimony. A party who intends to offer the testimony of an expert or other witness may, pursuant to C.R.C.P. 30(b)(1)-(4), take the deposition of that witness for the purpose of preserving the witness' testimony for use at trial. Such a deposition shall be taken at least 7 days before trial. In that event, any party may offer admissible portions of the witness' deposition, including any cross-examination during the deposition, without a showing of the witness' unavailability. Any witness who has been so deposed may not be offered as a witness to present live testimony at trial by the party taking the deposition.

(5) Depositions for Obtaining Documents. Depositions also may be taken for the sole purpose of obtaining and authenticating documents from a non-party.

(6) Trial Exhibits. All exhibits to be used at trial which are in the possession, custody or control of the parties shall be identified and exchanged by the parties at least 35 days before trial. Authenticity of all identified and exchanged exhibits shall be deemed admitted unless objected to in writing within 14 days after receipt of the exhibits. Documents in the possession, custody and control of third persons that have not been obtained by the identifying party pursuant to document deposition or otherwise, to the extent possible shall

be identified 35 days before trial and objections to the authenticity of those documents may be made at any time prior to their admission into evidence.

(7) Limitations on Witnesses and Exhibits at Trial. In addition to the sanctions under C.R.C.P. 37(c), witnesses and expert witnesses whose depositions have not been taken shall be limited to testifying on direct examination about matters disclosed in reasonable detail in the written disclosures, provided, however, that adverse parties and hostile witnesses shall be limited to testifying on direct examination to the subject matters disclosed pursuant to subparagraph (k)(3) of this Rule. However, a party may call witnesses for whom written disclosures were not previously made for the purpose of authenticating exhibits if the opposing party made a timely objection to the authenticity of such exhibits.

(8) Juror Notebooks and Jury Instructions. Counsel for each party shall confer about items to be included in juror notebooks as set forth in C.R.C.P. 47(t). At the beginning of trial or at such other date set by the court, the parties shall make a joint submission to the court of items to be included in the juror notebook. Jury instructions and verdict forms shall be prepared pursuant to C.R.C.P. 16(g).

(9) Voluntary Discovery. In addition to the disclosures required by this Rule, voluntary discovery may be conducted as agreed to by all the parties. However, the scheduling of such voluntary discovery may not serve as the basis for a continuance of the trial, and the costs of such discovery shall not be deemed to be actual costs recoverable at the conclusion of the action. Disputes relating to such agreed discovery may not be the subject of motions to the court. If a voluntary deposition is taken, such deposition shall not preclude the calling of the deponent as a witness at trial.

(l) Changed Circumstances. In a case governed by this Rule, any time prior to trial, upon a specific showing of substantially changed circumstances sufficient to render the application of Simplified Procedure under this Rule unfair and a showing of good cause for the timing of the motion to terminate, the court shall terminate application of this Rule and enter such orders as are appropriate under the circumstances.

Source: Entire rule added and adopted November 6, 2003, effective July 1, 2004; (k)(1)(C) corrected January 6, 2004, nunc pro tunc November 6, 2003, effective July 1, 2004; entire rule amended and adopted June 10, 2004, effective for District Court Civil Actions filed on or after July 1, 2004; (k)(1)(A) corrected June 6, 2005, nunc pro tunc November 6, 2003, effective July 1, 2004; (e), (g), (h), (k)(1)(A), (k)(1)(B)(iii), (k)(2), (k)(3), (k)(4), and (k)(6) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

ANNOTATION

Law reviews. For article, "Back to the Future New Rule 16.1: Simplified Procedure for Civil Cases Up to $100,000", see 33 Colo. Law. 11 (May 2004). For article, "Simplified Pretrial Procedure in the Real World Under C.R.C.P. 16.1", see 40 Colo. Law. 23 (April 2011).

Civil case cover sheet is an inadequate basis for establishing the jurisdictional amount for diversity jurisdiction under 28 U.S.C. § 1332. Harding v. Sentinel Ins. Co., 490 F. Supp. 2d 1134 (D. Colo. 2007); Baker v. Sears Holdings Corp., 557 F. Supp. 2d 1208 (D. Colo. 2007); Holladay v. Kone, Inc., 606 F. Supp. 2d 1296 (D. Colo. 2009).

Rule 16.2. Court Facilitated Management of Domestic Relations Cases and General Provisions Governing Duty of Disclosure

(a) Purpose and Scope. Family members stand in a special relationship to one another and to the court system. It is the purpose of Rule 16.2 to provide a uniform procedure for resolution of all issues in domestic relations cases that reduces the negative impact of adversarial litigation wherever possible. To that end, this Rule contemplates management and facilitation of the case by the court, with the disclosure requirements, discovery and

hearings tailored to the needs of the case. This Rule shall govern case management in all district court actions under Articles 10, 11 and 13 of Title 14 of the Colorado Revised Statutes, including post decree matters. The Child Support Enforcement Unit (CSEU) shall be exempted under this Rule unless the CSEU enters an appearance in an ongoing case. Upon the motion of any party or the court's own motion, the court may order that this Rule shall govern juvenile, paternity or probate cases involving allocation of parental responsibilities (decision-making and parenting time), child support and related matters. Any notice or service of process referenced in this Rule shall be governed by the Colorado Rules of Civil Procedure.

(b) Active Case Management. The court shall provide active case management from filing to resolution or hearing on all pending issues. The parties, counsel and the court shall evaluate each case at all stages to determine the scheduling of that individual case, as well as the resources, disclosures/discovery, and experts necessary to prepare the case for resolution or hearing. The intent of this Rule is to provide the parties with a just, timely and cost effective process. The court shall consider the needs of each case and may modify its Standard Case Management Order accordingly. Each judicial district may adopt a Standard Case Management Order that is consistent with this Rule and takes into account the specific needs and resources of the judicial district.

(c) Scheduling and Case Management for New Filings.

(1) Initial status conferences/Stipulated Case Management Plans.

(A) Petitioner shall be responsible for scheduling the initial status conference and shall provide notice of the conference to all parties. Each judicial district shall establish a procedure for setting the initial status conference. Scheduling of the initial status conference shall not be delayed in order to accomplish service.

(B) All parties and counsel, if any, shall attend the initial status conference, except as provided in subsection (c)(1)(C) or (c)(1)(D). At that conference, the parties and counsel shall be prepared to discuss the issues requiring resolution and any special circumstances of the case. The court may permit the parties and/or counsel to attend the initial conference and any subsequent conferences by telephone.

(C) If both parties are represented by counsel, counsel may submit a Stipulated Case Management Plan signed by counsel and the parties. Counsel shall also exchange Mandatory Disclosures and file a Certificate of Compliance. The filing of such a plan, the Mandatory Disclosures and Certificate of Compliance shall exempt the parties and counsel from attendance at the initial status conference. The court shall retain discretion to require a status conference after review of the Stipulated Case Management Plan.

(D) Parties who file an affidavit for entry of decree without appearance with all required documents before the initial status conference shall be excused from that conference.

(E) The initial status conference shall take place, or the Stipulated Case Management Plan shall be filed with the court, as soon as practicable but no later than 42 days from the filing of the petition.

(F) At the initial status conference, the court shall set the date for the next court appearance. The court may direct one of the parties to send written notice for the next court appearance or may dispense with written notice.

(2) Status conference procedures.

(A) At each conference the parties shall be prepared to discuss what needs to be done and determine a timeline for completion. The parties shall confer in advance on any unresolved issues.

(B) The conferences shall be informal.

(C) Family Court Facilitators may conduct conferences. Family Court Facilitators shall not enter orders but may confirm the agreements of the parties in writing. Agreements which the parties wish to have entered as orders shall be submitted to the judge or magistrate for approval.

(D) The judge or magistrate may enter interim orders at any status conference either upon the stipulation of the parties or to address emergency circumstances.

(E) A record of any part of the proceedings set forth in this section shall be made if requested by a party or by order of the court.

(F) The court shall either enter minute orders, direct counsel to prepare a written order, or place any agreements or orders on the record.

(3) Emergency matters/evidentiary hearings/temporary orders.

(A) Emergency matters may be brought to the attention of the clerk or the Family Court Facilitator for presentation to the court. Issues related to children shall be given priority on the court's calendar.

(B) At the request of either party or on its own motion, the court shall conduct an evidentiary hearing, subject to the Colorado Rules of Evidence, to resolve disputed questions of fact or law. The parties shall be given notice of any evidentiary hearing. Only a judge or magistrate may determine disputed questions of fact or law or enter orders.

(C) Hearings on temporary orders shall be held as soon as possible. The parties shall certify on the record at the time of the temporary orders hearing that they have conferred and attempted in good faith to resolve temporary orders issues. If the parties do not comply with this requirement, the court may vacate the hearing unless an emergency exists that requires immediate court attention.

(4) Motions.

(A) Motions related to the jurisdiction of the court, change of venue, service and consolidation, protection orders, contempt, motions to amend the petition or response, withdrawal or substitution of counsel, motions to seal the court file or limit access to the court file, motions in limine related to evidentiary hearings, motions for review of an order by a magistrate, and post decree motions may be filed with the court at any time.

(B) All other motions shall only be filed and scheduled as determined at a status conference or in an emergency upon order of court.

(d) Scheduling and Case Management for post-decree/modification matters. Within 49 days of the date a post decree motion or motion to modify is filed, the court shall review the matter and determine whether the case will be scheduled and resolved under the provisions of (c) or will be handled on the pleadings or otherwise.

(e) Disclosure.

(1) Parties to domestic relations cases owe each other and the court a duty of full and honest disclosure of all facts that materially affect their rights and interests and those of the children involved in the case. The court requires that, in the discharge of this duty, a party must affirmatively disclose all information that is material to the resolution of the case without awaiting inquiry from the other party. This disclosure shall be conducted in accord with the duty of candor owing among those whose domestic issues are to be resolved under this Rule 16.2.

(2) A party shall, without a formal discovery request, provide the Mandatory Disclosures, as set forth in the form and content of Appendix to Chapters 1 to 17A, Form 35.1, C.R.C.P., and shall provide a completed Sworn Financial Statement and (if applicable) Supporting Schedules as set forth in the form and content of Appendix to Chapters 1 to 17A, Form 35.2 and Form 35.3, C.R.C.P, to the other party within 42 days after service of a petition or a post decree motion involving financial issues. The parties shall exchange the required Mandatory Disclosures, the Sworn Financial Statement and (if applicable) Supporting Schedules by the time of the initial status conference to the extent reasonably possible.

(3) A party shall, without a formal discovery request, also provide a list of expert and lay witnesses whom the party intends to call at a contested hearing or final orders. This disclosure shall include the address, phone number and a brief description of the testimony of each witness. This disclosure shall be made no later than 63 days (9 weeks) prior to the date of the contested hearing or final orders, unless the time for such disclosure is modified by the court.

Unless otherwise stipulated or ordered by the court and subject to the provisions of subsection (g) of this Rule, the disclosure of expert testimony shall be governed by the provisions of C.R.C.P. 26(a)(2)(B). The time for the disclosure of expert or lay witnesses whom a party intends to call at a temporary orders hearing or other emergency hearing shall be determined by the court.

(4) A party is under a continuing duty to supplement or amend any disclosure in a timely manner. This duty shall be governed by the provisions of C.R.C.P. 26(e).

(5) If a party does not timely provide the Mandatory Disclosure, the court may impose sanctions pursuant to subsection (j) of this Rule.

(6) The Sworn Financial Statement, Supporting Schedules (if applicable) and child support worksheets shall be filed with the court. Other mandatory disclosure documents shall not be filed with the court.

(7) A Certificate of Compliance shall accompany the Mandatory Disclosures and shall be filed with the court. A party's signature on the Certificate constitutes certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the Mandatory Disclosure is complete and correct as of the time it is made, except as noted with particularity in the Certificate of Compliance.

(8) Signing of all disclosures, discovery requests, responses and objections shall be governed by C.R.C.P. 26(g).

(9) A Court Authorization For Financial Disclosure shall be issued at the initial status conference if requested, or may be executed by those parties who submit a Stipulated Case Management Plan pursuant to (c)(1)(C), identifying the persons authorized to receive such information.

(10) As set forth in this section, it is the duty of parties to an action for decree of dissolution of marriage, legal separation, or invalidity of marriage, to provide full disclosure of all material assets and liabilities. If the disclosure contains misstatements or omissions, the court shall retain jurisdiction after the entry of a final decree or judgment for a period of 5 years to allocate material assets or liabilities, the omission or non-disclosure of which materially affects the division of assets and liabilities. The provisions of C.R.C.P. 60 shall not bar a motion by either party to allocate such assets or liabilities pursuant to this paragraph. This paragraph shall not limit other remedies that may be available to a party by law.

(f) Discovery. Discovery shall be subject to active case management by the court consistent with this Rule.

(1) Depositions of parties are permitted.

(2) Depositions of non-parties upon oral or written examination for the purpose of obtaining or authenticating documents not accessible to a party are permitted.

(3) After an initial status conference or as agreed to in a Stipulated Case Management Plan filed pursuant to (c)(1)(E), a party may serve on each adverse party any of the pattern interrogatories and requests for production of documents contained in the Appendix to Chapters 1 to 17A Form 35.4 and Form 35.5, C.R.C.P. A party may also serve on each adverse party 10 additional written interrogatories and 10 additional requests for production of documents, each of which shall consist of a single question or request.

(4) The parties shall not undertake additional formal discovery except as authorized by the court or as agreed in a Stipulated Case Management Plan filed pursuant to (c)(1)(C). The court shall grant all reasonable requests for additional discovery for good cause as defined in C.R.C.P. 26(b)(2)(F). Unless otherwise governed by the provisions of this Rule additional discovery shall be governed by C.R.C.P. Rules 26 through 37 and C.R.C.P. 121 section 1-12. Methods to discover additional matters shall be governed by C.R.C.P. 26(a)(5). Additional discovery for trial preparation relating to documents and tangible things shall be governed by C.R.C.P. 26(b)(3).

(5) All discovery shall be initiated so as to be completed not later than 28 days before hearing, except that the court shall extend the time upon good cause shown or to prevent manifest injustice.

(6) Claims of privilege or protection of trial preparation materials shall be governed by C.R.C.P. 26(b)(5).

(7) Protective orders sought by a party relating to discovery shall be governed by C.R.C.P. 26(c).

(g) Use of Experts. If the matter before the court requires the use of an expert or more than one expert, the parties shall attempt to select one expert per issue. If they are unable to agree, the court shall act in accordance with CRE 706, or other applicable rule or statute.

(1) Expert reports shall be filed with the court only if required by the applicable rule or statute.

(2) If the court appoints or the parties jointly select an expert, then the following shall apply:

(A) Compensation for any expert shall be governed by the provisions of CRE 706.

(B) The expert shall communicate with and submit a draft report to each party in a timely manner or within the period of time set by the court. The parties may confer with the expert to comment on and make objections to the draft report before a final report is submitted.

(C) The court shall receive the expert reports into evidence without further foundation, unless a party notes an objection in the Trial Management Certificate. However, this shall not preclude either side from calling an expert for cross-examination, and voir dire on qualifications. Unless otherwise ordered by the court, a reasonable witness fee associated with the expert's court appearance shall be tendered before the hearing by the party disputing the expert's findings.

(3) Nothing in this rule limits the right of a party to retain a qualified expert at that party's expense, subject to judicial allocation if appropriate. The expert shall consider the report and documents or information used by the court appointed or jointly selected expert and any other documents provided by a party, and may testify at a hearing. Any additional documents or information provided to the expert shall be provided to the court appointed or jointly selected expert by the time the expert's report is submitted.

(4) The parties have a duty to cooperate with and supply documents and other information requested by any expert. The parties also have a duty to supplement or correct information in the expert's report or summary.

(5) Unless otherwise ordered by the court, expert reports shall be provided to the parties 56 days (8 weeks) prior to hearing. Rebuttal reports shall be provided 21 days thereafter.

(6) Unless otherwise ordered by the court, parental responsibility evaluations and special advocate reports shall be provided to the parties pursuant to the applicable statute.

(7) The court shall not give presumptive weight to the report of a court appointed or jointly selected expert when such report is disputed by one or both parties.

(8) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. Such trial preparation relating to experts shall be governed by C.R.C.P. 26(b)(4).

(h) Trial Management Certificates.

(1) If both parties are not represented by counsel, then each party shall file with the court a brief statement identifying the disputed issues and that party's witnesses and exhibits including updated Sworn Financial Statements and (if applicable) Supporting Schedules, together with copies thereof, mailed to the opposing party at least 7 days prior to the hearing date or at such other time as ordered by the court.

(2) If at least one party is represented by counsel, the parties shall file a joint Trial Management Certificate 7 days prior to the hearing date or at such other time as ordered by the court. Petitioner's counsel (or respondent's counsel if petitioner is pro se) shall be responsible for scheduling meetings among counsel and parties and preparing and filing the Trial Management Certificate. The joint Trial Management Certificate shall set forth stipulations and undisputed facts, any requests for attorney fees, disputed issues and specific points of law, lists of lay witnesses and expert witnesses the parties intend to call at hearing, and a list of exhibits, including updated Sworn Financial Statement, Supporting Schedules (if applicable) and proposed child support work sheets. The parties shall exchange copies of exhibits at least 7 days prior to hearing.

(i) Alternative Dispute Resolution.

(1) Nothing in this Rule shall preclude, upon request of both parties, a judge or magistrate from conducting the conferences as a form of alternative dispute resolution pursuant to section 13-22-301, C.R.S. (2002), provided that both parties consent in writing to this process. Consent may only be withdrawn jointly.

(2) The provisions of this Rule shall not preclude the parties from jointly consenting to the use of dispute resolution services by third parties, or the court from referring the parties to mediation or other forms of alternative dispute resolution by third parties pursuant to sections 13-22-311 and 313, C.R.S. (2002).

(j) Sanctions. If a party fails to comply with any of the provisions of this rule, the court may impose appropriate sanctions, which shall not prejudice the party who did comply. If a party attempts to call a witness or introduce an exhibit that the party has not disclosed under subsection (h) of this Rule, the court may exclude that witness or exhibit absent good cause for the omission.

Source: Entire rule adopted May 5, 1995, effective July 1, 1995, for all cases filed on or after that date; committee comment approved May 5, 1995, effective July 1, 1995; entire rule and committee comment repealed and replaced September 30, 2004, effective for Domestic Relations Cases as defined in 16.2(a) filed on or after January 1, 2005, and for post-decree motions filed on or after January 1, 2005; (e), (f), (h), and committee comment amended and adopted February 9, 2006, effective March 1, 2006; (c)(1)(E), (d), (e)(2), (e)(3), (f)(5), (g)(5), and (h) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

COMMITTEE COMMENT
(C.R.C.P. 16.2)

DISCLOSURES

This Rule is premised upon an expectation that regular status conferences will be conducted informally, that the parties will provide all necessary disclosures and that formal discovery, if authorized, will be tailored to the specific issues of the case. Disclosure of expert testimony and the signing of disclosures and discovery responses will be governed by C.R.C.P. 26 as specifically incorporated into section (e) of new Rule 16.2.

RULE 26.2

The current Rule 26.2 will be repealed. Disclosure of expert testimony and the signing of disclosures and discovery responses will be governed by C.R.C.P. 26 as specifically incorporated into section (e) of new Rule 16.2. Relevant provisions of C.R.C.P. 26 that relate to any additional discovery authorized by the court or stipulated to by the parties under sections (f) and (g) of the new Rule have been incorporated into new Rule 16.2. It is the intent of the committee that relevant caselaw under Rule 26.2 or Rule 26 will have precedential value. The pattern interrogatories and pattern requests for production of documents will also be modified to be consistent with new Rule 16.2.

APPENDICES AND FORMS

The Supreme Court approved the mandatory disclosures, sworn financial statement and supporting schedules forms referenced in 16.2(e)(2), and inclusion of these forms in the Appendix to Chapters 1 to 17A of the Colorado Rules of Civil Procedure. Rule 16.2 requires compliance with the mandatory disclosures, and completion of the sworn financial statement form and supplemental schedule (if applicable) submitted with this Rule to achieve the disclosure intended by the Rule. The court also approved the amended pattern interrogatories (Form 35.4) and pattern requests for production (Form 35.5). The court further approved the form of the Stipulated Case Management Plan, an associated Order referenced in 16.2(c)(1)(C), and the Court Authorization for Financial Disclosure, referenced in 16.2(e)(9), which forms now have JDF numbers.

SETTLEMENT CONFERENCES

Rule 121, Section 1-17 has been amended to permit a judge or magistrate to conduct a settlement conference or utilize other alternative dispute resolution techniques under Rule 16.2(i).

ANNOTATION

Law reviews. For article, "Everything You Want to Know About the New Domestic Rules", see 24 Colo. Law. 1795 (1995). For article, "Rules 16 and 16.2: Reality Check 1998", see 27 Colo. Law. 45 (March 1998). For article, "Tips for Working With Evidence in Domestic Relations Cases", see 31 Colo. Law. 87 (June 2002). For article, "New Rule 16.2: A Brave New World", see 34 Colo. Law. 101 (January 2005). For article, "Complex Financial Issues in Family Law Cases", see 37 Colo. Law. 53 (October 2008).

Where hearing on removal issue is set in shorter time frame than envisioned by C.R.C.P. 26.2, then the 60-day time limit for the disclosure of expert witness testimony set forth in that rule cannot be met and the more general provisions of that rule must yield to the provisions of this rule, which contain specific provisions for post-decree and modification matters subject to a shortened time schedule. In re Woolley, 25 P.3d 1284 (Colo. App. 2001).

Court properly balanced its obligation to accord mother due process against its need to

efficiently manage the case when it denied mother's last minute request to call 40 witnesses without providing prior notice to father. In re Hatton, 160 P.3d 326 (Colo. App. 2007).

Five-year retention provision in subsection (e)(10) of this rule applies only to disclosures made in connection with marital dissolution cases filed after January 1, 2005, the effective date of this rule as repealed and replaced. The five-year retention provision applies only to disclosures made pursuant to the new rule for the purposes of resolving new cases or new post-decree motions filed after the effective date of the rule. Disclosures made before January 1, 2005 were not subject to the heightened disclosure duties of the new rule and are therefore not subject to the retention provision. Even in cases where post-decree motions alleging improper asset disclosure are filed after January 1, 2005, trial court does not have jurisdiction to modify property divisions based on such disclosures filed under the old rule. In re Schelp, 228 P.3d 151 (Colo. 2010).

Application of this rule to wife's post-decree motion does not constitute retrospective legislation in accordance with art. II, § 11, of the Colorado constitution. In re Roberts, 194 P.3d 443 (Colo. App. 2008), rev'd on other grounds sub nom. In re Schelp, 228 P.3d 151 (Colo. 2010).

Husband's omission of the value of his marital portion of his pension materially affected the division of assets. Trial court correctly reopened permanent orders and awarded wife entire marital portion of husband's pension. In re Schelp, 194 P.3d 450 (Colo. App. 2008), rev'd on other grounds, 228 P.3d 151 (Colo. 2010).

CHAPTER 3

Parties

CHAPTER 3

PARTIES

Rule 17. Parties Plaintiff and Defendant; Capacity

(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, conservator, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute so provides, an action for the use or benefit of another shall be brought in the name of the people of the state of Colorado.

(b) Capacity to Sue or Be Sued. A married woman may sue and be sued in all matters the same as though she were sole. A partnership or other unincorporated association may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right. A father and mother or the sole surviving parent may maintain an action for the injury or death of a child; where both maintain the action, each shall have an equal interest in the judgment; where one has deserted or refuses to sue, the other may maintain the action. A guardian may maintain an action for the injury or death of his ward.

(c) Infants or Incompetent Persons. Whenever an infant or incompetent person has a representative, such as a general guardian, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative, or such representative fails to act, he may sue by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person, provided, that in an action in rem it shall not be necessary to appoint a guardian ad litem for any unknown person who might be an infant or incompetent person.

Cross references: For competence of persons eighteen years of age or older to sue and be sued, see § 13-22-101(1)(c), C.R.S.; for rights of married women, see part 2 of article 2 of title 14, C.R.S.; for service of process on minors, see C.R.C.P. 4(e)(2); for guardians of minors and guardians of incapacitated persons, see parts 2 and 3 of article 14 of title 15, C.R.S.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, "Damages Recoverable for Injuries to A Spouse in Colorado", see 28 Dicta 291 (1951). For article, "Pleadings, Rules 7 to 25", see 28 Dicta 368 (1951). For article, "Parties: Rules 17-25", see 23 Rocky Mt. L. Rev. 552 (1951). For article, "One Year Review of Civil Procedure and Appeals", see 40 Den. L. Ctr. J. 66 (1963).

This rule is procedural, providing how a legally constituted entity may bring its action.

Hidden Lake Dev. Co. v. District Court, 183 Colo. 168, 515 P.2d 632 (1973).

II. REAL PARTY IN INTEREST.

A. In General.

Annotator's note. Since section (a) of this rule is similar to §§ 3 and 5 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing those sections have been included in the annotations to this rule.

This rule is identical to F.R.C.P. 17(a). Hoeppner Constr. Co. v. United States, 287 F.2d 108 (10th Cir. 1960).

This rule provides that every action shall be prosecuted in the name of the real party in interest. Nat'l Advertising Co. v. Sayers, 144 Colo. 356, 356 P.2d 483 (1960); Elk-Rifle Water Co. v. Templeton, 173 Colo. 438, 484 P.2d 1211 (1971).

The function of the real-party-in-interest rule is to ensure a proper res judicata effect by protecting the defendant against a subsequent suit by the person who is actually entitled to recover. Ajay Sports, Inc. v. Casazza, 1 P.3d 267 (Colo. App. 2000).

Standing is a jurisdictional prerequisite that requires a named plaintiff to bring suit only to protect a cognizable interest, and a plaintiff has standing if he or she has an injury in fact and that injury is to a legally protected interest. Durdin v. Cheyenne Mountain Bank, 98 P.3d 899 (Colo. App. 2004).

Argument may be waived, as where defendant asserts it in the answer but omits it from a pretrial motion to dismiss for failure to state a claim on which relief may be granted. Ajay Sports, Inc. v. Casazza, 1 P.3d 267 (Colo. App. 2000).

Constitutional questions may only be raised by a party whose interests are in fact affected by a challenged legislative act. Garcia v. City of Pueblo, 176 Colo. 96, 489 P.2d 200 (1971).

Where a decision of a court as to validity of the ordinance cannot result in further proceedings against a petitioner, he has no standing to prosecute appellate proceedings beyond the court where his acquittal occurred. Garcia v. City of Pueblo, 176 Colo. 96, 489 P.2d 200 (1971).

Substitution of real party in interest not filing of new cause. The substitution of an insurer for an insured, as party plaintiff, does not constitute the filing of a new cause of action, and the substituted party benefits from the filing date of the original complaint and is not barred by the statute of limitations if the original complaint was timely filed. Travelers Ins. Co. v. Gasper, 630 P.2d 97 (Colo. App. 1981).

People of state should not be named as party when individual is party in interest. People ex rel. Garrison v. Lamm, 622 P.2d 87 (Colo. App. 1980).

The "real parties in interest" must follow the proceedings throughout, and, if not satisfied, must present the judgment of which complaint is made for review. Gates v. Hepp, 95 Colo. 285, 35 P.2d 857 (1934).

Assignee of original real party in interest must prove its status as an assignee. Alpine Assocs., Inc. v. KP & R, Inc., 802 P.2d 1119 (Colo. App. 1990).

Applied in Williams v. Genesee Dev. Co. No. 2, 759 P.2d 823 (Colo. App. 1988).

B. Who Is Real Party in Interest.

Effect of this rule is to put end to action of ejectment. The fiction by which "John Doe" and "Richard Roe" were made to represent the plaintiff and defendant, respectively, in an action of ejectment of common law permitted any number of actions of this character to be maintained between the same parties in interest after verdict and judgment. The litigation terminated only when the unsuccessful party tired of his futile efforts, or when a court of equity, after repeated trials at law resulting in like verdicts and judgments, enjoined the unsuccessful party from harrassing, by future actions in ejectment, him who had recovered these judgments. The effect of this rule, which requires actions to be prosecuted in the name of the real party in interest, is to put an end to this practice. Under the section, standing alone, the first verdict and judgment in ejectment, as in other cases, unless it was set aside or vacated for cause, would be conclusive of the rights of the parties, that were, or might have been, there litigated. Iron Silver Mining Co. v. Campbell, 61 F. 932 (8th Cir. 1894).

Suits should be prosecuted under name of mortgagee under loss-payable clause. Where actions are required to be prosecuted in the name of the real party in interest, suits should be prosecuted in the name of the mortgagee as the person appointed to receive the amount of the loss under a policy containing a loss-payable clause, regardless of contract relations between the mortgagee and the insurer, where the amount of the mortgage equals or exceeds the loss. Reed Auto Sales v. Empire Delivery Serv., 127 Colo. 205, 254 P.2d 1018 (1953).

One who holds legal title is the real party in interest. Bassett v. Inman, 7 Colo. 270, 3 P. 383 (1883); Gomer v. Stockdale, 5 Colo. App. 489, 39 P. 355 (1895); Koch v. Story, 47 Colo. 335, 107 P. 1093 (1910); Am. Sur. Co. v. Scott, 63 F.2d 961 (10th Cir. 1933).

Real party in interest is the person or entity who holds legal title in the note sought to be enforced. Platte Valley Sav. v. Crall, 821 P.2d

305 (Colo. App. 1991); Platte Valley Mortg. Corp. v. Bickett, 916 P.2d 631 (Colo. App. 1996).

Real party in interest is the party who, by virtue of the substantive law, has the right to invoke the aid of the court to vindicate the legal interest in question. Ogunwo v. Am. Nat'l Ins. Co., 936 P.2d 606 (Colo. App. 1997); Summers v. Perkins, 81 P.3d 1141 (Colo. App. 2003).

Parties are not real parties in interest because they are not aggrieved in a legal sense. Acad. of Charter Schs. v. Adams Cty. Sch. Dist. No. 12, 994 P.2d 442 (Colo. App. 1999), rev'd on other grounds, 32 P.3d 456 (Colo. 2001).

Association lacked standing where the association was not a party to the charter contract. Acad. of Charter Schs. v. Adams Cty. Sch. Dist. No. 12, 32 P.3d 456 (Colo. 2001).

Partial assignor is a real party in interest. A party who has made a partial assignment of a note for security purpose is a partial assignor, retains part of his substantive right and is a real party in interest under section (a) of this rule. Jouflas v. Wyatt, 646 P.2d 946 (Colo. App. 1982).

Purchaser of land may sue for accrued rents and profits. While it may be proper for a vendor of land to bring suit against the disseizor, in order that he may be able to deliver possession to the purchaser, yet, after the recovery in such action, it is entirely proper for the purchaser to sue in his own name for the rents and profits which accrued pending the former action, since he is the real party in interest. Limberg v. Higenbotham, 11 Colo. 156, 17 P. 481 (1887).

An assignee of claim may bring action in his own name. That an entire claim for damages to property may be assigned so as to vest in the assignee the right of action in his own name, is well established for the general rule is that assignability and descendibility go hand in hand. Home Ins. Co. v. Atchison, T. & S. F. R. R., 19 Colo. 46, 34 P. 281 (1893); Hoeppner Constr. Co. v. United States, 287 F.2d 108 (10th Cir. 1960); Thistle, Inc. v. Tenneco, Inc., 872 P.2d 1302 (Colo. App. 1993).

Whether it be an open account or otherwise, see Bassett v. Inman, 7 Colo. 270, 3 P. 383 (1883); Gomer v. Stockdale, 5 Colo. App. 489, 39 P. 355 (1895).

There may be annexed to the transfer a condition that when the sum is collected the whole or some part of it must be paid over to the assignor. Bassett v. Inman, 7 Colo. 270, 3 P. 383 (1883); Gomer v. Stockdale, 5 Colo. App. 489, 39 P. 355 (1895).

Almost any surviving right of action may be assigned so as to enable the assignee to maintain a suit in his own name. Reddicker v. Lavinsky, 3 Colo. App. 159, 32 P. 349 (1893).

Assignment of a claim after suit is filed but before trial is sufficient to make plaintiff a real party in interest. Thistle, Inc. v. Tenneco, Inc., 872 P.2d 1302 (Colo. App. 1993); Platte Valley Mortg. Corp. v. Bickett, 916 P.2d 631 (Colo. App. 1996).

A plaintiff not having standing at the outset of litigation may acquire standing after an objection is raised and the standing later acquired relates back to the commencement of the proceedings. Miller v. Accelerated Bureau of Collections, Inc., 932 P.2d 824 (Colo. App. 1996).

Generally, if a claim has been assigned in full, the assignee is the real party in interest with a right to pursue an action thereon; however, a partial assignor retains part of his or her substantive right and is a real party in interest under section (a). In re Cespedes, 895 P.2d 1172 (Colo. App. 1995).

Intangible property assignment. Assignment of all of an owner's right, title, and interest to intangible personal property includes an assignment of any agreements regarding the property to the extent the agreement benefits the transferee, and the transferee is the real party in interest to pursue its contract violation claims and related tort claims. Thistle, Inc. v. Tenneco, Inc., 872 P.2d 1302 (Colo. App. 1993).

Notice to, knowledge of, or acquiescence by the real party in interest in an action does not confer standing on the plaintiff. The stipulation entered into between the plaintiffs and the bankruptcy trustee deals only with the relationship between the plaintiffs and the trustee and does not confer standing on the plaintiffs. Miller v. Accelerated Bureau of Collections, Inc., 932 P.2d 824 (Colo. App. 1996).

A claim asserted by a grantee of lands against the grantor for moneys paid to relieve them of taxes for which the grantor was liable may be effectually assigned so as to give the assignee an action in his own name. Rambo v. Armstrong, 45 Colo. 124, 100 P. 586 (1909).

As legal title to a note is in one by reason of assignment, an action will lie in his name. Walsh v. Allen, 6 Colo. App. 303, 40 P. 473 (1895); Best v. Rocky Mt. Nat'l Bank, 37 Colo. 149, 85 P. 1124 (1906).

Where, after the execution and delivery of a promissory note, a person other than the payee and not otherwise connected with the note, for a new and sufficient consideration receives by himself from the payee promises to pay the note and thereupon indorses the same, he thereby makes the debt his own, and such debt is assignable so as to vest in the assignee a right of action in his own name. Fisk v. Reser, 19 Colo. 88, 34 P. 572 (1893); Gates v. Hepp, 95 Colo. 285, 35 P.2d 857 (1934).

An assignee of a valid mechanic's lien has a right to recover, and in an action to foreclose is the real party in interest. Howard v. Fisher, 86 Colo. 493, 283 P. 1042 (1929).

"Surviving" partner of dissolved partnership may sue on account due. Where a partnership has, in fact, been dissolved when suit is brought and plaintiff, through a settlement between himself and his copartner, including his purchase of the partnership property, has become the exclusive owner of an account sued on, he is therefore the only party really interested in collecting the balance due; hence, under this rule the action is properly brought in his name alone. Bassett v. Inman, 7 Colo. 270, 3 P. 383 (1883).

Partner in a general partnership is a real party in interest. Erickson v. Oberlohr, 749 P.2d 996 (Colo. App. 1987).

Even though a contract involved is entered into for the ultimate benefit of plaintiff's parent corporation, plaintiff is real party in interest entitled to bring the action without joining its parent corporation. P & M Vending Co. v. Half Shell of Boston, Inc., 41 Colo. App. 78, 579 P.2d 93 (1978).

Contrary common-law rule no longer applies. The common-law principle that an action for a partnership debt, whether instituted before or after dissolution of the firm, must be prosecuted in the name of all the partners, does not, under the present practice apply. Walker v. Steel, 9 Colo. 388, 12 P. 423 (1886).

Partner in whose name contract was made may sue in own name. In action for breach of contract where plaintiff has partners and the profits will be split, but he has the sole handling of the matter everything is in his name and defendant makes no attempt to have other parties joined, plaintiff has the capacity to sue in his own name. Monks v. Hemphill, 121 Colo. 1, 212 P.2d 1004 (1949).

Action on bond of county treasurer should be in his name. Since a bond taken by a county treasurer as security for county money deposited by him in a bank, running to him as treasurer, is a bond for his own safety and not for the benefit of the county, he is the real party in interest therein and the one in whose name an action thereon should be brought. Moulton v. McLean, 5 Colo. App. 454, 39 P. 78 (1895).

Action on injunction bond personal right of treasurer. Where an injunction against a county treasurer was dissolved, a right of action upon the injunction bond is a personal right of the treasurer, and he might maintain a personal action upon the bond after his term of office has expired. He is the proper party to maintain such action, and the fact that the county may have paid the expenses of resisting the injunction and would be entitled to receive the amount of damages recovered when collected, is immaterial to the obligors in the bond. Breeze v. Haley, 13 Colo. App. 438, 59 P. 333 (1899).

It is not necessary to appoint administrator to prosecute action upon appeal bond, but that action could be prosecuted by devisee in own name. Austin v. Snider, 17 Colo. App. 182, 68 P. 125 (1902).

Party was properly dismissed based upon holding that an employer or business may not recover against a third party for economic losses it suffered as a result of the third party's tortious injury to its employee. Gonzalez v. Yancey, 939 P.2d 525 (Colo. App. 1997).

For the right of a bank commissioner to bring action against bank stockholders, see Broadbent v. McFerson, 80 Colo. 264, 250 P. 852 (1926).

Applied in Baumgarten v. Burt, 148 Colo. 64, 365 P.2d 681 (1961); Valley Realty & Inv. Co. v. McMillan, 160 Colo. 109, 414 P.2d 486 (1966); Hollingsworth v. Satterwhite, 723 P.2d 169 (Colo. App. 1986).

C. Action by Executor or Trustee or in Contract.

A trustee may at his option sue in his own name or may join his "cestuis que" trust. Hecker v. Cook, 20 Colo. App. 282, 78 P. 311 (1904); Faust v. Goodnow, 4 Colo. App. 352, 36 P. 71 (1906).

Under this rule, a trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought. Elk-Rifle Water Co. v. Templeton, 173 Colo. 438, 484 P.2d 1211 (1971).

The judgment in an action by either will bar a subsequent action by the other. Hecker v. Cook, 20 Colo. App. 282, 78 P. 311 (1904).

It is not necessary that a trustee set forth the trust. The trustee of an express trust in real property may maintain an action to restrain irreparable injury thereto, without setting forth the nature of the trust, the name of the beneficiary, or his character as trustee. An averment of his trust capacity may be treated as surplusage. Koch v. Story, 47 Colo. 335, 107 P. 1093 (1911); Elk-Rifle Water Co. v. Templeton, 173 Colo. 438, 484 P.2d 1211 (1971).

Where the official bond of an officer in a fraternal society runs to the trustees of the society under the name the society bore prior to incorporation, such trustees can maintain an action in their own names on the bond for a default therein without making the society a party thereto, although at the time of the execution of the bond and the bringing of the action the society was incorporated under a slightly different name from that it bore prior to incorporation. Hecker v. Cook, 20 Colo. App. 282, 78 P. 311 (1904).

An averment of trust capacity may be treated as surplusage. Koch v. Story, 47 Colo. 335, 107 P. 1093 (1911).

The trustee of an express trust is authorized to maintain an action. Hardy v. Swigart, 25 Colo. 136, 53 P. 380 (1898); Houck v. Williams, 34 Colo. 138, 81 P. 800 (1905).

Cashier of bank who contracts may become the trustee of an express trust. The cashier of an unincorporated bank, who is also a partner, who is alone authorized to transact all the business, and in whose name contracts are habitually made for the bank may become by virtue of such a contract the trustee of an express trust and may sue thereon in his own name. Merchants' Bank v. McClelland, 9 Colo. 608, 13 P. 723 (1886).

A suit on contract is properly brought in the name of the contractor. City & County of Denver v. Morrison, 88 Colo. 67, 291 P. 1023 (1930).

A person with whom or in whose name a contract has been made for the benefit of another may maintain an action thereon in his own name. Rockwell v. Holcomb, 3 Colo. App. 1, 31 P. 944 (1892).

Although others are interested in the contract, it is not necessary that they should be made parties. City & County of Denver v. Morrison, 88 Colo. 67, 291 P. 1023 (1930).

In an action by a bank to collect certain money which it had been expressly authorized to collect by one to whom the money was owing, the suit need not be brought in the name of the beneficial owner, for the suit could be maintained in the name of the trustee. First Nat'l Bank v. Hummel, 14 Colo. 259, 23 P. 986 (1890).

Where a contract is made for the benefit of a third person, the latter may bring an action thereon. Haldane v. Potter, 94 Colo. 558, 31 P.2d 709 (1934).

There is nothing to prevent real party from becoming litigant. While one who has made a contract for the benefit of another can prosecute an action in his own name, there is nothing to prevent the real party in interest from becoming the actual litigant. Gates v. Hepp, 95 Colo. 285, 35 P.2d 857 (1934).

When, as a matter of fact, the beneficiary becomes an actual party to the action, the latter, in respect to the primary right, supersedes the former, whereupon the judgment entered must be in favor of the beneficiary if he succeeds or against him if he fails. Gates v. Hepp, 95 Colo. 285, 35 P.2d 857 (1934).

An action may be brought by a bank on a promissory note given in renewal of a similar note made payable to it, although the renewal note mistakenly is made payable to the president of the bank, who turns it over to the bank as its property, the latter retaining it in possession at all times, notwithstanding section (a) of this rule which provides that one in whose name a contract is made for the benefit of another may sue without joining the person beneficially interested. Best v. Rocky Mt. Nat'l Bank, 37 Colo. 149, 85 P. 1124 (1906).

If a person has the right to sue, no error can be based on a proceeding under this rule. Rockwell v. Holcomb, 3 Colo. App. 1, 31 P. 944 (1892).

If defendants imagined it to be necessary for their protection that the beneficiary should be brought into the suit, doubtless they might procure an order for the purpose, but, having taken no action in the trial court, they cannot be held on appeal to assign error concerning it. Faust v. Goodnow, 4 Colo. App. 352, 36 P. 71 (1894).

Estate beneficiaries are not indispensable parties to a partition action commenced by the personal representative, where the personal representative is acting on behalf of all the estate beneficiaries to segregate their collective interests in the real property to be partitioned, so that he can perform his statutory duty to settle and distribute the estate expeditiously and efficiently. Fry & Co. v. District Court, 653 P.2d 1135 (Colo. 1982).

III. CAPACITY TO SUE OR BE SUED.

A. In General.

Annotator's note. Since section (b) of this rule is similar to §§ 6 and 9 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing §§ 6 and 9 have been included in the annotations to this rule.

Actions may be brought only by legal entities and against legal entities. Ivanhoe Grand Lodge A.F. & A.M. v. Most Worshipful Grand Lodge A.F. & A.M., 126 Colo. 515, 251 P.2d 1085 (1952).

There must be some ascertainable persons, natural or artificial, to whom judgments are awarded and against whom they may be enforced. Ivanhoe Grand Lodge A.F. & A.M. v. Most Worshipful Grand Lodge A.F. & A.M., 126 Colo. 515, 251 P.2d 1085 (1952).

A voluntary condominium association has standing and may maintain an action on behalf of its members if: (1) Its members would otherwise have standing to sue in their own right; (2) the interests sought to be protected are germane to the association's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the litigation. Villa Sierra Condominium v. Field Corp., 787 P.2d 661 (Colo. App. 1990).

This rule does not grant the right to sue to a loosely formed group. Hidden Lake Dev. Co. v. District Court, 183 Colo. 168, 515 P.2d 632 (1973).

B. Married Women.

That section (b) relates to procedure and does not confer a substantive right is an ob-

jection that cannot be urged successfully against § 6 of art. II, Colo. Const. Rains v. Rains, 97 Colo. 19, 46 P.2d 740 (1935).

If the common-law fiction of unity ever existed in this state, it does not exist now. Whyman v. Johnston, 62 Colo. 461, 163 P. 76 (1917); Hedlund v. Hedlund, 87 Colo. 607, 290 P. 285 (1930); Rains v. Rains, 97 Colo. 19, 46 P.2d 740 (1935).

A married woman may sue and be sued in all matters, including contract. A married woman may in this state enter into any contract, express or implied, the same as if she were sole; she may, in like manner, be held liable thereon; and in civil actions, she may sue and be sued in all matters the same as if she were sole. Rose v. Otis, 18 Colo. 59, 31 P. 493 (1892); Thompson v. Thompson, 30 Colo. App. 57, 489 P.2d 1062 (1971).

A married woman may sue husband for personal injuries caused by his negligence. In view of the broad, liberal provisions of the constitution and statutes of this state and the liberal construction thereof adopted by the courts of this state, a wife may sue her husband for personal injuries caused by the negligence of her husband. Rains v. Rains, 97 Colo. 19, 46 P.2d 740 (1935).

C. Partnerships or Unincorporated Associations.

At common law, an unincorporated association of persons had no capacity to sue or be sued in any character other than as partners in whatever was done, and it was necessary for such an association to sue or defend in the names of its members, and liability had to be enforced against each member. Thomas v. Dunne, 131 Colo. 20, 279 P.2d 427 (1955).

Necessities dictated otherwise. The growth of large unincorporated associations of many different kinds, and the necessities arising therefrom, at an early date called for legal recognition of such associations as entities possessed of capacity to sue, and be sued, in their common name. Thomas v. Dunne, 131 Colo. 20, 279 P.2d 427 (1955).

This rule purports to create a new right not theretofore recognized in the law and authorizes the bringing of an action in the common name of an unincorporated association. Thomas v. Dunne, 131 Colo. 20, 279 P.2d 427 (1955).

Section (b) is permissive and not mandatory. A partnership or a limited partnership may sue or be sued either in its common name or by naming its partners. Frazier v. Carlin, 42 Colo. App. 226, 591 P.2d 1348 (1979).

Section (b) must be viewed as either creating an entity or permitting existing ones to sue. Section (b) of this rule must be held either to create an artificial entity of a partnership or unincorporated association or to permit existing entities to bring suit in an artificial name. Ivanhoe Grand Lodge A.F. & A.M. v. Most Worshipful Grand Lodge A.F. & A.M., 126 Colo. 515, 251 P.2d 1085 (1952).

If this rule is held to be one creating a legal entity capable of suing or being sued, it is performing a legislative, rather than a judicial function, and the rule would therefore, be beyond the power of the court. Ivanhoe Grand Lodge A.F. & A.M. v. Most Worshipful Grand Lodge A.F. & A.M., 126 Colo. 515, 251 P.2d 1085 (1952).

If an existing entity is permitted to sue under a common or artificial name, then, upon challenge by defendant, the plaintiff must disclose the identity of the parties so doing; and if defendant seeks affirmative relief in excess of the property or rights owned, held, possessed, or exercised by the partnership or unincorporated association itself, then the ascertained legal entities must be properly served with process and be made parties to the action. Ivanhoe Grand Lodge A.F. & A.M. v. Most Worshipful Grand Lodge A.F. & A.M., 126 Colo. 515, 251 P.2d 1085 (1952).

Status of an unincorporated association to sue must be founded on more than a bold allegation, and to sue as an unincorporated association in name only is insufficient. Hidden Lake Dev. Co. v. District Court, 183 Colo. 168, 515 P.2d 632 (1973).

D. Injury or Death of Child.

While a father and mother may join in a damage suit, it is not essential that they should so join. Pierce v. Conners, 20 Colo. 178, 37 P. 721 (1894).

The joining of the father and mother is permissive. The joining of the father and mother appears to be permissive, not imperative. Pierce v. Conners, 20 Colo. 178, 37 P. 721 (1894).

Joinder or nonjoinder material only to parents themselves. The joinder or nonjoinder of a parent in an action for damages is material only to the parents themselves. Pierce v. Conners, 20 Colo. 178, 37 P. 721 (1894).

Since either or both may sue, the defendant cannot be affected or prejudiced whichever course they may take; the grounds and measure of recovery are the same in either case, and the defendant can only be subjected to a single suit. Pierce v. Conners, 20 Colo. 178, 37 P. 721 (1894).

IV. INFANTS OR INCOMPETENT PERSONS.

A. In General.

Law reviews. For article, "Legal Capacity of Adjudged Incompetents", see 29 Dicta 292 (1952).

Annotator's note. Since section (c) of this rule is similar to § 7 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Quasi-judicial immunity. A court appointed guardian ad litem in service of the public interest in the welfare of children is entitled to absolute quasi-judicial immunity. Short by Ossterhous v. Short, 730 F. Supp. 1307 (D. Colo. 1990).

Applied in Welsh v. Independent Lumber Co., 110 Colo. 280, 133 P.2d 535 (1943).

B. Sue or Defend.

Where an infant is a party to a suit, he must appear by next friend or guardian to be appointed by the court or judge. Seaton v. Tohill, 11 Colo. App. 211, 53 P. 170 (1898).

He is in reality, however, but the agent of the court through whom it acts to protect the interest of the minor. Seaton v. Tohill, 11 Colo. App. 211, 53 P. 170 (1898).

The court is itself the guardian. Seaton v. Tohill, 11 Colo. App. 211, 53 P. 170 (1898).

The court will suffer no advantage to be taken of those acting in the infant's behalf to the detriment of the infant. Seaton v. Tohill, 11 Colo. App. 211, 53 P. 170 (1898).

If a next friend does not perform properly, the court could and should remove her, and, if appropriate, could appoint a successor. The court should not allow the next friend's conduct to deprive the infant of his rights. Black ex rel. Bayless v. Cullar, 665 P.2d 1029 (Colo. App. 1983).

Next friend may assist child in suit to enforce support obligation of parent. When a noncustodial parent's child support obligation is incorporated into a dissolution decree, and the custodial parent dies and the child is not in the physical custody of the noncustodial parent, the child support obligation of the noncustodial parent continues beyond the death of the custodial parent in accordance with the terms of the dissolution decree, and such obligation of the parent can be enforced through a suit on behalf of the child by a next friend. Abrams v. Connolly, 781 P.2d 651 (Colo. 1989).

Son may bring action on behalf of his incompetent father by proceeding as his next friend although son had not been appointed guardian. Delsas ex rel. Delsas v. Centex Home Equity, 186 P.3d 141 (Colo. App. 2008).

An infant cannot be bound by the admissions of his guardian unless they are for his benefit. Seaton v. Tohill, 11 Colo. App. 211, 53 P. 170 (1898).

An infant cannot be bound by guardian's errors or omissions in his answers or pleadings. Seaton v. Tohill, 11 Colo. App. 211, 53 P. 170 (1898).

It is the policy of the law to fully protect the rights of minors, and this may be done, even if the guardian or "prochein ami" does not properly claim such rights or has even failed to claim them at all. Hutchison v. McLaughlin, 15 Colo. 492, 25 P. 317 (1890); Seaton v. Tohill, 11 Colo. App. 211, 53 P. 170 (1898).

Presence of both parents at an administrative hearing concerning a minor is not required, thus administrative law judge's order of sequestration that included minor's father, since he was a witness, was not error. M.G. v. Colo. Dept. of Human Servs., 12 P.3d 815 (Colo. App. 2000).

C. Appointment of Guardian.

This rule does not make the appointment of a guardian "ad litem" mandatory. Johnson v. Lambotte, 147 Colo. 203, 363 P.2d 165 (1961).

Where a mental incompetent is "otherwise represented" by well qualified lawyers of long experience at the bar, the appointment of a guardian "ad litem" is not necessary. Johnson v. Lambotte, 147 Colo. 203, 363 P.2d 165 (1961).

The appointment of a guardian ad litem is a matter left to the discretion of the court if the adult incompetent is already represented by an attorney. People in Interest of M.M., 726 P.2d 1108 (Colo. 1986).

"Incompetent person" includes those who are mentally impaired to the degree of being incapable of effectively participating in a proceeding and thus need the assistance of a fiduciary representative. People in Interest of M.M., 726 P.2d 1108 (Colo. 1986).

When a substantial question exists regarding the mental competence of a spouse in a domestic relations proceeding, the preferred procedure is for the trial court to conduct a hearing to determine whether or not the spouse is competent, so that a guardian ad litem may be appointed if needed. In re Sorensen, 166 P.3d 254 (Colo. App. 2007).

It would be an abuse of discretion not to appoint a guardian ad litem in those situations in which the spouse (1) is mentally impaired so as to be incapable of understanding the nature and significance of the proceeding; (2) is incapable of making critical decisions; (3) lacks the intellectual capacity to communicate with counsel; or (4) is mentally or emotionally incapable of weighing the advice of counsel on the particular course to pursue in his or her own interest. In re Sorensen, 166 P.3d 254 (Colo. App. 2007).

No error in trial court's determination that it had not automatically lost jurisdiction to enter an award for payment of guardian

ad litem fees by husband upon wife's death; in contrast to an order pertaining to custody, parenting time, property division, or attorney fees under the Uniform Dissolution of Marriage Act, trial court's authority to appoint a guardian ad litem and to order payment of the guardian's fees was not dependent upon the fact that the case at hand was a dissolution of marriage proceeding. In re Heil, 33 P.3d 1270 (Colo. App. 2001).

Rule 18. Joinder of Claims and Remedies

(a) Joinder of Claims. A party asserting a claim to relief as an original claim, counterclaim, cross claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal or equitable, as he has against an opposing party.

(b) Joinder of Remedies; Fraudulent Conveyances. Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money.

ANNOTATION

I. General Consideration.
II. Joinder of Claims.
III. Joinder of Remedies.

I. GENERAL CONSIDERATION.

Law reviews. For article, "A Victim of 'Permissive Counterclaims'", see 18 Dicta 83 (1941). For article, "Parties: Rules 17-25", see 23 Rocky Mt. L. Rev. 552 (1951). For article, "Pleadings, Rules 7 to 25", see 28 Dicta 368 (1951). For article, "One Year Review of Civil Procedure", see 34 Dicta 69 (1957).

II. JOINDER OF CLAIMS.

Law reviews. For article, "Direct Action Against the Liability Insurer Under the Rules of Civil Procedure", see 22 Dicta 314 (1945). For comment on Crowley v. Hardman Bros. appearing below, see 23 Rocky Mt. L. Rev. 366 (1951). For article, "Joinder of Claims and Counterclaims in Cases Under the Uniform Dissolution of Marriage Act", see 15 Colo. Law. 1818 (1986).

At common law, legal and equitable causes of action could not be joined. Colo. High Sch. Activities Ass'n v. Uncompahgre Broadcasting Co., 134 Colo. 131, 300 P.2d 968 (1956).

Under this rule, however, either a plaintiff or defendant may join, either as independent or as alternate claims, as many claims either legal or equitable or both as he may have against an opposing party. Colo. High Sch. Activities Ass'n v. Uncompahgre Broadcasting Co., 134 Colo. 131, 300 P.2d 968 (1956).

Joinder of claims allowed if the requirements of C.R.C.P. 20 are met. Section (a) of this rule allows the joinder of as many claims as a plaintiff has when there are multiple parties, if the requirements of C.R.C.P. 20 are met. Twin Lakes Reservoir & Canal Co. v. Bond, 156 Colo. 433, 399 P.2d 793 (1965).

Where claims involve the same series of transactions and common questions of fact and law, the claims met the test for joinder as laid down in section (a) of this rule and C.R.C.P. 20. Twin Lakes Reservoir & Canal Co. v. Bond, 156 Colo. 433, 399 P.2d 793 (1965).

A claim for personal injuries and one for damages to automobile may properly be joined under this rule. Gray v. Blight, 112 F.2d 696 (10th Cir.), cert. denied, 311 U.S. 704, 61 S. Ct. 170, 85 L. Ed. 457 (1940).

A difference in the evidence required to prove two different causes of action is ground for holding them misjoined. Colo. High Sch. Activities Ass'n v. Uncompahgre Broadcasting Co., 134 Colo. 131, 300 P.2d 968 (1956).

In order to state a claim to set aside a fraudulent conveyance, a plaintiff need not first have a judgment against the debtor. Emarine v. Haley, 892 P.2d 343 (Colo. App. 1994).

Under these rules it is no longer necessary that each one of several parties have a like interest in all the claims of the other parties before all of them can join in a common suit. Schwab v. Martin, 165 Colo. 547, 441 P.2d 17 (1968).

Diverse parties in a foreclosure action can join in requesting a common receiver, if they feel their own interests can best be served thereby. Schwab v. Martin, 165 Colo. 547, 441 P.2d 17 (1968).

This rule specifically authorized the inclusion of counterclaims in replies to counterclaims, the analogous federal rules having been so interpreted by federal courts. T. L. Smith Co. v. District Court, 163 Colo. 444, 431 P.2d 454 (1967).

This rule does not relieve a pleader from the requirement that claims must be sepa-

rately stated in his pleadings, and "a fortiori", expressly requested as relief in his complaint. Colo. High Sch. Activities Ass'n v. Uncompahgre Broadcasting Co., 134 Colo. 131, 300 P.2d 968 (1956).

Officers of a municipal corporation cannot, in the same action, be charged officially and personally, since nothing in this rule compels a departure from this long established and fundamental principle. Colo. State Bd. of Exam'rs of Architects v. District Court, 126 Colo. 340, 249 P.2d 146 (1952).

Where a liability policy contains a "no action" clause providing that no action will lie against the insurer until judgment has been obtained against the insured, one may not sue the insured and the insurance carrier jointly or the insurance carrier separately, but must first obtain a judgment against the insured, and then and then only, if the provisions of the policy are such as to create a contractual relationship between the insured and the insurer, the injured party's rights against the insurer first ripens into existence. Such a provision establishes a substantive right in the insurer and does not violate the rules of civil procedure. Crowley v. Hardman Bros., 122 Colo. 489, 223 P.2d 1045 (1950).

An election requirement between rescission or damages on a contract ordered by a court is not prejudicial where at the time the motion for election was filed plaintiff has already accepted damages and the only issue left to be tried is whether the remedy of rescission is available. Gladden v. Guyer, 162 Colo. 451, 426 P.2d 953 (1967).

Level of prejudice contemplated by doctrine of laches not reached by permissive parties. While failure to litigate the issue of personal liability in either of two earlier actions against a corporate entity may have been poor judicial economy, the expense and inconvenience of further litigation, without more did not rise to the level of prejudice contemplated by the doctrine of laches where the defendants, individual owners of a corporation were not indispensable parties to the first action under C.R.C.P. 19 but rather permissive parties under this rule. Lin Ron, Inc. v. Mann's World of Arts & Crafts, Inc., 624 P.2d 1343 (Colo. App. 1981).

Refusal to allow joinder of employer as a third party defendant was proper because Colorado law does not recognize a right to contribution between employers and third parties. Gruntmeir v. Mayrath Industries, Inc., 841 F.2d 1037 (10th Cir. 1988).

III. JOINDER OF REMEDIES.

Law reviews. For article, "Direct Action Against the Liability Insurer Under the Rules of Civil Procedure", see 22 Dicta 314 (1945). For article, "Reaching Fraudulent Conveyances and Equitable Interests of Debtors", see 27 Dicta 137 (1950).

Applied in Greco v. Pullara, 166 Colo. 465, 444 P.2d 383 (1968).

Rule 19. Joinder of Persons Needed for Just Adjudication

(a) Persons to be Joined if Feasible. A person who is properly subject to service of process in the action shall be joined as a party in the action if: (1) In his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may: (A) As a practical matter impair or impede his ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenever Joinder Not Feasible. If a person as described in subsections (a) (1) and (a) (2) of this Rule cannot be made a party, the court shall determine whether in the interest of justice the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: First, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subsections (a) (1) and (a) (2) of this Rule who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is subject to the provisions of Rule 23.

Cross references: For pleading claims for relief, see C.R.C.P. 8(a); for class actions, see C.R.C.P. 23.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, "Pleadings, Rules 7 to 25", see 28 Dicta 368 (1951). For article, "Parties: Rules 17-25", see 23 Rocky Mt. L. Rev. 552 (1951). For article, "One Year Review of Civil Procedure", see 34 Dicta 69 (1957). For note on current developments, "Civil Procedure Application of 'Indispensable Party' Provision of Colo. R. Civ. P. 19 — the 'Procedural Phantom' Still Stalks in Colorado", see 46 U. Colo. L. Rev. 609 (1974-75).

Due process of law requires that those parties whose interests are at stake be before the court. Hidden Lake Dev. Co. v. District Court, 183 Colo. 168, 515 P.2d 632 (1973).

This rule pertains not to permissive or discretionary joinder of the parties, as under C.R.C.P. 20, but to the question of who must be made parties because of necessity or indispensability to a complete adjudication of rights as between the litigants. Bender v. District Court, 133 Colo. 12, 291 P.2d 684 (1955).

This rule recognizes difference between "necessary" and "indispensable" parties. This rule clearly shows its section (a) modified by its section (b), thus recognizing a difference between a necessary party and an indispensable party. Centennial Cas. Co. v. Lacey, 133 Colo. 357, 295 P.2d 690 (1956).

Rule inapplicable to state Administrative Procedure Act proceedings. Because the general assembly specifically has addressed the question of joinder in § 24-4-106, this rule is not applicable in proceedings brought under the state Administrative Procedure Act. Town of Frederick v. Colo. Water Quality Control Comm'n, 628 P.2d 129 (Colo. App. 1980), rev'd on other grounds, 641 P.2d 958 (Colo. 1982).

Complaint should not be dismissed for misjoinder of parties where the co-obligee on a construction performance bond was present in the case. Weyerhaeuser Mortgage Co. v. Equitable General Insurance Co., 686 P.2d 1357 (Colo. App. 1983).

Pleading a defense of failure to state a claim upon which relief can be granted is sufficient to raise the issue of failure of plaintiff to join an indispensable party. Cold Springs Ranch v. Dept. of Nat. Res., 765 P.2d 1035 (Colo. App. 1988).

Partnership not required to be joined as indispensable party. Erickson v. Oberlohr, 749 P.2d 996 (Colo. App. 1987).

Environmental protection agency was an indispensable party where plaintiffs' claims for relief essentially challenged the reasonableness of the agency's removal action under CERCLA. Aztec Minerals Corp. v. Romer, 940 P.2d 1025 (Colo. App. 1996).

The director of a state agency is not necessarily an indispensable party in a suit challenging the constitutionality of a statute governing the state agency. The director is an indispensable party when the appeal involves a statutory duty of the director that concerns a mandatory exercise of discretion. Cruz-Cesario v. Don Carlos Mexican Foods, 122 P.3d 1078 (Colo. App. 2005).

Applied in Colo. High Sch. Activities Ass'n v. Uncompahgre Broadcasting Co., 134 Colo. 131, 300 P.2d 968 (1956); Howard v. First Nat'l Bank of Denver, Inc., 354 F.2d 217 (10th Cir. 1966); Union P. R. R. v. State, 166 Colo. 307, 443 P.2d 375 (1968); Greco v. Pullara, 166 Colo. 465, 444 P.2d 383 (1968); Hennigh v. Bd. of County Comm'rs, 168 Colo. 128, 450 P.2d 73 (1969); F.R. Orr Constr. Co. v. Ready Mixed Concrete Co., 28 Colo. App. 273, 472 P.2d 193 (1970); Bashor v. Northland Ins. Co., 29 Colo. App. 81, 480 P.2d 864 (1970), aff'd, 177 Colo. 463, 494 P.2d 1292 (1972); Sentinel Petroleum Corp. v. Bernat, 29 Colo. App. 109, 478 P.2d 688 (1970); Jones v. Adkins, 34 Colo. App. 196, 526 P.2d 153 (1974); Stalos v. Booras, 34 Colo. App. 252, 528 P.2d 254 (1974); Fischer v. District Court, 193 Colo. 24, 561 P.2d 1266 (1977); Erger v. District Court, 198 Colo. 369, 599 P.2d 917 (1979); West-Brandt Found., Inc. v. Carper, 199 Colo. 334, 608 P.2d 339 (1980); Lin Ron, Inc. v. Mann's World of Arts & Crafts, Inc., 624 P.2d 1343 (Colo. App. 1981); Creditor's Serv., Inc. v. Shaffer, 659 P.2d 694 (Colo. App. 1982); Mitchell v. District Court ex rel. Eighth Judicial Dist., 672 P.2d 997 (Colo. 1983).

II. JOINED IF FEASIBLE.

A. In General.

Section (a) is mandatory and requires the trial court to join persons falling within its provisions, if feasible. Potts v. Gordon, 34 Colo. App. 128, 525 P.2d 500 (1974).

Persons having an interest "proper parties". Persons having an interest in the subject matter of litigation which may conveniently be settled therein are "proper parties". Woodco v. Lindahl, 152 Colo. 49, 380 P.2d 234 (1963).

Presence is not indispensable. If interests of parties before the court may be finally adjudicated without affecting interests of absent parties, the presence of "proper parties" is not indispensable. Woodco v. Lindahl, 152 Colo. 49, 380 P.2d 234 (1963); Brody v. Bock, 897 P.2d 769 (Colo. 1995).

Only if an absent person's interest in the subject matter of the litigation is such that no decree can be entered in the case that will do justice between the parties actually before the court without injuriously affecting the right of such absent person is the absent person considered indispensable. Brody v. Bock, 897 P.2d 769 (Colo. 1995).

Persons whose presence is essential to a determination of entire controversy are "necessary parties". Woodco v. Lindahl, 152 Colo. 49, 380 P.2d 234 (1963).

Persons having a joint interest in the subject of an action should be made parties. Woodco v. Lindahl, 152 Colo. 49, 380 P.2d 234 (1963).

Joinder is "feasible". Joinder is "feasible" under this rule as long as the absentee is subject to service of process, his joinder will not deprive the court of jurisdiction, and he has no valid objection to venue of the court. Potts v. Gordon, 34 Colo. App. 128, 525 P.2d 500 (1974).

In order to be a person whose joinder is required, it is not necessary that the legal relief contemplated purport to be binding on the absent person, for the prejudicial effect of nonjoinder may be practical rather than legal in character. Potts v. Gordon, 34 Colo. App. 128, 525 P.2d 500 (1974).

Joinder will be insisted upon if the action might detrimentally affect the absentee's ability to protect his property or to prosecute or defend any subsequent litigation in which he might become involved. Potts v. Gordon, 34 Colo. App. 128, 525 P.2d 500 (1974).

For recovery of damages for joint interest in an item, it is mandatory, under section (a) of this rule that the person having a joint interest be joined on the same side as the other party having the joint interest. Weng v. Schleiger, 130 Colo. 90, 273 P.2d 356 (1954), aff'd, 133 Colo. 441, 296 P.2d 748 (1956); Clubhouse at Fairway Pines v. Fairway Pines Estates, 214 P.3d 451 (Colo. App. 2008).

Joinder is not required if the award will not affect property values of the absent owners. Seago v. Fellet, 676 P.2d 1224 (Colo. App. 1983); Clubhouse at Fairway Pines v. Fairway Pines Estates, 214 P.3d 451 (Colo. App. 2008).

When a person who should join as a plaintiff refuses to do so, or his consent cannot be obtained, he may be made a defendant or, in proper cases, an involuntary plaintiff. Reed Auto Sales, Inc. v. Empire Delivery Serv., 127 Colo. 205, 254 P.2d 1018 (1953).

Persons summoned if subject to jurisdiction. Persons who are not indispensable to an action, but who ought to be parties if complete relief is to be accorded between those already parties, shall be summoned to appear in the action if subject to the jurisdiction of the court. Woodco v. Lindahl, 152 Colo. 49, 380 P.2d 234 (1963).

Even if it is impossible to join all absentees in a case, the trial court is not necessarily precluded from continuing with the case. Potts v. Gordon, 34 Colo. App. 128, 525 P.2d 500 (1974).

Failure to join a necessary party is not a ground for dismissal of an action. McIntosh v. Romero, 32 Colo. App. 435, 513 P.2d 239 (1973).

Court should join party or allow amendment to complaint. Instead of dismissing a complaint where a necessary party has not been joined, the court should proceed in accordance with this rule, joining the party, or allowing the opportunity to amend the complaint. McIntosh v. Romero, 32 Colo. App. 435, 513 P.2d 239 (1973).

Judgment void. A judgment which adversely affects an indispensable party who is not joined is void. Hidden Lake Dev. Co. v. District Court, 183 Colo. 168, 515 P.2d 632 (1973).

Joinder first raised on appeal. Joinder has been required under this rule after trial where the issue was first raised on appeal. Potts v. Gordon, 34 Colo. App. 128, 525 P.2d 500 (1974).

B. Illustrative Cases.

In action for breach of contract against a subdivision developer in which certain plaintiffs held property in subdivision as joint tenants with their spouses, spouses were indispensable parties. Seago v. Fellett, 676 P.2d 1224 (Colo. App. 1983).

And any error resulting from a failure to insist upon joinder of a spouse who is a co-owner, when the record shows that a party had and rejected a clear opportunity to insist upon joinder at trial, is invited error. Karakehian v. Boyer, 900 P.2d 1273 (Colo. App. 1994).

All individual landowners within a subarea of a subdivision were indispensable parties, notwithstanding that the homeowner's association was a party, where the complaint implicated the interests of all of the individual landowners and the individual landowners had potentially conflicting interests with each other and with the association itself. Dunne v. Shen-

andoah Homeowners Ass'n, Inc., 12 P.3d 340 (Colo. App. 2000).

One joint owner cannot recover damages to the jointly owned property without joining the other joint owner in the action. Downing v. Don Ward & Co., 28 Colo. App. 75, 470 P.2d 868 (1970).

Individual landowners neither indispensable nor necessary parties in initiative or referendum proceedings dealing with zoning. Individual landowners are neither indispensable nor necessary parties to an action involving initiative and referendum petitions dealing with the zoning of their property as the relief sought can be granted in their absence, and the relief neither impairs nor impedes the landowners' ability to protect their interests and does not involve the risk of multiple inconsistent obligations. Margolis v. District Court, 638 P.2d 297 (Colo. 1981).

Landowners not affected by special use permit not indispensable. Where the grant of special use permits to one landowner does not create a particularized benefit in other owners of land contained within the boundaries of the permit areas, such landowners are not indispensable parties in a proceeding under C.R.C.P. 106(a)(4). Thorne v. Bd. of County Comm'rs, 638 P.2d 69 (Colo. 1981).

Additional landowners not indispensable parties in action to enforce easement across defendant's property. Although the additional landowners may have been joined permissibly, their presence was not necessary to accord the parties already joined complete relief; the nonjoined parties would not lose their ability to assert their rights; and the defendant would not be exposed to the risk of inconsistent decisions, multiple suits, and related obligations or injuries. Williamson v. Downs, 829 P.2d 498 (Colo. App. 1992).

Defendant-lawyer is not proper party to action by seller against buyer and guarantor. Where sellers of personal property had two distinct claims: an action on a note and other matters against the buyer and the guarantor and a malpractice action against the lawyer, the lawyer would not have been either a proper or necessary party to the other lawsuit. Deaton v. Mason, 616 P.2d 994 (Colo. App. 1980).

Where both mortgagor and mortgagee are parties in interest, both should join in the suit. Reed Auto Sales, Inc. v. Empire Delivery Serv., 127 Colo. 205, 254 P.2d 1018 (1953); Centennial Cas. Co. v. Lacey, 133 Colo. 357, 295 P.2d 690 (1956).

No requirement to join persons who have separate notes or contract arrangements with a guarantor. Andrikopoulos v. Minnelusa Co., 911 P.2d 663 (Colo. App. 1995), aff'd on other grounds, 929 P.2d 1321 (Colo. 1996).

Plaintiff shall have opportunity to join third party agreements if plaintiff has alleged a meritorious claim that third party agreements have affected its rights and obligations as a judgment debtor and because the equitable issue may again rise if the third party fails to pay promissory note. Lakeside Ventures, LLC v. Lakeside Dev. Co., 68 P.3d 516 (Colo. App. 2002).

The bailor is not a necessary party to an action by the bailee against a third person for injury to the subject matter of the bailment, such person not being exposed to a multiplicity of lawsuits because payment of the damages to the bailee will bar any subsequent suit by the bailor for the same cause of action. Downing v. Don Ward & Co., 28 Colo. App. 75, 470 P.2d 868 (1970).

Other water users need not be joined. In controversies involving the respective rights of users from flowing streams or impounded waters, then, since only the disputed rights between litigants are involved in such proceedings, other users of water from the same source need not be joined. Bender v. District Court, 133 Colo. 12, 291 P.2d 684 (1955).

Water rate petitioners without special interest in appeal not indispensable parties. Petitioners who request that their county commissioners fix a maximum water rate, which would then apply to all water users in the county, and who have no interest in the outcome of the litigation beyond that of all persons subject to the rate are not indispensable parties in an appeal of the ratemaking order. Talbott Farms, Inc. v. Bd. of County Comm'rs, 43 Colo. App. 131, 602 P.2d 886 (1979).

Shareholders in mutual ditch company should be joined in condemnation action. Pursuant to this rule and the court's power under C.A.R. 21, the district court should join as parties to a condemnation action those shareholders in a mutual ditch corporation whose water rights would be affected by the condemnation action of the defendant as of the date of the initiation of the condemnation action and all parties in interest. Jacobucci v. District Court, 189 Colo. 380, 541 P.2d 667 (1975).

In a situation in which a court has been asked to determine the disposition of escrowed money, as a pragmatic matter, the money is there and there is a duty on the part of the judiciary, once asked, to reach a decision on the merits; and to do so means that the trial court must sua sponte join the parties necessary to a determination as to who gets the money. City & County of Denver v. City of Arvada, 192 Colo. 88, 556 P.2d 76 (1976).

The trial court had and currently has an obligation to bring in water users, or their successors in interest, who have paid tap fees requested by Denver as the furnisher of the water for a determination of escrowed tap fees, irrespective of the fact that neither of the original parties moved for joinder. City & County of

Denver v. City of Arvada, 192 Colo. 88, 556 P.2d 76 (1976).

County treasurer not indispensable party in proceeding challenging lien priority. In a tax sale the county treasurer who issued the certificate of sale to purchaser of tax sale was not an indispensable party under section (a) of this rule to a proceeding challenging priority of lien of a secured party in the property sold at the tax sale since complete relief could be and was afforded without the treasurer's presence as a party. John Deere Indus. Equip. Co. v. Moorehead, 38 Colo. App. 220, 556 P.2d 91 (1976), rev'd on other grounds, 194 Colo. 398, 572 P.2d 1207 (1977).

City council is indispensable party to suit brought seeking review of denial of rezoning petition and failure to join it is a jurisdictional defect requiring dismissal. Dahman v. City of Lakewood, 44 Colo. App. 261, 610 P.2d 1357 (1980).

An applicant for a zoning variance is an indispensable party to an action challenging the approval of the variance. Norby v. City of Boulder, 195 Colo. 231, 577 P.2d 277 (1978).

Applicant whose request for rezoning is challenged is indispensable party. An applicant whose request for rezoning is challenged in court is an indispensable party to the judicial proceeding. Norby v. City of Boulder, 195 Colo. 231, 577 P.2d 277 (1978).

Applicant for special review use is indispensable party. Applicant for a special review use is an indispensable party to an action challenging approval of special review use. Norby v. City of Boulder, 195 Colo. 231, 577 P.2d 277 (1978).

Fire protection district not necessary party to tax refund action involving allocation for protection. Where a community seeks a refund of taxes mistakenly paid for fire protection from the board of county commissioners, the fire protection district is not a necessary party to the action, and failure by the community to join the district is not a ground for dismissal. Bd. of County Comm'rs v. District Court, 199 Colo. 338, 607 P.2d 999 (1980).

Claimant who has not intervened in civil rights commission proceeding is not party and service of a petition for judicial review is not required upon that individual under § 24-34-308 (3). Red Seal Potato Chip Co. v. Colo. Civil Rights Comm'n, 44 Colo. App. 381, 618 P.2d 697 (1980).

Child, through guardian ad litem, is indispensable party in dependency and neglect hearing. People in Interest of M.M.T., 676 P.2d 1238 (Colo. App. 1983).

As is applicant for use permit. An applicant for use permit is an indispensable party to a proceeding challenging the grant of the application. Neighbors For A Better Approach v. Nepa, 770 P.2d 1390 (Colo. App. 1989).

III. DETERMINATION BY COURT.

One is not an indispensable party to a suit merely because he has a substantial interest in the subject matter of the litigation. Woodco v. Lindahl, 152 Colo. 49, 380 P.2d 234 (1963).

A mere interest in the subject matter of litigation, even though substantial, is not sufficient in itself to warrant a determination of indispensability. Thorne v. Bd. of County Comm'rs, 638 P.2d 69 (Colo. 1981).

One is not an indispensable party even though one's interest in the subject matter of the litigation is such that his presence as a party to the suit is required for a complete adjudication in that suit of all questions related to the litigation. Woodco v. Lindahl, 152 Colo. 49, 380 P.2d 234 (1963).

The test for an indispensable party may be stated thus: Is the absent person's interest in the subject matter of the litigation such that no decree can be entered in the case which will do justice between the parties actually before the court without injuriously affecting the right of such absent person? Woodco v. Lindahl, 152 Colo. 49, 380 P.2d 234 (1963); Civil Serv. Comm'n v. District Court, 185 Colo. 179, 522 P.2d 1231 (1974); Civil Serv. Comm'n v. District Court, 186 Colo. 308, 527 P.2d 531 (1974); Intermountain Rubber Industries v. Valdez, 688 P.2d 1133 (Colo. App. 1984); Prutch Bros. TV v. Crow Watson No. 8, 732 P.2d 241 (Colo. App. 1986).

The definition of "indispensable parties" by the U.S. supreme court is: Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience. Davis v. Maddox, 169 Colo. 433, 457 P.2d 394 (1969).

Whether or not a party is indispensable turns on the facts of each case. Civil Serv. Comm'n v. District Court, 185 Colo. 179, 522 P.2d 1231 (1974); I.M.A., Inc. v. Rocky Mountain Airways, Inc., 713 P.2d 882 (Colo. 1986).

Though injury to the absent party is the most important factor in determining indispensability, other factors are recognized such as the danger of inconsistent decisions, avoidance of a multiplicity of suits, and the reluctance of a court to render a decision which will not finally settle the controversy before it. Davis v. Maddox, 169 Colo. 433, 457 P.2d 394 (1969).

A party permitted to intervene pursuant to C.R.C.P. 24 is not necessarily indispensable pursuant to this rule. C.R.C.P. 24(a)(2) provides for intervention when the applicant claims an interest relating to the property or transaction that is the subject of the action and he or she is so situated that the disposition of the action may

as a practical matter impair or impede his or her ability to protect that interest. Although language of this rule and C.R.C.P. 24 are similar, this rule involves a two-step analysis: (1) Whether the party is necessary within the meaning of section (a) of this rule; and (2) whether the party is indispensable based on the factors of section (b) of this rule. Hicks v. Joondeph, 232 P.3d 248 (Colo. App. 2009).

The issue of indispensability was not waived by the common interest community association where the association raised indispensability to protect the interests of absent parties rather than to protect itself against possible future claims by such parties, and, as the defendant, the association did not choose the parties to the action. Clubhouse at Fairway Pines v. Fairway Pines Estates, 214 P.3d 451 (Colo. App. 2008).

If present trust property is involved and a money judgment is recovered in an action, it will be property of the trust, and so the holder of the legal title should be a party. Davis v. Maddox, 169 Colo. 433, 457 P.2d 394 (1969).

Nonresident shareholders need not be joined if the action is merely one to review the propriety of an election and does not seek any action directly or indirectly against the particular shareholder whose vote is being challenged. State ex rel. Gentles v. Barnholt, 145 Colo. 259, 358 P.2d 466 (1961).

Grantors of a warranty deed which is the subject of an action to determine an adverse possession encumbrance are not indispensable parties to a determination of the dispute. Rivera v. Queree, 145 Colo. 146, 358 P.2d 40 (1960).

Partial assignees of an agreement of a plaintiff, though necessary parties, are not indispensable, and failure to join is not fatal. Centennial Cas. Co. v. Lacey, 133 Colo. 357, 295 P.2d 690 (1956).

Where a judgment creditor and an insured party make an agreement whereby the insured will sue his insurance company to pay off the judgment against him, the judgment creditor is not an indispensable and necessary party, because a third party judgment creditor of an insured cannot sue the insurer. Northland Ins. Co. v. Bashor, 177 Colo. 463, 494 P.2d 1292 (1972).

Even if indispensable parties are omitted, the question of jurisdiction shall not be raised. Centennial Cas. Co. v. Lacey, 133 Colo. 357, 295 P.2d 690 (1956).

Court had jurisdiction to determine that party was indispensable. Although federal court had dismissed actions twice for lack of jurisdiction based on finding that a party was indispensable and therefore diversity did not exist, issue was not res judicata and state court did have jurisdiction since determination of whether a party is indispensable was not substantive question. Sharp Bros. Constr. v. Westvaco Corp., 878 P.2d 38 (Colo. App. 1994).

If a court can do justice to the parties before it without injuring absent persons, it will do so and shape its relief in such a manner as to preserve the rights of the persons not before the court. Woodco v. Lindahl, 152 Colo. 49, 380 P.2d 234 (1963).

Purchaser pendente lite in mechanic's lien action is not an indispensable party. Abrams v. Colo. Seal and Stripe, Inc., 702 P.2d 765 (Colo. App. 1985).

Party held not to be indispensable. Draper v. Sch. Dist. No. 1, 175 Colo. 216, 486 P.2d 1048 (1971).

The court may dismiss a claim without prejudice at the close of plaintiff's evidence if it concluded that indispensable parties have not been included. Bock v. Brody, 870 P.2d 530 (Colo. App. 1993).

Trial court did not abuse its discretion by denying county's motion to dismiss under C.R.C.P. 12(b)(5) and 12(b)(6) and subsection (a) of this rule for failure to join landowners as indispensable parties. A finding that county land use department abused its discretion by refusing to perform ministerial task of accepting application of fire protection district in no way implicated landowner's interests as to make them indispensable parties. Nor did fire protection district's request for a declaration that project could proceed absent an amendment to the planned unit development (PUD). At root, question presented involved which process the district was required to employ in order to build its fire station. This determination did not impair the landowners' ability to protect their interests because, whether the court required a location and extent review, as the district sought, or an amendment to the PUD, which the county believed to be required, the landowners would have had the opportunity to be heard and protect their interests through the applicable statutory processes. Hygiene Fire Prot. Dist. v. Bd. of County Comm'rs, 205 P.3d 487 (Colo. App. 2008), aff'd on other grounds, 221 P.3d 1063 (Colo. 2009).

Rule 20. Permissive Joinder of Parties

(a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in

the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective right to relief, and against one or more defendants according to their respective liabilities.

(b) Separate Trials. The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice.

(c) Parties Jointly or Severally Liable. Persons jointly or severally liable upon the same obligation or instrument, including the parties to negotiable instruments and sureties on the same or separate instruments, may all or any of them be sued in the same action, at the option of the plaintiff.

Cross references: For joinder of persons needed for just adjudication, see C.R.C.P. 19.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, "Pleadings, Rules 7 to 25", see 28 Dicta 368 (1951). For article, "One Year Review of Civil Procedure", see 34 Dicta 69 (1957). For article, "Immunity to Direct Action: Is it a Defense to a Contribution Claim?", see 52 U. Colo. L. Rev. 151 (1980).

It is within sound discretion of trial court to drop or strike parties, and decision will not be reversed on appeal unless abuse is shown. Corbin by Corbin v. City and County of Denver, 735 P.2d 214 (Colo. App. 1987).

Applied in M & G Engines v. Mroch, 631 P.2d 1177 (Colo. App. 1981); Bd. of County Comm'rs v. District Court, 632 P.2d 1017 (Colo. 1981); Thorne v. Bd. of County Comm'rs, 638 P.2d 69 (Colo. 1981); Creditor's Serv., Inc. v. Shaffer, 659 P.2d 694 (Colo. App. 1982); W.R. Hall Constr. Co. v. H.W. Moore Equip. Co., 661 P.2d 1183 (Colo. App. 1982).

II. PERMISSIVE JOINDER.

Law reviews. For article, "Direct Action Against the Liability Insurer Under the Rules of Civil Procedure", see 22 Dicta 314 (1945).

This rule relates to joinder of parties and has no application to misjoinder of claims. Colo. State Bd. of Exam'rs of Architects v. District Court, 126 Colo. 340, 249 P.2d 146 (1952).

This rule relates to multiple plaintiffs and defendants in actions involving common questions of law or fact. Jernigan v. Lakeside Park Co., 136 Colo. 141, 314 P.2d 693 (1957).

There must be such a common question among defendants. Section (a) of this rule requires, in order that a joinder of multiple parties and claims may be sustained, that there shall be a common question of law or fact among the defendants as well as among the plaintiffs. Western Homes, Inc. v. District Court, 133 Colo. 304, 296 P.2d 460 (1956).

It is no longer necessary that each plaintiff have an interest in claims of the other plaintiffs before joining in a common suit with them. Western Homes, Inc. v. District Court, 133 Colo. 304, 296 P.2d 460 (1956); Schwab v. Martin, 165 Colo. 547, 441 P.2d 17 (1968).

Individual claims do not result in a fatal misjoinder. The fact that the claim of each plaintiff is individually his own and free from any right of other plaintiffs to share therein does not result in a fatal misjoinder either of parties or claims. Western Homes, Inc. v. District Court, 133 Colo. 304, 296 P.2d 460 (1956).

Such joinder is discretionary. When the grounds upon which liability is based are mutually exclusive, a request for a joinder pursuant to section (a) of this rule, which deals with permissive parties, is addressed to the sound discretion of the trial court. Draper v. Sch. Dist. No. 1, 175 Colo. 216, 486 P.2d 1048 (1971).

Broadest possible reading, to rule's permissive language is desirable. In view of the full protection allowed by C.R.C.P. 42(b) and section (b) of this rule, it is desirable to give the broadest possible reading to the permissive language of section (a) of this rule. Sutterfield v. District Court, 165 Colo. 225, 438 P.2d 236 (1968).

In action for death caused by negligent operation of motor vehicle, the owner was properly joined with the driver as a party defendant under this rule. Drake v. Hodges, 114 Colo. 10, 161 P.2d 338 (1945).

The administrative law judge's (ALJ) reliance on this rule was misplaced. This rule was not the proper vehicle by which to accomplish joinder because the plaintiff did not, in the first instance, assert any right to relief against the parties whom the ALJ ordered to be joined. However, the ALJ did not abuse his discretion by joining those parties because the question of their liability had been raised and the joinder posed no risk of prejudice. Renaissance Salon v. Indus. Claim Appeals Office, 994 P.2d 447 (Colo. App. 1999).

Applied in Arms Roofing Co. v. Petrie, 136 Colo. 154, 314 P.2d 903 (1957); Twin Lakes Reservoir & Canal Co. v. Bond, 156 Colo. 433, 399 P.2d 793 (1965); O'Neal v. Reliance Mortg. Corp., 721 P.2d 1230 (Colo. App. 1986).

III. SEPARATE TRIALS.

A trial judge is permitted wide discretion when he finds that the necessary prerequisites to separate trials laid down by this rule exist. Sutterfield v. District Court, 165 Colo. 225, 438 P.2d 236 (1968).

Severance cannot be sustained without proper findings. Where a trial court makes no finding that any of the conditions permitting separate trials of properly joined claims are present, a severance cannot be sustained until proper findings are made. Sutterfield v. District Court, 165 Colo. 225, 438 P.2d 236 (1968).

IV. PARTIES JOINTLY OR SEVERALLY LIABLE.

A. In General.

Annotator's note. Since section (c) of this rule is similar to § 13 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

The effect of this rule is to abrogate the common-law rule respecting parties to actions on joint contracts of the descriptions specified. Mattison v. Childs, 5 Colo. 78 (1879).

Common-law rule not changed where a joint maker dies. A joint maker having died, a separate action is maintainable against either the survivor or the executors of the deceased, but they cannot, however, be joined in the same action; as against one the judgment would be "de bonis propriis", and against the other "de bonis testatoris". In this respect, this rule is not believed to have changed the common-law rule. Mattison v. Childs, 5 Colo. 78 (1879).

This rule does not purport in any way to alter the obligations which parties have assumed in their contracts. Bennett v. Morse, 6 Colo. App. 122, 39 P. 582 (1895).

The rule does not make a contract valid which would otherwise be invalid. Bennett v. Morse, 6 Colo. App. 122, 39 P. 582 (1895).

The rule operates merely as an enlargement of the remedy upon a contract, permitting suit to be brought against any of the parties liable or against all, at the plaintiff's pleasure. Bennett v. Morse, 6 Colo. App. 122, 39 P. 582 (1895).

Where parties contract jointly, there must be a joint liability in order that there may be a several liability, for, if a joint agreement is invalid or incapable of enforcement against all of its makers, it is invalid and incapable of enforcement against any one or more of them. Bennett v. Morse, 6 Colo. App. 122, 39 P. 582 (1895).

A stranger to a contract cannot become a party to it without consent of both parties. Kruschke v. Quatsoe, 49 Colo. 312, 112 P. 769 (1910).

A stranger cannot become a surety without such consent within the meaning of this rule, which, in this respect, applies only to persons jointly or severally liable upon the same instrument, including parties to bills of exchange and promissory notes as well as sureties on the same or separate instruments, and not to the independent volunteer guarantor of the payment of the instrument executed by other parties. Kruschke v. Quatsoe, 49 Colo. 312, 112 P. 769 (1910).

Where an action is dismissed as to the principal and continued as to the surety, it is the same as though the action in the first instance had been brought by the obligee against the surety only, and this is permitted by this rule. McAllister v. People, 28 Colo. 156, 63 P. 308 (1900).

If a judgment creditor seeks by "scire facias" to keep a judgment in force, then he must proceed against all defendants. Allen v. Patterson, 69 Colo. 302, 194 P. 934 (1920).

If the judgment creditor selects a new action on the judgment, he need join only such as he elects to join; this conclusion is not only supported by the weight of authority, but is in accord with principles of harmonious and consistent procedure and also with equity and good conscience. Allen v. Patterson, 69 Colo. 302, 194 P. 934 (1920).

This rule is intended to include proceedings in other tribunals besides courts of record. Hughes v. Fisher, 10 Colo. 383, 15 P. 702 (1887).

This rule applies to actions on appeal bonds. Wilson v. Welch, 8 Colo. App. 210, 46 P. 106 (1896), aff'd, 12 Colo. App. 185, 55 P. 201 (1898).

B. Joint and Several Obligations.

Whenever the word "obligation" is used as the name of a contract as it is in this rule, an

agreement in writing, sealed or unsealed, is referred to, but, where, in a legislative provision, it is used with reference to legal duty or liability, such duty or liability may arise from an oral or written contract, or, in some instances, from actionable tortious conduct. The word is used in statutes, as well as in textbooks and decisions, with these different meanings, and the significance to be given it in each statute must be gathered from the purpose and context of the enactment. Exchange Bank v. Ford, 7 Colo. 314, 3 P. 449 (1884); Sawyer v. Armstrong, 23 Colo. 287, 47 P. 391 (1896).

"Obligation", as employed in this rule, does not embrace or apply to oral contracts. Exchange Bank v. Ford, 7 Colo. 314, 3 P. 449 (1884); Townsend v. Heath, 106 Colo. 273, 103 P.2d 691 (1940).

It is argued that giving this restricted meaning to the word "obligation" in this rule renders the word "instrument" entirely superfluous; that "instrument" includes all written contracts, sealed as well as simple; and that, unless a court assents to the proposition that "obligation" includes oral contracts, it violates the rule requiring effect to be given, if possible, to all the language. The use of the word "obligation" under the common law was originally confined to sealed instruments of a certain kind, and courts have not always given it the significance adopted under this rule. Exchange Bank v. Ford, 7 Colo. 314, 3 P. 449 (1884).

A joint obligation will not support a judgment in an action brought against but one of the joint obligors. Erskine v. Russell, 43 Colo. 449, 96 P. 249 (1908).

A firm's debts are joint obligations, not joint and several, and action therefore must be brought against the firm, not against an individual member. Erskine v. Russell, 43 Colo. 449, 96 P. 249 (1908).

In an action against an individual for rent under a lease signed by him where it appears that the lease was made to defendant's firm and that defendant was not acting in his individual capacity, the partner should be made a party to the suit. Erskine v. Russell, 43 Colo. 449, 96 P. 249 (1908).

This rule does not apply to partnership obligations. Thompson v. White, 25 Colo. 226, 54 P. 718 (1898).

An action cannot be maintained against the executor or administrator of a deceased partner upon a partnership contract, whether such contract be written or oral, unless it be shown that the partnership has been finally settled and that the partnership assets are insufficient to pay the firm debts. Thompson v. White, 25 Colo. 226, 54 P. 718 (1898).

A contention made by defendant that his "partner" is an indispensable party to an action on a promissory note is without merit where there previously has been an action for a partnership accounting and termination brought by the "partner" which was settled by a stipulation in which defendant agreed to pay certain obligations, including the unpaid balance on the note in question. Sakal v. Donnelly, 30 Colo. App. 384, 494 P.2d 1316 (1972).

Where an obligation is joint and several, an action is proper against either of the joint makers. Milner Bank & Trust Co. v. Estate of Whipple, 61 Colo. 252, 156 P. 1098 (1916).

Where a surety agreement provides that the principal and surety will be jointly and severally liable, a creditor may, at his option, bring an action against both the principal and the surety or either one alone. Fountain Sand & Gravel Co. v. Chilton Constr., 40 Colo. App. 363, 578 P.2d 664 (1978).

One who has indorsed a promissory note previous to its delivery is a maker, and the obligation is joint and several. Tabor v. Miles, 5 Colo. App. 127, 38 P. 64 (1894).

Holder may sue indorser after obtaining judgment against maker. Under this rule the holder of a note who sues the maker and indorser as joint makers, dismisses as to the indorser without prejudice, and obtains judgment against the maker may afterwards sue the indorser. Hamill v. Ward, 14 Colo. 277, 23 P. 330 (1890).

Obligee on appeal bond may sue surety with or without principal. The obligee in a bond given on appeal may, if he so elects, sue the surety thereon without joining the principals, or having joined them and not having procured service of summons upon them, may proceed against the defendant served as if he were the only defendant. Lux v. McLeod, 19 Colo. 465, 36 P. 246 (1894).

Where the liability is several, the parties may be joined. Upon a contract expressing a several liability of the defendants, they may, under this rule, be joined in an action thereon; this construction is in accord with the reform spirit and express purpose of code practice. Irwine v. Wood, 7 Colo. 477, 4 P. 783 (1884).

It is perfectly proper to unite in one suit both the maker and the acceptor of an instrument. Hughes v. Fisher, 10 Colo. 383, 15 P. 702 (1887).

Where an agreement is regarded as one of suretyship and not of guarantee, the subscribers are liable severally as well as jointly. News-Times Publishing Co. v. Doolittle, 51 Colo. 386, 118 P. 974 (1911).

A receiver and purchaser of a railroad may both be proper parties in an action for damages. Where a passenger on a railroad is killed after a foreclosure sale of the road, but before the sale has been consummated and while the road is still being operated by a receiver, and the decree of foreclosure provides that the purchasers should take the property upon condition that they should pay all indebt-

edness, obligations, or liabilities legally contracted or incurred by the receiver before the delivery of possession, to the extent that the assets or proceeds in the hands of the receiver are insufficient for that purpose, and the property is conveyed to the purchaser and the receiver is discharged under an order which provides that the discharge should not operate to prevent the prosecution in the name of the receiver of any suit then pending, or from defending any suit then pending or which might thereafter be brought against him as such receiver, the receiver and purchaser are both proper parties defendant to an action for damages for the death of such passenger brought after the discharge of such receiver. Denver & R. G. R. R. v. Gunning, 33 Colo. 280, 80 P. 727 (1904).

This rule does not apply to an action against two persons who, acting separately, deprive one of what belongs to him, as they are in no sense liable jointly or severally as contemplated. Millard v. Miller, 39 Colo. 103, 88 P. 845 (1907).

Where two parties, acting separately, appropriated to their respective use certain lands belonging to plaintiff, the liability, if any, against them is several and must be availed of, if at all, in separate actions. Millard v. Miller, 39 Colo. 103, 88 P. 845 (1907).

Defendant-lawyer is not proper party to action by seller against buyer and guarantor. Where sellers of personal property had two distinct claims: an action on a note and other matters against the buyer and the guarantor and a malpractice action against the lawyer, the lawyer would not have been either a proper or necessary party to the other lawsuit. Deaton v. Mason, 616 P.2d 994 (Colo. App. 1980).

Applied in Wilder v. Baker, 147 Colo. 92, 362 P.2d 1045 (1961).

Rule 21. Misjoinder and Nonjoinder of Parties

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

ANNOTATION

Law reviews. For article, "Pleadings, Rules 7 to 25", see 28 Dicta 368 (1951). For article, "New Role for Nonparties in Tort Actions — The Empty Chair", see 15 Colo. Law. 1650 (1986).

Common-law rule altered. This rule alters the common-law rule requiring dismissal of an entire action in which parties have been improperly joined. King v. W.R. Hall Transp. & Storage Co., 641 P.2d 916 (Colo. 1982).

The proper remedy for misjoinder is to require the party against whom the objection lies to bring in such additional parties as are required or permitted by the rules. Krueger v. Merriman Elec., 29 Colo. App. 492, 488 P.2d 228 (1971).

This requirement can be met either by actually joining the omitted party or by establishing that the rights of the omitted party are properly under the jurisdiction of the court for determination. Krueger v. Merriman Elec., 29 Colo. App. 492, 488 P.2d 228 (1971).

The latter result can be accomplished by an assignment of the right of action to the person who actually prosecutes it, inasmuch as assignments for collection have long been recognized as valid in Colorado, and the assignee thereof is the real party in interest and entitled to prosecute the claim. Krueger v. Merriman Elec., 29 Colo. App. 492, 488 P.2d 228 (1971).

Under this rule parties may be added by order of court on motion at any stage of the proceeding. Lerner v. Stone, 126 Colo. 589, 252 P.2d 533 (1952).

This rule gives a trial court authority, even if one has been made a party, to later sever the claims and to proceed with them separately. Centennial Cas. Co. v. Lacey, 133 Colo. 357, 295 P.2d 690 (1956).

Dropping of party under this rule is equivalent to dismissal without prejudice of the claim against that party. King v. W.R. Hall Transp. & Storage Co., 641 P.2d 916 (Colo. 1982).

Decision to drop parties is within sound discretion of the court and will not be disturbed on appeal unless abuse is shown. King v. W.R. Hall Transp. & Storage Co., 641 P.2d 916 (Colo. 1982).

Applied in Reed Auto Sales, Inc. v. Empire Delivery Serv., Inc., 127 Colo. 205, 254 P.2d 1018 (1953); Linke v. Bd. of County Comm'rs, 129 Colo. 165, 268 P.2d 416 (1954); W.R. Hall Transp. & Storage Co. v. King, 43 Colo. App. 202, 606 P.2d 75 (1979); B.C. Inv. Co. v. Throm, 650 P.2d 1333 (Colo. App. 1982); Weyerhaeuser Mortgage Co. v. Equitable General Insurance Co., 686 P.2d 1357 (Colo. App. 1983).

Rule 22. Interpleader

(1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross claim or counterclaim. The provisions of this Rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

(2) In any civil action of interpleader, a district court may enter its order restraining all claimants from instituting or prosecuting any proceeding in any court of this state affecting the property, instrument, or obligation involved in the interpleader action until further order of the court.

Such district court shall hear and determine the case, and may discharge the plaintiff from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment.

Cross references: For joinder of additional parties pursuant to counterclaims or cross claims, see C.R.C.P. 13(h); for proper venue, see C.R.C.P. 98.

ANNOTATION

Law reviews. For article, "Pleadings, Rules 7 to 25", see 28 Dicta 368 (1951).

Rule must be given liberal construction. In determining the right of one to intervene in an action, the liberal construction of the rules of civil procedure called for in C.R.C.P. 1 must be followed. Senne v. Conley, 110 Colo. 270, 133 P.2d 381 (1943).

Trial court's order not subject to collateral attack in interpleader action. McLeod v. Provident Mut. Life Ins. Co., 186 Colo. 234, 526 P.2d 1318 (1974).

Amended pleading asserting an interpleader claim is not futile if it alleges facts sufficient to support a reasonable belief that exposure to double or multiple liability may exist. Certainty of exposure to double or multiple liability is not the test; rather, the allegations must meet a minimum threshold of substantiality. Benton v. Adams, 56 P.3d 81 (Colo. 2002).

For earlier cases affording a limited sort of interpleader, see Fischer v. Hanna, 8 Colo. App. 471, 47 P. 303 (1896); Price v. Lucky Four Gold Mining Co., 56 Colo. 163, 136 P. 1021 (1913); Engineer's Constr. Corp. v. Tolbert, 74 Colo. 542, 223 P. 56 (1924) (decided under § 18 of the former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941).

Applied in Sch. Dist. No. 11 v. Colo. Springs Teachers Ass'n, 41 Colo. App. 267, 583 P.2d 952 (1978); M & G Engines v. Mroch, 631 P.2d 1177 (Colo. App. 1981); West Greeley Nat'l Bank v. Wygant, 650 P.2d 1339 (Colo. App. 1982).

Rule 23. Class Actions

(a) Prerequisites to Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if: (1) The class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. Any action may be maintained as a class action if the prerequisites of section (a) are satisfied, and in addition:

(1) The prosecution of separate actions by or against individual members of the class would create a risk of:

(A) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

(B) Adjudications with respect to individual members of the class which would as a

practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interest; or

(2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(A) The interest of members of the class in individually controlling the prosecution or defense of separate actions;

(B) The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(C) The desirability or undesirability of concentrating the litigation of the claims in the particular forum;

(D) The difficulties likely to be encountered in the management of class action.

(c) **Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.**

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this section (c) may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subsection (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that: (A) The court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subsections (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subsection (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subsection (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate: (A) An action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this Rule shall then be construed and applied accordingly.

(d) **Orders in Conduct of Actions.** In the conduct of actions to which this Rule applies, the court may make appropriate orders:

(1) Determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

(2) Requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, the notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

(3) Imposing conditions on the representative parties or on intervenors;

(4) Requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly;

(5) Dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(f) Appeals. An appeal from an order granting or denying class certification under this rule may be allowed pursuant to the procedures set forth in C.R.S. § 13-20-901 (2003).

Source: (f) added and adopted September 18, 2003, effective nunc pro tunc July 1, 2003, for civil actions filed on or after that date.

ANNOTATION

Law reviews. For article, "Pleadings, Rules 7 to 25", see 28 Dicta 368 (1951). For article, "Standing to Sue in Colorado: A State of Disorder", see 60 Den. L.J. 421 (1983). For article, "Approval of a Class Action Settlement Under C.R.C.P. 23(e)", see 31 Colo. Law. 71 (May 2002). For article, "Class Action Certification Under C.R.C.P. 23: Procedural and Evidentiary Considerations", see 39 Colo. Law. 29 (June 2010).

Courts must liberally construe this rule because its policy favors maintaining class actions. When evaluating whether this rule's requirements are met, courts must generally accept as true the allegations supporting certification and must not base determination on whether the class will ultimately succeed in establishing each element necessary to prove its claim. Farmers Ins. Exch. v. Benzing, 206 P.3d 812 (Colo. 2009).

A designation of an action as a class action does not make it so when the facts show otherwise. Associated Master Barbers, Local 115 v. Journeyman Barbers, Local 205, 132 Colo. 52, 285 P.2d 599 (1955).

Failure to meet the mandatory requirements of section (a) is grounds for denial. Borwick v. Bober, 34 Colo. App. 423, 529 P.2d 1351 (1974).

Failure to qualify under one of the subsections of section (b) is grounds for denial. Medina v. Conseco Annuity Assurance Co., 121 P.3d 345 (Colo. App. 2005).

Determination of whether requirements met within discretion of trial court. The determination of whether an action does or does not meet the requirements of a class action is within the discretion of the trial court. Borwick v. Bober, 34 Colo. App. 423, 529 P.2d 1351 (1974); State v. Buckley Powder Co., 945 P.2d 841 (Colo. 1997); Medina v. Conseco Annuity Assurance Co., 121 P.3d 345 (Colo. App. 2005); State Farm Mut. Auto. Ins. Co. v. Reyher, 266 P.3d 383 (Colo. 2011).

Need for class certification under section (b)(3) is permissible, but not dispositive, when common questions of law or fact predominate. State v. Buckley Powder Co., 945 P.2d 841 (Colo. 1997).

The decision of whether to certify a class action lies within the discretion of the trial court and will not be disturbed unless the decision is clearly erroneous and an abuse of discretion. Friends of Cham. Music v. City & County of Denver, 696 P.2d 309 (Colo. 1985); Villa Sierra Condo. v. Field Corp., 787 P.2d 661 (Colo. App. 1990); Rosenthal v. Dean Witter Reynolds, Inc., 883 P.2d 522 (Colo. App. 1994); State Farm Mut. Auto. Ins. Co. v. Reyher, 266 P.3d 383 (Colo. 2011).

Where trial court conducts rigorous analysis of the evidence in making its class certification decision, the trial court did not abuse its discretion in making its decision. State Farm Mut. Auto. Ins. Co. v. Reyher, 266 P.3d 383 (Colo. 2011).

A trial court's determination whether the action should be accorded class treatment may not be set aside, unless that determination constitutes "clear error". Berco Res., Inc. v. Louisiana Land & Exploration Co., 805 P.2d 1132 (Colo. App. 1990); Robinson v. Lynmar Racquet Club, Inc., 851 P.2d 274 (Colo. App. 1993).

Because a trial court's decision to decertify a class is equivalent to a decision to deny class certification in the first instance, whether to decertify the class also lies within the trial court's discretion. Benzing v. Farmers Ins. Exch., 179 P.3d 103 (Colo. App. 2007), rev'd on other grounds, 206 P.3d 812 (Colo. 2009).

Prior partial certifications are not determinative. The court is not required to certify a class for claims that had been previously certified in a partial settlement context against other settling defendants. Toothman v. Freeborn & Peters, 80 P.3d 804 (Colo. App. 2002).

Trial court may act sua sponte to create subclasses. Toothman v. Freeborn & Peters, 80 P.3d 804 (Colo. App. 2002).

Trial court is given broad discretion regarding whether to certify a class action under this rule and that decision will not be disturbed unless clearly erroneous and an abuse of discretion. Trial court determination that plaintiffs failed to demonstrate typicality is clearly not erroneous. Ammons v. Am. Family Mut. Ins. Co., 897 P.2d 860 (Colo. App. 1995); Buckley Powder Co. v. State, 924 P.2d 1133 (Colo. App. 1996), aff'd in part and rev'd in part on other grounds, 945 P.2d 841 (Colo. 1997).

However, no review of the validity of the certification of a class is necessary where all reasonable steps to provide the "best notice practicable" to members of the class as required by section (c)(2) have not been taken, resulting in the decertification of the class. Friends of Cham. Music v. City & County of Denver, 696 P.2d 309 (Colo. 1985).

Trial court abused discretion in certifying plaintiff's class as appropriate where no detailed findings were made which would have delineated the class or subclass with respect to each issue, especially in light of the large class and wide range of issues presented. Goebel v. Colo. Dept. of Insts., 764 P.2d 785 (Colo. 1988).

Trial court abused discretion in certifying two classes because it failed to rigorously analyze or even take into account defendant's evidence, offered to rebut class-wide inferences of causation, that the causation and amount of any damages to plaintiffs could only be determined by independent examination of each plaintiff's purchase transaction. Garcia v. Medved Chevrolet, Inc., 263 P.3d 92 (Colo. 2011).

Where the trial court failed to recognize its obligation to provide damages due to its misreading of the McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Dept. of Business Regulation of Florida, 496 U.S. 18 (1990), decision, the trial court must reconsider its reliance on that decision as a justification for denying class certification. State v. Buckley Powder Co., 945 P.2d 841 (Colo. 1997).

Source of determination of maintainability of class action. Where the complaint lacks sufficient factual material upon which to make a decision as to whether a class action is to be maintained, the trial court may consider affidavits and exhibits, but, absent a timely request to provide the court with further information in the form of affidavits, discovery, or evidence, the trial court may determine this issue based upon allegations of the complaint alone. Levine v. Empire Sav. & Loan Ass'n, 40 Colo. App. 285, 579 P.2d 642 (1977), aff'd, 197 Colo. 293, 592 P.2d 410 (1979).

The determination of an action's class status may require more than a review of the pleadings; its resolution may well demand consideration of the nature of the evidence that will be presented. Thus, it is generally better practice for a trial court to hold an evidentiary hearing upon the question of class certification. Villa Sierra Condo. v. Field Corp., 787 P.2d 661 (Colo. App. 1990); Medina v. Conseco Annuity Assurance Co., 121 P.3d 345 (Colo. App. 2005).

A trial court must rigorously analyze the evidence presented and determine that each requirement of this rule is met in order to certify a class. A trial court may consider factual or legal disputes, including expert disputes, to the extent necessary to determine whether the requirements have been met, but may not resolve factual or legal disputes to screen out or prejudge the merits of the case. Jackson v. Unocal Corp., 262 P.3d 874 (Colo. 2011).

Focus is whether the proof presented at trial will be predominantly common to the class or primarily individualized. Medina v. Conseco Annuity Assurance Co., 121 P.3d 345 (Colo. App. 2005).

Existence of a common nucleus of operative fact is the standard used by many courts. Medina v. Conseco Annuity Assurance Co., 121 P.3d 345 (Colo. App. 2005).

Where plaintiff alleged misconduct by insurer in charging higher premiums than stated in policy, the fact that the insurer used at least seven different types of policies, with varying statements of the amounts and payment schedules for premiums, precluded class certification. Medina v. Conseco Annuity Assurance Co., 121 P.3d 345 (Colo. App. 2005).

Early determination of feasibility of class action is preferred so that ample notice may be given to members of the class to appear in the action, seek exclusion from the class, or object to the representation by the plaintiffs, and, so that, if certification is properly denied, applicable statutes of limitations will not have run. Levine v. Empire Sav. & Loan Ass'n, 40 Colo. App. 285, 579 P.2d 642 (1977), aff'd, 197 Colo. 293, 592 P.2d 410 (1979).

Actual size of defined class is significant factor in the determination that the class is sufficiently large to render joinder impracticable and mere speculation as to size is insufficient. Kniffin v. Colo. W. Dev. Co., 622 P.2d 586 (Colo. App. 1980).

Sections (c) and (d) grant to a trial court substantial discretion to create subclasses with respect to separate issues or to enter other orders designed to manage the litigation. Thus, to the extent that a fraud claim alleged by plaintiffs could be asserted only by those condominium unit owners to whom a specific representation was made, the court, after receipt of evidence upon the matter, could either refuse class action treatment with respect to that claim or create a separate class for its assertion, depending upon the nature of any alleged representation and the number of present unit owners to whom it was allegedly made. Villa Sierra Condo. v. Field Corp., 787 P.2d 661 (Colo. App. 1990).

Creation of smaller class or of subclasses is an option if the original definition of a class is too broad; however, the burden is on the plaintiff not the court to suggest these alternatives. Medina v. Conseco Annuity Assurance Co., 121 P.3d 345 (Colo. App. 2005).

In a class action under this rule where the interests sought to be represented are not in full harmony with the plaintiff, he cannot maintain a class action in their behalf. Associ-

ated Master Barbers, Local 115 v. Journeyman Barbers, Local 205, 132 Colo. 52, 285 P.2d 599 (1955); Darnall v. City of Englewood, 740 P.2d 536 (Colo. App. 1987); Robinson v. Lynmar Racquet Club, Inc., 851 P.2d 274 (Colo. App. 1993).

Very nature of "habeas corpus" forfends class actions. Although "habeas corpus" is a civil proceeding, this rule of civil procedure, providing for class actions, does not apply; the very nature of "habeas corpus" proceedings forfends class actions. Riley v. City & County of Denver, 137 Colo. 312, 324 P.2d 790 (1958).

Under this rule, in order to qualify persons as members of a class, there must be some status or relationship in common between them which arises out of circumstances other than that of conducting business under a common name as an unincorporated association. Thomas v. Dunne, 131 Colo. 20, 279 P.2d 427 (1955).

Class properly confined to geographical parameters originally pleaded. Goebel v. Colo. Dept. of Insts., 830 P.2d 1036 (Colo. 1992).

Members who make up an unincorporated association do not, by the bare fact of common membership, constitute a "class" within the meaning of this rule. Thomas v. Dunne, 131 Colo. 20, 279 P.2d 427 (1955).

A voluntary condominium association has standing and may maintain an action on behalf of its members if: (1) Its members would otherwise have standing to sue in their own right; (2) the interests sought to be protected are germane to the association's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the litigation. Villa Sierra Condo. v. Field Corp., 787 P.2d 661 (Colo. App. 1990).

As to the third part of the test, while an association may generally obtain declaratory or injunctive relief without joining its members, any litigation designed to obtain damages on their behalf would normally require the member's presence. Villa Sierra Condo. v. Field Corp., 787 P.2d 661 (Colo. App. 1990).

Class action may be maintained by an association of public employees seeking declaratory judgment pertaining to longevity pay increases. Colo. Ass'n of Pub. Employees v. Colo. Civil Serv. Comm'n, 31 Colo. App. 369, 505 P.2d 54 (1972).

Burden of establishing that action should proceed as class action on party seeking. In any application to proceed as a class action, the burden of establishing that an action should proceed as a class action is on the party seeking to utilize the class action. Borwick v. Bober, 34 Colo. App. 423, 529 P.2d 1351 (1974); Levine v. Empire Sav. & Loan Ass'n, 40 Colo. App. 285, 579 P.2d 642 (1977), aff'd, 197 Colo. 293, 592 P.2d 410 (1979); Villa Sierra Condo. v. Field Corp., 787 P.2d 661 (Colo. App. 1990); Robinson v. Lynmar Racquet Club, Inc., 851 P.2d 274 (Colo. App. 1993); Medina v. Conseco Annuity Assurance Co., 121 P.3d 345 (Colo. App. 2005).

In class actions the courts have broad discretion to shape and administer judicial relief. Gorin v. Arizona Columbine Ranch, Inc., 34 Colo. App. 405, 527 P.2d 899 (1974).

A party requesting class action certification has the burden of proving that all the requisites of this rule have been satisfied. Kniffin v. Colo. W. Dev. Co., 622 P.2d 586 (Colo. App. 1980).

A class action advocate bears the burden of demonstrating that the claims being asserted may properly be accorded class action treatment. Before a plaintiff may have one or more of its claims treated as class claims it must initially demonstrate that the numerosity, commonality, typicality, and adequacy of representation requirements of section (a) are met. Berco Res., Inc. v. Louisiana Land & Exploration Co., 805 P.2d 1132 (Colo. App. 1990).

Plaintiffs had the burden of demonstrating the propriety of a class action. However, if the plaintiffs make an initial demonstration that a class action is appropriate under section (b)(3), then defendants cannot rely only upon the general allegations of a pleading to argue that common issues do not predominate over individual ones. They must, at the least, describe in some detail the nature of the evidence that they intend to produce upon the issue, so that the court may render an informed judgment upon the predominance of common legal or factual issues over individual ones. Villa Sierra Condo. v. Field Corp., 787 P.2d 661 (Colo. App. 1990).

A "predominant" issue need not be one that is determinative of a defendant's liability. Rather, when one or more of the central issues in the action are common to the class and can be said to predominate, the action is proper under section (b)(3), even though other matters will have to be tried separately. Thus, resolution of common issues need not guarantee a conclusive finding on liability. Villa Sierra Condo. v. Field Corp., 787 P.2d 661 (Colo. App. 1990).

Individual issues regarding applicable statute of limitations do not necessarily defeat class certification. Named plaintiffs in a class action may demonstrate ignorance or reliance on a class-wide basis necessary to toll the statute of limitations using circumstantial evidence that is common to the class. Patterson v. BP Am. Prod. Co., 240 P.3d 456 (Colo. App. 2010), aff'd, 263 P.3d 103 (Colo. 2011).

Ignorance and reliance elements of fraudulent concealment may be inferred from circumstantial evidence, enabling plaintiffs to establish a theory of fraudulent concealment on a class-wide basis with evidence common to the class. BP Am. Prod. Co. v. Patterson, 263 P.3d 103 (Colo. 2011).

Trial court failed to consider, in class certification issue, whether claims for damages were appropriate for class and if so whether notice to individual class members was required. Goebel v. Colo. Dept. of Insts., 764 P.2d 785 (Colo. 1988).

Litigants should be afforded opportunity to present evidence as to whether class action is maintainable, which implies sufficient discovery; however, a plaintiff may not rely on the theory that discovery and an evidentiary hearing are a matter of right, without making a minimal showing as to the requirements of this rule. Levine v. Empire Sav. & Loan Ass'n, 197 Colo. 293, 592 P.2d 410 (1979).

Once excluded from a class action, such excluded members are not to be included within any judgment of the court, whether adverse or favorable. Gorin v. Arizona Columbine Ranch, Inc., 34 Colo. App. 405, 527 P.2d 899 (1974).

Generally, only a named class member may challenge settlement agreement. Absent intervention, an unnamed class member does not have standing to appeal the approval of a settlement agreement and plan of allocation. However, an unnamed class member who has not been permitted to intervene may also have standing to bring a direct appeal if a motion to intervene, which is then appealed, should have been granted. Higley v. Kidder, Peabody & Co., 920 P.2d 884 (Colo. App. 1996).

Where certain plaintiffs in a 42 U.S.C. § 1983 class action are dismissed because they have no claims under § 1983, and such plaintiffs are not representatives of a class of persons who may have claims under § 1983 and remain in the action, they cannot represent the class on appeal. Casados v. City & County of Denver, 924 P.2d 1192 (Colo. App. 1996).

Disallowance of discovery after dismissal. The trial court, after dismissing a class action, does not abuse its discretion in declining to allow discovery when that request is made for the first time in a motion for rehearing. Levine v. Empire Sav. & Loan Ass'n, 40 Colo. App. 285, 579 P.2d 642 (1977), aff'd, 197 Colo. 293, 592 P.2d 410 (1979).

Where plaintiffs fail to request right to amend complaint for the purpose of demonstrating that their class action should be maintained, either prior to a trial court ruling on a motion to dismiss or in a motion for rehearing filed thereafter, they are precluded from raising that issue on appeal. Levine v. Empire Sav. & Loan Ass'n, 40 Colo. App. 285, 579 P.2d 642 (1977), aff'd, 197 Colo. 293, 592 P.2d 410 (1979).

Trial court's approval of settlement for fundamental fairness must balance at least: The strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement. Helen G. Bonfils Found. v. Denver Post Employees Stock Trust, 674 P.2d 997 (Colo. App. 1983).

Extent of court's discretion in approving settlements summarized in Higley v. Kidder, Peabody & Co., 920 P.2d 884 (Colo. App. 1996).

Same legal principles apply in appellate review of total settlement, as between defendants and the class as a whole, and of an agreement for allocation of the settlement proceeds among class members. Higley v. Kidder, Peabody & Co., 920 P.2d 884 (Colo. App. 1996).

Settlement needs not benefit all class members equally. However, a court may refuse to approve a settlement when a disparity of benefits to be received among the class members evidences either substantive unfairness or inadequate representation. Higley v. Kidder, Peabody & Co., 920 P.2d 884 (Colo. App. 1996).

Evaluation of a proposed settlement or allocation plan is a fact-specific inquiry. Higley v. Kidder, Peabody & Co., 920 P.2d 884 (Colo. App. 1996).

No error in approval of settlement plan. Where the trial court considered all factors when weighing the fairness of a proposed settlement and, based upon all considerations, approved the settlement plan, there was no error. Helen G. Bonfils Found. v. Denver Post Employees Stock Trust, 674 P.2d 997 (Colo. App. 1983).

Defendant required to assist plaintiff in sending notice of the class action to the members of the class. Although the costs of sending notices of a class action lawsuit to the members of the class usually are borne by the plaintiff, there are situations where the defendant is better able to perform the mailing and incur the associated costs. The district court did not abuse its discretion when it required the defendant to send the notices since the defendant makes periodic mailings to class members and such notices could be included at insubstantial expense to the defendant. Mountain States v. District Court, 778 P.2d 667 (Colo. 1989), cert. denied, 493 U. S. 893, 110 S. Ct. 519, 107 L. Ed. 2d 520 (1989).

Four elements must be addressed prior to issuing a restraint on future communications during the pre-certification period. Several factors guide the trial court in considering the formulation of restrictions on future communication by a defendant to putative class members, including the: (1) Severity and likelihood of perceived harm; (2) precision with which the

order is drawn; (3) availability of a less onerous alternative; and (4) duration of the order. Air Commc'n & Satellite Inc. v. EchoStar Satellite Corp., 38 P.3d 1246 (Colo. 2002).

Applicability of statutes of limitation and repose under federal tolling doctrines. As long as a party seeking to act as a class representative does not commence a new, separate suit as class representative, but merely seeks to mintain the currently pending and timely filed action as a class action and act as class representative, a statute of repose that would otherwise constitute a defense as to that party, disqualifying the party as a class representative, does not apply. Rosenthal v. Dean Witter Reynolds, Inc., 883 P.2d 522 (Colo. App. 1994).

The commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action. Once the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied. State Farm Mut. Auto. Ins. Co. v. Boellstorff, 540 F.3d 1223 (10th Cir. 2008) (citing Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974) and Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 103 S. Ct. 2392, 76 L. Ed. 2d 628 (1983)).

Class actions for injunctive relief certified under section (b)(2) do not preclude individual actions for damages. Jahn ex rel. Jahn v. ORCR, Inc., 92 P.3d 984 (Colo. 2004).

Due process, as well as the requirements of the claim preclusion doctrine, must be satisfied before a class action can bind class members for a class judgment. While courts have held that due process is satisfied in class actions for injunctive relief when class members are adequately represented, minimal due process requires both notice and adequate representation in class claims for monetary damages since there is a property right at stake. Jahn ex rel. Jahn v. ORCR, Inc., 92 P.3d 984 (Colo. 2004).

Because section (b)(3) includes due process safeguards necessary to preclude class members from bringing individual suits for damages and section (b)(2) lacks such safeguards, section (b)(2) was not intended to certify actions that preclude individual suits for damages. Section (b)(2), which authorizes class actions for injunctive relief and lacks notice and other procedural requirements, reflects that due process may only require adequate representation to bind class members to judgments for injunctive relief. In contrast, section (b)(3), which governs class actions for damages and imposes specific notice requirements, embodies due process requirements necessary to bind class members to judgments for monetary relief. Jahn ex rel. Jahn v. ORCR, Inc., 92 P.3d 984 (Colo. 2004).

Federal cases under Fed.R.Civ.P. 23 are persuasive because C.R.C.P. 23 is virtually identical to the federal rule. Goebel v. Dept. of Insts., 764 P.2d 785 (Colo. 1988); Rosenthal v. Dean Witter Reynolds, Inc., 883 P.2d 522 (Colo. App. 1994); Higley v. Kidder, Peabody & Co., 920 P.2d 884 (Colo. App. 1996); Medina v. Conseco Annuity Assurance Co., 121 P.3d 345 (Colo. App. 2005).

Failure strictly to comply with section (c)(3) does not preclude appellate review of the judgment. A failure of such compliance is merely a clerical defect correctable under C.R.C.P. 60(a). Any such defect does not toll the time for filing a notice of appeal. Goodwin v. Homeland Cent. Ins. Co., 172 P.3d 938 (Colo. App. 2007).

Applied in City & County of Denver v. Gushurst, 120 Colo. 465, 210 P.2d 616 (1949); Mar-Lee Corp. v. Steele, 145 Colo. 447, 359 P.2d 364 (1961); Hoper v. City & County of Denver, 173 Colo. 390, 479 P.2d 967 (1971); Rodgers v. Atencio, 43 Colo. App. 268, 608 P.2d 813 (1979); City of Lakewood v. Colfax Unlimited Ass'n, 634 P.2d 52 (Colo. 1981); Cottrell v. City & County of Denver, 636 P.2d 703 (Colo. 1981); Ackmann v. Merchants Mtg. & Trust Corp., 645 P.2d 7 (Colo. 1982); In re Brandt v. Indus. Comm'n, 648 P.2d 676 (Colo. App. 1982); Ackmann v. Merchants Mtg. & Trust Corp., 659 P.2d 697 (Colo. App. 1982); Bancroft-Clover Water & San. Dist. v. Metro. Denver Sewage Disposal Dist. No. 1, 670 P.2d 428 (Colo. App. 1983); Elk River Assocs. v. Huskin, 691 P.2d 1148 (Colo. App. 1984); Jackson v. Unocal Corp., 262 P.3d 874 (Colo. 2011); Garcia v. Medved Chevrolet, Inc., 263 P.3d 92 (Colo. 2011); State Farm Mut. Auto. Ins. Co. v. Reyher, 266 P.3d 383 (Colo. 2011).

Rule 23.1. Derivative Actions by Shareholders

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his

failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

Cross references: For actions by shareholders, see § 7-107-402, C.R.S.

ANNOTATION

The purpose underlying the requirements of this rule is to avoid the possibility of a multiplicity of lawsuits against corporations by individual stockholders or small groups of stockholders. Bell v. Arnold, 175 Colo. 277, 487 P.2d 545 (1971).

This rule avoids multiple suits by condominium unit owners against the condominium association or against the wrongdoers. Ireland v. Wynkoop, 36 Colo. App. 205, 539 P.2d 1349 (1975).

Courts have generally been careful to regard the derivative suit as an extraordinary remedy, which is available to the shareholder, as the corporation's representative, only when there is no other road to redress. Bell v. Arnold, 175 Colo. 277, 487 P.2d 545 (1971).

The purpose of a derivative action is to recover sums owed the corporation. O'Malley v. Casey, 42 Colo. App. 85, 589 P.2d 1388 (1979).

The fact that a shareholder is a judgment creditor of the corporation does not automatically render such shareholder ineligible to maintain a derivative action. New Crawford Valley, Ltd. v. Benedict, 847 P.2d 642 (Colo. App. 1993).

The requirements of this rule are mandatory. Van Schaack v. Phipps, 38 Colo. App. 140, 558 P.2d 581 (1976).

This rule encourages corporation rather than shareholders to sue. The purpose of this rule is to encourage the corporation itself, rather than the shareholders in its behalf, to sue for redress of corporate claims. Ireland v. Wynkoop, 36 Colo. App. 205, 539 P.2d 1349 (1975).

Stockholder may maintain a personal action only if actions of third party that injure corporation result from a violation of a duty owed to him as a stockholder and cause injury unique to himself and not suffered by other stockholders. Security Nat'l Bank v. Peters, Writer, & Christensen, Inc., 39 Colo. App. 344, 569 P.2d 875 (1977); Nicholson v. Ash, 800 P.2d 1352 (Colo. App. 1990); Kim v. Grover C. Coors Trust, 179 P.3d 86 (Colo. App. 2007).

This rule does not preclude derivative suit by corporation with only one minority stockholder. Clemons v. Wallace, 42 Colo. App. 17, 592 P.2d 14 (1978).

Compliance must be shown on face of complaint. In order to pursue a shareholder's derivative action, compliance must be shown on the face of the complaint. Van Schaack v. Phipps, 38 Colo. App. 140, 558 P.2d 581 (1976).

Where it is obvious from the face of the complaint that the requisite demand upon shareholders was not made and no explanation for the lack of demand is offered, an action by the stockholder will not lie. Van Schaack v. Phipps, 38 Colo. App. 140, 558 P.2d 581 (1976).

Redress must first be sought from the directors. Courts will not interfere with the internal affairs and management of a corporation on the complaint of an individual stockholder or a small group of stockholders, unless it appears from the allegations of the complaint that all efforts to obtain redress from the directors have been exhausted or would have been futile. Bell v. Arnold, 175 Colo. 277, 487 P.2d 545 (1971).

Redress must then be sought from stockholders. When a stockholder or group of stockholders has exhausted all efforts to obtain redress from the directors, or where such efforts would have been futile, the stockholder must then make demand upon and seek relief from the stockholders of the corporation. Bell v. Arnold, 175 Colo. 277, 487 P.2d 545 (1971).

Record was insufficient to allow the trial court to conclude as a matter of law that plaintiffs were required to make a demand upon over 8,000 shareholders before they filed their complaint. New Crawford Valley, Ltd. v. Benedict, 847 P.2d 642 (Colo. App. 1993).

Demands for desired action need not be made by shareholder plaintiffs upon directors allegedly involved as wrongdoers. Bell v. Arnold, 175 Colo. 277, 487 P.2d 545 (1971); Hirsch v. Jones Intercable, Inc., 984 P.2d 629 (Colo. 1999).

A demand need be made only upon the directors who are in office at the time suit is commenced. A substantial change in membership of the board after suit is filed does not give rise to a requirement that a new demand for action be made. A contrary result would be overly burdensome to plaintiffs. New Crawford

Valley, Ltd. v. Benedict, 847 P.2d 642 (Colo. App. 1993).

Where it is demonstrated that making demand on shareholders in connection with nonratifiable wrongs of directors would involve unreasonable expense and effort, there is considerable authority that this would outweigh the merits of making the demand and that the demand therefore should be excused under such circumstances. Bell v. Arnold, 175 Colo. 277, 487 P.2d 545 (1971).

Demand upon shareholders is excused when the allegations in plaintiff's complaint are of such a nature and are stated with sufficient particularity as to indicate that such demand would be futile. Van Schaack v. Phipps, 38 Colo. App. 140, 558 P.2d 581 (1976).

Where directors and controlling shareholders are antagonistic, a demand upon them is presumptively futile and no demand need be made. Van Schaack v. Phipps, 38 Colo. App. 140, 558 P.2d 581 (1976).

Where the number of shareholders is not pled as an excuse, nor is it accompanied by any allegation regarding unreasonable costs of making the demand, a court will not determine whether thousands of shareholders do, or do not, formulate a valid basis for an excuse in making demand on them. Bell v. Arnold, 175 Colo. 277, 487 P.2d 545 (1971).

That the shareholders could not ratify the alleged wrongs because of the illegal nature of the wrongs is not an acceptable reason or a valid excuse for not making a demand on the shareholders. Bell v. Arnold, 175 Colo. 277, 487 P.2d 545 (1971).

The purpose of making demand on the shareholders is to inform them of the alleged nonratifiable wrongs, to seek their participation in available courses of action such as the removal of the involved directors and the election of new directors who will seek the redress required in the circumstances, or to secure shareholder approval of an action for damages to the corporation caused by the alleged wrongdoing directors. Bell v. Arnold, 175 Colo. 277, 487 P.2d 545 (1971).

Where plaintiffs allege that the defendant directors frustrated their attempt to secure a shareholders list by unreasonable restrictions, this is not a valid excuse for not making demand on the stockholders. Bell v. Arnold, 175 Colo. 277, 487 P.2d 545 (1971).

A shareholder or member must make demand on all claims or suit barred. A corporate shareholder or member cannot, consistent with the requirements of this rule, make a demand upon the corporation as to certain claims, and then attempt to sue derivatively on other claims. Ireland v. Wynkoop, 36 Colo. App. 205, 539 P.2d 1349 (1975).

Summary judgment for failure of complaint to allege demand is error. Where the fact of the futility of a shareholder demand is placed in issue by the depositions and exhibits in the court file, it is error to grant summary judgment on the ground that plaintiff's complaint fails to allege the demand for shareholder relief required by this rule. Van Schaack v. Phipps, 38 Colo. App. 140, 558 P.2d 581 (1976).

A complaint that specifically alleges that a demand was made by one plaintiff on the board of directors to require the president of the corporation to pay sums which he received as a premium for stock sold and that such demand was refused is sufficient not only to plead the demand, but also to set forth the reasons why another plaintiff was excused from making a second demand for the same action. Allegations that the board of directors breached a duty of care owed to the corporation and its shareholders was sufficient to establish reason for plaintiff's failure to make further demands. Greenfield v. Hamilton Oil Corp., 760 P.2d 664 (Colo. App. 1988).

Dismissal of complaint for lack of verification was error. While the original complaint, as filed, had not been verified, where a notarized verification of the complaint, which had been signed and verified by plaintiff on November 21, 1972, was filed with the court on May 16, 1975, and defendant had failed to raise the issue until some two and one-half years after the complaint was filed, defendant waived the defect. Hence, the trial court erred in dismissing plaintiff's complaint on the ground that the verification required by this rule was lacking. Van Schaack v. Phipps, 38 Colo. App. 140, 558 P.2d 581 (1976).

Summary dismissal of complaint based on special litigation committee recommendations was error. There is no basis to dismiss a claim asserted by plaintiffs in a derivative action where the ultimate decision to seek dismissal of such action was not made by the special litigation committee, but was a decision adopted by those persons who, as defendants in the litigation, had a vital personal interest in that decision. Greenfield v. Hamilton Oil Corp., 760 P.2d 664 (Colo. App. 1988).

Private settlements prevented. The provision that "[t]he action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs" was intended to prevent private settlements between a plaintiff shareholder and the defendants. Ireland v. Wynkoop, 36 Colo. App. 205, 539 P.2d 1349 (1975).

An out-of-court settlement by a corporation involved in a derivative suit is not prevented. Ireland v. Wynkoop, 36 Colo. App. 205, 539 P.2d 1349 (1975).

The standard for the evaluation by trial courts of settlements in derivative suits under this rule is whether the agreement is fair, adequate, and reasonable. The standard is the same as the standard for settlements of class action suits under C.R.C.P. 23 because the court is charged with guarding the interests of those who are not parties to the agreement. Thomas v. Rahmani-Azar, 217 P.3d 945 (Colo. App. 2009).

And the standard of review of a trial court's decision to approve a settlement is for an abuse of discretion, as it is with appellate review of class action settlements. Thomas v. Rahmani-Azar, 217 P.3d 945 (Colo. App. 2009).

Particularity required by rule lacking. The general allegation that the plaintiffs "have diligently endeavored, over several years past, to have the Board of Managers of the defendant Association and the Association membership as a whole prosecute and resolve the claims involved in this action, but said efforts have been unavailing", completely lacks the particularity required by this rule. Ireland v. Wynkoop, 36 Colo. App. 205, 539 P.2d 1349 (1975).

The mere fact that plaintiffs were represented by the same counsel as other plaintiffs was not sufficient to establish that they were "fronts" for a conflicting interest. New Crawford Valley, Ltd. v. Benedict, 847 P.2d 642 (Colo. App. 1993).

For factors to be considered in a derivative action brought by a limited partner, see Moore v. 1600 Downing St., Ltd., 668 P.2d 16 (Colo. App. 1983).

Applied in Neusteter v. District Court, 675 P.2d 1 (Colo. 1984); Collie v. Becknell, 762 P.2d 727 (Colo. App. 1988).

Rule 23.2. Actions Relating to Unincorporated Associations

An action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members. In the conduct of the action the court may make appropriate orders corresponding with those described in Rule 23(d), and the procedure for dismissal or compromise of the action shall correspond with that provided in Rule 23(e).

Rule 24. Intervention

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) When a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) When a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.

Cross references: For service and filing of pleadings and other papers, see C.R.C.P. 5.

ANNOTATION

I. General Consideration.
II. Intervention of Right.
III. Permissive Intervention.
IV. Procedure.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Notes on Proposed Amendments to Colorado Rules of Civil Procedure", see 27 Dicta 165 (1950). For article, "Amendments to the Colorado Rules of Civil Procedure", see 28 Dicta 242 (1951). For article, "Pleadings, Rules 7 to 25", see 28 Dicta 368 (1951). For article, "One Year Review of Civil Procedure and Appeals", see 37 Dicta 21 (1960). For note, "One Year Review of Civil Procedure", see 41 Den. L. Ctr. J., 67 (1964).

This rule is a duplicate of the same numbered federal rule. Roosevelt v. Beau Monde Co., 152 Colo. 567, 384 P.2d 96 (1963).

It must be liberally construed to avoid a multiplicity of suits, so that all related controversies should as far as possible be settled in one action. Senne v. Conley, 110 Colo. 270, 133 P.2d 381 (1943); Tekai Corp. v. Transamerica Title Ins. Co., 39 Colo. App. 528, 571 P.2d 321 (1977).

The rules of intervention are to be liberally construed so that all related controversies may be settled in one action. City of Delta v. Thompson, 37 Colo. App. 205, 548 P.2d 1292 (1975); Great Neck Plaza, L.P. v. Le Peep Restaurants, LLC, 37 P.3d 485 (Colo. App. 2001).

The legal concept of intervention is based upon the natural right of a litigant to protect himself from the consequences of an action against one in whose cause he has an interest, or by the result of which he may be bound. Grijalva v. Elkins, 132 Colo. 315, 287 P.2d 970 (1955).

An existing or pending suit is prerequisite to intervention. Saunders v. Bankston, 31 Colo. App. 551, 506 P.2d 1253 (1972).

Where a party is permitted intervention, it is immaterial whether the intervention is allowed under section (a) or (b) of this rule. Groendyke Transp., Inc. v. District Court, 140 Colo. 190, 343 P.2d 535 (1959).

This distinction is important only where a motion to intervene is denied, in which case it becomes important to determine whether a party seeking intervention is in fact a necessary party. Groendyke Transp., Inc. v. District Court, 140 Colo. 190, 343 P.2d 535 (1959).

If he is not a necessary party, his only recourse upon suing out his appeal is to assert that the trial court abused its discretion in denying permissive intervention. Groendyke Transp., Inc. v. District Court, 140 Colo. 190, 343 P.2d 535 (1959).

An order for intervention does no more than add a new party plaintiff. Groendyke Transp., Inc. v. District Court, 140 Colo. 190, 343 P.2d 535 (1959).

An order for intervention is not final, and no appeal from it lies. Groendyke Transp., Inc. v. District Court, 140 Colo. 190, 343 P.2d 535 (1959).

Intervenor, however, cannot be substituted for defendant. While an intervenor may join either plaintiff or defendant in the principal action, or may oppose both, he cannot, without the consent of plaintiff, be substituted in the place or stead of defendant. North Poudre Irrigation Co. v. Hinderlider, 112 Colo. 467, 150 P.2d 304 (1944).

Intervenor is bound by forfeiture judgment where indemnity agreement. Under a contract by which intervenors agreed to indemnify a surety company against loss, they unquestionably would be bound by a judgment of forfeiture. Allison v. People, 132 Colo. 156, 286 P.2d 1102 (1955).

Where intervention is permitted by the trial court, its ruling will not be disturbed absent an abuse of discretion. Tekai Corp. v. Transamerica Title Ins. Co., 39 Colo. App. 528, 571 P.2d 321 (1977).

No abuse of discretion when motion for intervention denied because it was filed four days before trial. Supporting factual affidavit was not submitted and plaintiff had little opportunity to investigate the allegations. Andrikopoulos v. Minnelusa Co., 911 P.2d 663 (Colo. App. 1995), aff'd on other grounds, 929 P.2d 1321 (Colo. 1996).

The determination of the timeliness of a motion to intervene is a matter that rests within the sound discretion of the trial court, which must weigh the lapse of time in light of all the circumstances of the case, including whether the applicant was in a position to seek intervention at an earlier stage in the case. Law Offices of Quiat v. Ellithorpe, 917 P.2d 300 (Colo. App. 1995).

Generally, intervention by a new party is not permitted at the appellate stage of litigation. Cerveny v. City of Wheat Ridge, 888 P.2d 339 (Colo. App. 1994).

The adequacy of an applicant's representation may bar the right to intervene. Benham v. Manufacturers & Wholesalers Indem. Exch., 685 P.2d 249 (Colo. App. 1984).

The intervention standards of this rule have no application to a criminal case, and, therefore, department of corrections may not intervene in such a case. People v. Ham, 734 P.2d 623 (Colo. 1987).

This rule had no application in a proceeding under the children's code, as the code itself expressly contemplates the active participation of interested parties. People in Interest of M.D.C.M., 34 Colo. App. 91, 522 P.2d 1234 (1974).

Rule as basis for jurisdiction. See Bd. of County Comm'rs v. Anderson, 34 Colo. App. 37, 525 P.2d 478 (1974), aff'd, 188 Colo. 337, 534 P.2d 1201 (1975); In re Crabtree, 37 Colo. App. 149, 546 P.2d 505 (1975).

Applied in Smith v. County of El Paso, 42 Colo. App. 316, 593 P.2d 979 (1979); O'Hara

Group Denver, Ltd. v. Marcor Hous. Sys., 197 Colo. 530, 595 P.2d 679 (1979); Sec. State Bank v. Weingardt, 42 Colo. App. 219, 597 P.2d 1045 (1979); Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980); In re East Nat'l Bank, 517 F. Supp. 1061 (D. Colo. 1981); Thorne v. Bd. of County Comm'rs, 638 P.2d 69 (Colo. 1981); Margolis v. District Court, 638 P.2d 297 (Colo. 1981); People of Dept. of Soc. Serv. In Interest of A.E.V., 782 P.2d 858 (Colo. App. 1989).

II. INTERVENTION OF RIGHT.

Law reviews. For article, "One Year Review of Civil Procedure and Appeals", see 40 Den. L. Ctr. J. 66 (1963). For article, "Civil Procedure", which discusses recent a Tenth Circuit decision dealing with intervention of right, see 65 Den. U. L. Rev. 434 (1988).

An order denying intervention is appealable if intervention is a matter of right. Grijalva v. Elkins, 132 Colo. 315, 287 P.2d 970 (1955).

Standard of review. A de novo standard of review should apply when reviewing a trial court's denial of a motion to intervene as a matter of right under the substantive requirements of subsection (a)(2) because such requirements concern questions of law. Feigin v. Alexa Group, Ltd., 19 P.3d 23 (Colo. 2001).

Standard of review is de novo when considering whether the applicant has an interest related to the subject of the litigation, whether that interest may be impaired or impeded if intervention is not allowed, and whether the present parties adequately represent that interest. Feigin v. Sec. Am., Inc., 992 P.2d 675 (Colo. App. 1999), rev'd on other grounds, 19 P.3d 23 (Colo. 2001).

It is the duty of courts to respect the integrity of the issues raised by the pleadings between the original parties and to prevent the injection of new issues by intervention. Crawford v. McLaughlin, 172 Colo. 366, 473 P.2d 725 (1970).

Intervention under subsection (a)(2) of this rule must be predicated upon both of the factors referred to therein, i.e., that the intervenor's interest is or may be inadequately represented and that he would or might be bound by a judgment in the action. Denver Chapter of Colo. Motel Ass'n v. City & County of Denver, 150 Colo. 524, 374 P.2d 494 (1962).

An applicant for intervention of right under subsection (a)(2) must show both that the representation of his interest by existing parties is or might be inadequate and that the applicant is or might be bound by the judgment in action. Howlett v. Greenberg, 34 Colo. App. 356, 530 P.2d 1285 (1974); Int'l Broth. of Elec. v. Denver Metro., 880 P.2d 160 (Colo. App. 1994).

All three elements of the rule — a property interest, an impairment of the ability to protect it, and inadequate representation — must be present before a right to intervene arises. In re Estate of Scott, 40 Colo. App. 343, 577 P.2d 311 (1978); Diamond Lumber, Inc. v. H.C.M.C., Ltd., 746 P.2d 76 (Colo. App. 1987); United Airlines, Inc. v. Schwesinger, 805 P.2d 1209 (Colo. App. 1991); Higley v. Kidder, Peabody & Co., 920 P.2d 884 (Colo. App. 1996); Feigin v. Sec. Am., Inc., 992 P.2d 675 (Colo. App. 1999), rev'd on other grounds, 19 P.3d 23 (Colo. 2001).

Neither element, standing alone, is sufficient. Denver Chapter of Colo. Motel Ass'n v. City & County of Denver, 150 Colo. 524, 374 P.2d 494 (1962); Howlett v. Greenberg, 34 Colo. App. 356, 530 P.2d 1285 (1974).

If either factor is missing, there is no absolute right of intervention. Denver Chapter of Colo. Motel Ass'n v. City & County of Denver, 150 Colo. 524, 374 P.2d 494 (1962); Howlett v. Greenberg, 34 Colo. App. 356, 530 P.2d 1285 (1974).

A party permitted to intervene pursuant to subsection (a)(2) of this rule is not necessarily indispensable pursuant to C.R.C.P. 19. Subsection (a)(2) provides for intervention when the applicant claims an interest relating to the property or transaction that is the subject of the action and he or she is so situated that the disposition of the action may as a practical matter impair or impede his or her ability to protect that interest. Although language of this rule and C.R.C.P. 19 are similar, rule 19 involves a two-step analysis: (1) Whether the party is necessary within the meaning of C.R.C.P. 19(a); and (2) whether the party is indispensable based on the factors of C.R.C.P. 19(b). Hicks v. Joondeph, 232 P.3d 248 (Colo. App. 2009).

Because a grandparent may institute a new proceeding for visitation under § 19-1-117, regardless of prior child custody orders, disposition of a paternity action does not necessarily impair or impede his or her ability to protect the interest in visitation. Thus, both factors of subsection (a)(2) of this rule are not met and the court was justified in denying intervention. In re K.L.O-V., 151 P.3d 637 (Colo. App. 2006).

The interest in the litigation that an intervenor must show is an interest in the subject matter of the litigation. Hulst v. Dower, 121 Colo. 150, 213 P.2d 834 (1949).

It is not sufficient for him to show that he has an independent right of action against the defendant based on grounds like those asserted by the plaintiff. Hulst v. Dower, 121 Colo. 150, 213 P.2d 834 (1949).

Flexible standard applies when determining a party's interest. A formalistic approach should not be used. The interest factor, unlike the practical harm and inadequate representation factors, should be viewed as a prerequisite

rather than as a determinative criterion for intervention. Feigin v. Alexa Group, Ltd., 19 P.3d 23 (Colo. 2001).

"Interest" element looks merely to what interest is claimed by the intervenor, not whether he or she will ultimately be successful. Higley v. Kidder, Peabody & Co., 920 P.2d 884 (Colo. App. 1996).

Where intervenor differed with class representatives on definition of "loss" that would qualify intervenor to share in proposed settlement, all three elements of this rule were present and intervention should have been granted. Higley v. Kidder, Peabody & Co., 920 P.2d 884 (Colo. App. 1996).

The timeliness of the intervention is a threshold question that must be answered before the adequacy of the elements is addressed. Diamond Lumber, Inc. v. H.C.M.C., Ltd., 746 P.2d 76 (Colo. App. 1987); Law Offices of Quiat v. Ellithorpe, 917 P.2d 300 (Colo. App. 1995).

Timeliness of an attempted intervention is to be gathered from all the circumstances in the case. The point of progress in the lawsuit is only one factor to be considered and is not, in itself, determinative. Diamond Lumber, Inc. v. H.C.M.C., Ltd., 746 P.2d 76 (Colo. App. 1987).

Abuse of discretion occurred when trial court denied city's motion to intervene pursuant to subsection (a)(1) where the totality of the circumstances indicated that city was not notified of the court's ruling because it was no longer a party to the underlying suit nor included on the certificates of service, there was no basis on which to request intervention until the court issued its ruling, and the city's request was ancillary to the underlying case. Lattany v. Garcia, 140 P.3d 348 (Colo. App. 2006).

Lack of an attached pleading is not fatal where the person seeking intervention does not assert a "claim or defense" in the usual sense, and the basis of the person's contentions appears in the motion itself. Feigin v. Sec. Am., Inc., 992 P.2d 675 (Colo. App. 1999), rev'd on other grounds, 19 P.3d 23 (Colo. 2001).

Cost of pursuing a separate action is not "impairment" of a party's interest within meaning of this rule. Feigin v. Alexa Group, Ltd., 19 P.3d 23 (Colo. 2001).

Where investors possessed a private right of action that was not affected by res judicata, collateral estoppel, or stare decisis, their interests would be neither impaired nor impeded for purposes of subsection (a)(2) of this rule if they were denied intervention in an enforcement action by the securities commissioner. Feigin v. Alexa Group, Ltd., 19 P.3d 23 (Colo. 2001).

Where the party seeking intervention could not opt out of a judgment prohibiting the named applicant "or any other person" from claiming wastewater returns as replacement credit, and could not bring an independent challenge to the water court's interpretation of a stipulation, the party should have been granted the right to intervene. Cherokee Metro. Dist. v. Meridian Serv. Metro. Dist., 266 P.3d 401 (2011).

Even though the applicant might be bound by the judgment, he cannot intervene as of right if he is in fact adequately represented by the existing parties to the action. Denver Chapter of Colo. Motel Ass'n v. City & County of Denver, 150 Colo. 524, 374 P.2d 494 (1962); Roosevelt v. Beau Monde Co., 152 Colo. 567, 384 P.2d 96 (1963).

The most important inquiry in determining the adequacy of representation does not involve an analysis of the courtroom strategy of the representative but rather is concerned with how the interest of the absentee compares with the interest of the representative. In re Estate of Scott, 40 Colo. App. 343, 577 P.2d 311 (1978).

The presumption that representation is adequate because of an identity of interests can be overcome by evidence of bad faith, collusion, or negligence on the part of the representative. In re Estate of Scott, 40 Colo. App. 343, 577 P.2d 311 (1978).

A showing that the representative stands alone in his opinions about how the litigation should be conducted may be evidence of a divergence of interests between the representative and those he represents and may therefore be evidence of inadequacy. In re Estate of Scott, 40 Colo. App. 343, 577 P.2d 311 (1978).

Failure of the personal representative to appeal a ruling sustaining a claim against the estate did not constitute inadequate representation. In re Estate of Scott, 40 Colo. App. 343, 577 P.2d 311 (1978).

Inadequacy of representation is shown if there is proof of collusion between the representative and an opposing party, if the representative has or represents some interest adverse to that of the petitioner, or if he fails because of nonfeasance in his duty of representation. Denver Chapter of Colo. Motel Ass'n v. City & County of Denver, 150 Colo. 524, 374 P.2d 494 (1962).

Taxpayers are not qualified to intervene in matters of public interest that are prosecuted or defended for a governmental subdivision by its proper officials. Denver Chapter of Colo. Motel Ass'n v. City & County of Denver, 150 Colo. 524, 374 P.2d 494 (1962).

Although a taxpayer may bring an action in the first instance against a municipality and its officers in some situations, such as where the corporate officers fail or refuse to prosecute or defend an action, this is different, however, from a situation where litigation is already in progress, being prosecuted or defended, or both, by the proper corporate officers. Denver Chapter of Colo. Motel Ass'n v. City & County of Denver, 150 Colo. 524, 374 P.2d 494 (1962).

In the absence of such factors as fraud, collusion, bad faith, and the like, a taxpayer cannot intervene as a matter of absolute right. Denver Chapter of Colo. Motel Ass'n v. City & County of Denver, 150 Colo. 524, 374 P.2d 494 (1962).

Taxpayers and ratepayers do not have an absolute right to intervene. Taxpayers and ratepayers have not fared very well in their efforts to secure an absolute right of intervention, inasmuch as representation by the governmental authorities is considered adequate in the absence of gross negligence or bad faith on their part. Denver Chapter of Colo. Motel Ass'n v. City & County of Denver, 150 Colo. 524, 374 P.2d 494 (1962).

Defrauded investors' interests were adequately represented by securities commissioner, who is the official designated to enforce laws to protect investors from fraud. Feigin v. Alexa Group, Ltd., 19 P.3d 23 (Colo. 2001).

Taxpayer has standing to raise legitimacy of governmental access to bank records. Once the court allows intervention in a § 39-21-112 proceeding, it follows that a taxpayer with an expectation of privacy in his bank records has standing to raise the legitimacy of governmental access to the records in a motion to quash the subpoena for the records. Charnes v. DiGiacomo, 200 Colo. 94, 612 P.2d 1117 (1980).

Where it does not appear that intervenors are parties to an alleged contract between plaintiff and defendants upon which right of recovery in the action proper is premised, nor does it appear the defendants are apprised of the existence of an alleged contract between plaintiff and intervenors, which is the basis of intervenors' claim against plaintiff, an application for leave to intervene is properly denied. Hulst v. Dower, 121 Colo. 150, 213 P.2d 834 (1949).

Where a stockholder of a corporation, acting promptly after the entry of a default judgment against the latter, moves to intervene individually and on behalf of other stockholders similarly situated, presents to the trial court a petition to have the judgment set aside, asks for leave to file an answer, and requests that the case be decided on the merits — it appearing from the petition that he was not a party to the original proceeding, would be prejudiced by the judgment if it were permitted to stand, and that he had good defense to the action — the petition should be granted, since a denial thereof constitutes prejudicial, reversible error. Brown v. Deerksen, 163 Colo. 194, 429 P.2d 302 (1967).

Rezoning dispute permits intervention. Intervention as a matter of right is permitted in a rezoning dispute. Dillon Cos. v. City of Boulder, 183 Colo. 117, 515 P.2d 627 (1973).

Insurer has a right to intervene in action between its insured and an uninsured motorist if insurer can show that its interests are or might be inadequately represented. Briggs v. Am. Family Mut. Ins. Co., 833 P.2d 859 (Colo. App. 1992).

When an insurer can show that representation of its interest is or might be inadequate in an action between the insured and an uninsured motorist, it has the right to intervene in an action between the two and to have full adjudication of all issues at a single trial. Briggs v. Am. Family Mut. Ins. Co., 833 P.2d 859 (Colo. App. 1992).

Intervention was properly granted to subcontractor whose presence was necessary in action for disclosure of documents to present evidence establishing that disclosure of redacted material would be injurious to its competitive position in the industry. International Broth. of Elec. v. Denver Metro., 880 P.2d 160 (Colo. App. 1994).

Section 19-1-117 does not confer an unconditional right to intervene in a paternity action under subsection (a)(1) or as of right under subsection (a)(2). Because the statute requires a grandparent to rebut the presumption that the parent's decision regarding visitation is in the child's best interest, it does not give rise to an absolute right to visitation. Because the statute does not vest a grandparent with an absolute right to visitation and issues concerning grandparent visitation are not inherent in a paternity action, there is no absolute or unconditional right for a grandparent to intervene in a paternity action. In re K.L.O-V., 151 P.3d 637 (Colo. App. 2006).

Applied in Susman v. Exchange Nat'l Bank, 117 Colo. 12, 183 P.2d 571 (1947); Shotkin v. Atchison, T. & S. F. R. R., 124 Colo. 141, 235 P.2d 990 (1951), cert. denied, 343 U.S. 906, 72 S. Ct. 638, 96 L. Ed. 1325 (1952).

III. PERMISSIVE INTERVENTION.

Where intervention is permissive only, the application is addressed to the discretion of the court. Grijalva v. Elkins, 132 Colo. 315, 287 P.2d 970 (1955); Feigin v. Alexa Group, Ltd., 19 P.3d 23 (Colo. 2001).

Permissive intervention is a matter of right within discretion of court. It is a matter which rests within the discretion of the trial court as to whether a petition for intervention should be granted where there is no showing upon which the intervention of petitioners should be granted as a matter of right. Denver Chapter of Colo. Motel Ass'n v. City & County of Denver, 150 Colo. 524, 374 P.2d 494 (1962).

Order denying intervention is not of that final character which furnishes a basis for appeal. Grijalva v. Elkins, 132 Colo. 315, 287 P.2d 970 (1955).

Order not final unless applicant has no other means of protecting his rights. An order

refusing intervention is not a final and appealable order unless the applicant has no other adequate means of protecting his rights. Grijalva v. Elkins, 132 Colo. 315, 287 P.2d 970 (1955).

Denial of intervention appealable if court abuses its discretion. If intervention is permissive only, denial thereof is not appealable unless a trial court abuses its discretion. Grijalva v. Elkins, 132 Colo. 315, 287 P.2d 970 (1955).

It can seldom, if ever, be shown that a trial court has abused its discretion in denying a permissive right to intervene. Grijalva v. Elkins, 132 Colo. 315, 287 P.2d 970 (1955).

Where permission to intervene is granted by a trial court, such a ruling may be reviewed only after entry of final judgment in the action and then only for possible abuse of judicial discretion. Groendyke Transp., Inc. v. District Court, 140 Colo. 190, 343 P.2d 535 (1959).

Intervention is frequently denied even though common questions of law or fact are presented, if in addition collateral or extrinsic issues would be brought in by an intervenor. Grijalva v. Elkins, 132 Colo. 315, 287 P.2d 970 (1955).

Allowance of intervention is not error although the rights of the parties might have been worked out without the presence of the intervenor, where such participation did no harm and made a more comprehensive decree possible. North Poudre Irrigation Co. v. Hinderlider, 112 Colo. 467, 150 P.2d 304 (1944).

Trial court did not abuse its discretion in allowing child's stepfather to intervene in an action for child support payment, because there were common questions involved in the dispute and the stepfather had been assigned the right to collect past-due child support. In re Paul, 978 P.2d 136 (Colo. App. 1998).

Trial court did not abuse its discretion when it granted intervention. The intervening party to the case was the only party that had an interest in seeking the release of documents at issue in the case and the other party clearly indicated on the record that its interest was not aligned with the intervening party's interest. CF&I Steel, L.P. v. Air Pollution Control Div., 77 P.3d 933 (Colo. App. 2003).

Court did not abuse its discretion when it denied permissive intervention by grandparent for visitation. If, however, intervention would be in the child's best interest or would further judicial economy, intervention into a paternity action by a grandparent may be allowed at the court's discretion. In re K.L.O-V., 151 P.3d 637 (Colo. App. 2006).

This rule plainly dispenses with any requirement that an intervenor shall have a direct personal or pecuniary interest in the subject of the litigation. North Poudre Irrigation Co. v. Hinderlider, 112 Colo. 467, 150 P.2d 304 (1944).

Adjoining property owners in a suit to vacate a zoning order have such a vital interest in the result of that suit that they should be granted permission to intervene as a matter of course unless compelling reasons against such intervention are shown. Roosevelt v. Beau Monde Co., 152 Colo. 567, 384 P.2d 96 (1963).

Intervention under this rule proper for suspended attorney's former wife who was assignee of right to fees under divorce decree and sought to intervene as "real party in interest" in dispute over three-way division of contingent fee. Rutenbeck v. Grossenbach, 867 P.2d 36 (Colo. App. 1993).

Intervention by attorney general. The attorney general's argument on the appropriateness of his permissive intervention under subsection (b) (2) of this rule failed to recognize the statutory language directing his appearance for the state of Colorado only "when required to do so by the governor or the general assembly". Gillies v. Schmidt, 38 Colo. App. 233, 556 P.2d 82 (1976).

Intervention by department of social services in paternity action. Where the interest of the department of social services in a support obligation owed to a dependent child is contingent on the outcome of a paternity action under § 19-6-110 (now § 19-4-110), it was improper to allow it to intervene as a party to the action. However, such action was harmless since the department could have enforced its interest derived from the paternity proceeding in a separate proceeding following entry of the order determining paternity. J.E.S. v. F.F., 762 P.2d 703 (Colo. App. 1988).

This rule does not permit intervention in a criminal case for civil relief absent exceptional circumstances. No exceptional circumstances existed to allow a sheriff to intervene in a first degree murder case to seek financial relief for housing the defendant. People v. Hood, 867 P.2d 203 (Colo. App. 1993).

Applied in Susman v. Exchange Nat'l Bank, 117 Colo. 12, 183 P.2d 571 (1947); Clung v. Griffith, 127 Colo. 315, 255 P.2d 973 (1953).

IV. PROCEDURE.

This rule requires that a motion to intervene shall be filed and that it shall be accompanied by a pleading. Capitol Indus. Bank v. Strain, 166 Colo. 55, 442 P.2d 187 (1968).

Intervening party's failure to file a pleading with his motion does not compel reversal in light of the fact that defendant did not make a timely objection. In re Paul, 978 P.2d 136 (Colo. App. 1998).

One who does not file petition is a mere interloper. A party, complete stranger to an action, who without leave of court files a mo-

tion to restrain an action and who does not file a petition to intervene in the action pursuant to this rule is a mere interloper who acquires no rights by such unauthorized action, unless objections thereto are waived. Hercules Equip. Co. v. Smith, 138 Colo. 458, 335 P.2d 255 (1959).

This rule specifies that the motion shall set forth the grounds for intervention while the pleading shall state the claim of the intervenor, each being distinct from the other. A motion is not a pleading, although the two have similar formal parts and even though certain defenses may be raised by motion. Capitol Indus. Bank v. Strain, 166 Colo. 55, 442 P.2d 187 (1968).

Motions for intervention filed after judgment or after a decision is rendered on appeal are viewed with disfavor, and the moving party has a heavy burden to show facts or circumstances which justify intervention at that late date. Spickard v. Civil Serv. Comm'n, 33 Colo. App. 426, 523 P.2d 149 (1974).

Courts view motions for intervention after judgment or after a decision is rendered on appeal with a jaundiced eye because it is assumed that intervention at this point will either prejudice the rights of the existing parties to the litigation, or substantially interfere with the orderly processes of the court. Spickard v. Civil Serv. Comm'n, 33 Colo. App. 426, 523 P.2d 149 (1974).

Abuse of discretion is the appropriate standard for review of a trial court's conclusion as to whether a would-be intervenor has satisfied the procedural requirements of subsection (c). Weston v. T&T, LLC, 271 P.3d 552 (Colo. App. 2011).

A trial court does not err in permitting intervention after judgment has been entered where the intervenors file their motion to intervene before judgment is entered. Am. Nat'l Bank v. First Nat'l Bank, 28 Colo. App. 486, 476 P.2d 304 (1970).

The fact that a default judgment is entered before the court's determination of the intervenors' motion does not cause the court to lose jurisdiction in the case. Am. Nat'l Bank v. First Nat'l Bank, 28 Colo. App. 486, 476 P.2d 304 (1970).

Although creditor did not strictly comply with this rule, creditor's complaint stated the grounds and facts upon which creditor sought intervention, together with creditor's claims. Weston v. T&T, LLC, 271 P.3d 552 (Colo. App. 2011).

Because defendant was given a full opportunity to respond to the allegations of creditor's complaint in intervention, any failure by creditor to comply precisely with this rule was not to the detriment of defendant's substantial rights. Weston v. T&T, LLC, 271 P.3d 552 (Colo. App. 2011).

Creditor's complaint in intervention sufficient even though complaint did not cite to the Colorado Uniform Fraudulent Transfer Act (CUFTA) or expressly allege a CUFTA claim. Because defendant's opening statement at trial demonstrated that defendant was aware of the substance of creditor's claim, defendant suffered no prejudice as a result of creditor's pleading. Weston v. T&T, LLC, 271 P.3d 552 (Colo. App. 2011).

Rule 25. Substitution of Parties

(a) Death.

(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of process, and may be served in any county. Suggestion of death upon the record is made by service of a statement of the fact of death as provided herein for the service of the motion and by filing of proof thereof. If the motion for substitution is not made within 91 days (13 weeks) after such service, the action shall be dismissed as to the deceased party.

(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

(b) Incompetency. If a party becomes incompetent, the court upon motion served as provided in section (a) of this Rule may allow the action to be continued by or against his representative.

(c) Transfer of Interest. In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person

to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subsection (a)(1) of this Rule.

(d) Public Officers; Death or Separation from Office.

(1) When a public officer is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial right of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

(2) When a public officer sues or is sued in his official capacity, he may be described as a party by his official title rather than by name; but the court may require his name to be added.

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

Cross references: For service of process, see C.R.C.P. 4; for service and filing of pleadings and other papers, see C.R.C.P. 5.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, "Notes on Proposed Amendments to Colorado Rules of Civil Procedure", see 27 Dicta 165 (1950). For article, "Pleadings, Rules 7 to 25", see 28 Dicta 368 (1951). For article, "One Year Review of Civil Procedure", see 35 Dicta 3 (1958).

Annotator's note. Since this rule is similar to §§ 15 and 290 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing those sections have been included in the annotations to this rule.

Applied in In re Van Camp, 632 P.2d 1062 (Colo. App. 1981); B.C. Inv. Co. v. Throm, 650 P.2d 1333 (Colo. App. 1982); Garcia v. Title Ins. Co. of Minnesota, 712 P.2d 1114 (Colo. App. 1985).

II. DEATH.

This rule does not define the causes that survive. Clapp v. Williams, 90 Colo. 13, 5 P.2d 872 (1931).

This rule merely provides that, if the cause survives, the action shall not abate. Clapp v. Williams, 90 Colo. 13, 5 P.2d 872 (1931).

Trial court had personal jurisdiction over estate after plaintiffs amended complaint to name estate and estate's special administrator as defendants instead of deceased, non-existent defendant before any answer had been filed in the case. This cured the defect in personal jurisdiction contained in the original complaint. Currier v. Sutherland, 218 P.3d 709 (Colo. 2009).

An action involving the death of a party shall remain in abeyance a reasonable time until a representative can be appointed and qualified, who may be substituted and the suit proceed to judgment. Williams v. Carr, 4 Colo. App. 363, 36 P. 644 (1894).

An action does not abate by the death of a party, if the cause survives or continues. Williams v. Carr, 4 Colo. App. 363, 36 P. 644 (1894).

This rule authorizes substitution of a proper party where a defendant dies and the claim against him is not extinguished by his death. Willis v. Neilson, 32 Colo. App. 129, 507 P.2d 1106 (1973).

Section (a)(1) of this rule mandates personal service of suggestion of death on non-party successors or personal representatives in accordance with C.R.C.P. 4. Where suggestion of death was not personally served upon daughters of decedent involved in negligence lawsuit, 90-day time limit for substitution was not triggered. Therefore, trial court improperly dismissed lawsuit for failure to substitute parties. Sawyer ex rel. Sawyer v. Kindred Nursing Ctrs. W., LLC, 225 P.3d 1161 (Colo. App. 2009).

The provisions of section (a)(1) of this rule for substitution of parties are procedural. Duke v. Pickett, 30 Colo. App. 438, 494 P.2d 120 (1972).

Survival of actions and substitution of parties are function of the substantive law. This rule does not attempt to state what actions survive the death of a party nor does it attempt to designate the "proper parties" who may be substituted, as this is a function of the substantive law. Duke v. Pickett, 30 Colo. App. 438, 494 P.2d 120 (1972).

In case of the death of a party, the court may, on motion, allow the action to be continued by his representative or successor in interest. Williams v. Carr, 4 Colo. App. 363, 36 P. 644 (1894).

The rule that an administrator cannot be joined in his capacity as administrator with codefendants in their individual capacity does not apply where an administrator is substituted in place of a deceased defendant, who died during the pendency of the action. Morgan v. King, 27 Colo. App. 539, 63 P. 416 (1900).

The "proper party" is the administrator of decedent's estate. Mills v. Saunders, 30 Colo. App. 462, 494 P.2d 1309 (1972).

This rule plainly recognizes the duty resting on litigants to make substitution of an administrator or executor for a party litigant who dies while a case is pending. Koon v. Barmettler, 134 Colo. 221, 301 P.2d 713 (1956).

Action against deceased cannot be further prosecuted until administrator is substituted. Where a suit does not abate by reason of death, it cannot be further prosecuted against the estate of deceased or any liability on that account established against it until his legal representative, the administrator of the estate, is substituted as a party defendant. First Nat'l Bank v. Hotchkiss, 49 Colo. 593, 114 P. 310 (1911); Colo. Nat'l Bank v. Irvine, 105 Colo. 588, 101 P.2d 30 (1939).

It is the duty of administrator to defend. Where an action commenced against deceased does not abate by reason of his death, it becomes the duty of the administrator to defend under this rule where he is properly made a party defendant. Morgan v. King, 27 Colo. 539, 63 P. 416 (1900).

Until the administrator is made a party defendant, the action commenced against deceased remains in abeyance. First Nat'l Bank v. Hotchkiss, 49 Colo. 593, 114 P. 310 (1911); Colo. Nat'l Bank v. Irvine, 105 Colo. 588, 101 P.2d 30 (1940).

An administrator is not required to take notice of pendency or defend until made a party thereto. First Nat'l Bank v. Hotchkiss, 49 Colo. 593, 114 P. 310 (1911); Colo. Nat'l Bank v. Irvine, 105 Colo. 588, 101 P.2d 30 (1940).

An attorney for a deceased defendant has a duty to notify the court and the other parties in the action that his client has died. Farmers Ins. Group v. District Court, 181 Colo. 85, 507 P.2d 865, cert. denied, 414 U.S. 878, 94 S. Ct. 156, 38 L. Ed. 2d 122 (1973).

This rule does not require notification of identity of representative. There is nothing in this rule which could reasonably be a basis for requiring that notification of the death of a defendant should include the identity of the deceased defendant's executor, administrator, or representative. Farmers Ins. Group v. District Court, 181 Colo. 85, 507 P.2d 865, cert. denied, 414 U.S. 878, 94 S. Ct. 156, 38 L. Ed. 2d 122 (1973).

The plaintiff's attorney who receives notification of the defendant's death has the responsibility to promptly initiate the necessary inquiries to determine the identity of a person to be substituted for the deceased defendant and to file a motion for substitution. Farmers Ins. Group v. District Court, 181 Colo. 85, 507 P.2d 865, cert. denied, 414 U.S. 878, 94 S. Ct. 156, 38 L. Ed. 2d 122 (1973).

Burden is on plaintiffs to show excusable neglect to file motion for substitution. Where the issue is whether the failure to file a motion for substitution within the required 90 days under the facts is the result of excusable neglect, the burden is clearly on the plaintiffs to show that the failure to comply was due to excusable neglect. Farmers Ins. Group v. District Court, 181 Colo. 85, 507 P.2d 865, cert. denied, 414 U.S. 878, 94 S. Ct. 156, 38 L. Ed. 2d 122 (1973).

An intervenor is not required to move for revivor after such substitution. When substitution of parties is made and the legal representatives appear in the action, there can be perceived no valid reason why an intervenor therein, who supports the side of the party bringing about the revival and who originally intervened at the behest of the adverse party, should be required separately to additionally move for a revivor as a condition precedent to the final adjudication of the mutual controversy with the common adversary. Colo. Nat'l Bank v. Irvine, 105 Colo. 588, 101 P.2d 30 (1940).

Lien may be enforced by substituting executor. If a valid lien existed during the lifetime of deceased, it might be enforced, under this rule, by the substitution of his executor as a party defendant, and the subsequent rendition of a judgment against him in his representative capacity in favor of the plaintiff. Thompson v. White, 25 Colo. 226, 54 P. 718 (1898).

This rule does not apply to lien which became vested upon entry of divorce decree. This rule has no application where plaintiff is seeking to enforce against specific real property deeded by the deceased to defendant a lien which became vested upon entry of a divorce decree. Willis v. Neilson, 32 Colo. App. 129, 507 P.2d 1106 (1973).

Merely because the person designated for appointment as personal representative in the motion for substitution is not appointed by the court does not serve to make the motion a nullity. Smith v. Bridges, 40 Colo. App. 171, 574 P.2d 511 (1977).

When there is no prejudice caused by delay nor a lengthy period of inaction by a movant for substitution, rather than allowing substantial rights to be lost by dismissing the action, the court should either allow a reasonable additional time for the movant to submit an

amended motion or, failing that, appoint a proper personal representative such as the public administrator. Smith v. Bridges, 40 Colo. App. 171, 574 P.2d 511 (1977).

Dismissal of action based on C.R.C.P. 41 not to be considered under this rule. Where the record revealed that the action against the estate was dismissed voluntarily, without prejudice, under C.R.C.P. 41, and not based on failure to make a timely substitution under this rule, dismissal under this rule could not be considered in the appeal of the second action. Vigil v. Lewis Maintenance Serv., Inc., 38 Colo. App. 209, 554 P.2d 703 (1976).

Dismissal for failure to make a timely substitution when a party dies falls within the purview of C.R.C.P. 41 (b)(1), but not as to the claims against remaining defendants. Cheney v. Hailey, 686 P.2d 808 (Colo. App. 1984).

If there is a substitution of parties, any error therein is waived by failure to object. Thomason v. McAlister, 748 P.2d 798 (Colo. App. 1987).

Applied in Ray v. Schooley, 156 Colo. 33, 396 P.2d 730 (1964); Wildenstein v. Stills, 156 Colo. 96, 396 P.2d 969 (1964).

III. TRANSFER OF INTEREST.

For cases construing the former code provision, see Perkins v. Marrs, 15 Colo. 262, 25 P. 168 (1890); Portland Gold Mining Co. v. Stratton's Independence, 196 F. 714 (D. Colo. 1912); Winchester v. Walker, 59 Colo. 17, 147 P. 343 (1915); Metro. State Bank v. Bisher, 82 Colo. 421, 260 P. 688 (1927).

When plaintiff, on appeal, seeks to use section (c) of this rule to substitute a defendant post-judgment, and the trial court did not explain its decision to deny the original motion for substitution, the case shall be remanded for further proceedings conducted by the trial court, such that the trial court conduct an evidentiary hearing to determine transfer of interest. Liberty Mut. Fire Ins. Co. v. Human Res. Cos., Inc., 94 P.3d 1257 (Colo. App. 2004).

Applied in Recreational Dev. Co. v. Am. Const., 749 P.2d 1002 (Colo. App. 1987).

IV. PUBLIC OFFICERS.

Action against officer does not abate because his term of office expires. Where the obligation which is sought to be enforced is a duty devolving upon no particular officer, but is perpetual upon the then incumbent of the office and his successors, unless legally excused, the action will not abate by reason of the expiration of the term of office of the official against whom the action was originally commenced. Nance v. People, 25 Colo. 252, 54 P. 631 (1898).

Successor in office must be substituted as a party within six months. Bach v. Schooley, 155 Colo. 30, 392 P.2d 649 (1964); Union P. R. R. v. State, 166 Colo. 307, 443 P.2d 375 (1968).

Jurisdiction held not lost where facts establish predecessor's actions are continued. People ex rel. Dunbar v. Hively, 140 Colo. 265, 344 P.2d 443 (1959).

Substitution had to be effected previously. Ray v. Schooley, 156 Colo. 33, 396 P.2d 730 (1964); Gilliland v. McClearn, 168 Colo. 358, 451 P.2d 756 (1969).

CHAPTER 4

Disclosure and Discovery

CHAPTER 4

DISCLOSURE AND DISCOVERY

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

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

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

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

(A) The name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying who the person is and the subjects of the information;

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

(C) A description of the categories of damages sought and a computation of any category of economic damages claimed by the disclosing party, making available for inspection and copying pursuant to C.R.C.P. 34 the documents or other evidentiary material, not privileged or protected from disclosure, as though a request for production of those documents had been served pursuant to C.R.C.P. 34; and

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

The timing of disclosures shall be within 35 days after the case is at issue as defined in C.R.C.P.16(b). A party shall make the required disclosures based on the information then known and reasonably available to the party and is not excused from making such disclosures because the party has not completed investigation of the case or because the party challenges the sufficiency of another party's disclosures or because another party has not made the required disclosures.

(2) Disclosure of Expert Testimony.

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

(B) Except as otherwise stipulated or directed by the court, this disclosure shall:

(I) With respect to a witness who is retained or specially employed to provide expert testimony, or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report or summary. The report or summary shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years. In addition, if a report is issued by the expert it shall be provided.

(II) With respect to a witness who may be called to provide expert testimony but is not within the description contained in subsection (a)(2)(B)(I) above, the report or summary shall contain the qualifications of the witness and a complete statement describing the substance of all opinions to be expressed and the basis and reasons therefor.

(C) Unless otherwise provided in the Case Management Order, the timing of the disclosures shall be as follows:

(I) The disclosure by a claiming party under a complaint, counterclaim, cross-claim or third-party claim shall be made at least 126 days (18 weeks) before the trial date.

(II) The disclosure by a defending party shall be made within 28 days after service of the claiming party's disclosure, provided, however, that if the claiming party serves its disclosure earlier than required under subparagraph 26(a)(2)(C)(I), the defending party is not required to serve its disclosures until 98 days (14 weeks) before the trial date.

(III) If the evidence is intended to contradict or rebut evidence on the same subject matter identified by another party under subparagraph (a)(2)(C)(II) of this Rule, such disclosure shall be made no later than 77 days (11 weeks) before the trial date.

(3) [There is no Colorado Rule - see instead C.R.C.P. 16(c).]

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

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

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

(1) In General. Subject to the limitations and considerations contained in subsection (b)(2) of this Rule, parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

(2) Limitations. Except upon order for good cause shown, discovery shall be limited as follows:

(A) A party may take one deposition of each adverse party and of two other persons, exclusive of persons expected to give expert testimony disclosed pursuant to subsection 26(a)(2). The scope and manner of proceeding by way of deposition and the use thereof shall otherwise be governed by C.R.C.P. Rules 26, 28, 29, 30, 31, 32 and 45.

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

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

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

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

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

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

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

(iii) Whether the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues in the litigation, and the importance of the proposed discovery in resolving the issues; and

(iv) Whether because of the number of parties and their alignment with respect to the underlying claims and defenses, the proposed discovery is reasonable.

[Subsections (E)(i)-(iv) are moved to new paragraph (F).]

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

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

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

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

(4) Trial Preparation: Experts.

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. Except to the extent otherwise stipulated by the parties or ordered by the court, no discovery, including depositions, concerning either the identity or the opinion of experts shall be conducted until after the disclosures required by subsection (a)(2) of this Rule.

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

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subsection (b)(4); and (ii) with respect to discovery obtained pursuant to subsection (b)(4)(B) of this Rule, the court shall require the party seeking discovery to pay

the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

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

[This subsection has been moved from section (a)(6) and amended.]

(c) Protective Orders. Upon motion by a party or by the person from whom disclosure is due or discovery is sought, accompanied by a certificate that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

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

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

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

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

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

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

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

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

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of C.R.C.P. 37(a)(4) apply to the award of expenses incurred in relation to the motion.

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

(e) Supplementation of Disclosures and Responses. A party is under a duty to supplement its disclosures under section (a) of this Rule when the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the disclosure or discovery process. A party is under a duty to amend a prior response to an interrogatory, request for production or request for admission when the party learns that the prior response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process. With respect to experts, the duty to supplement or correct extends both to information contained in the expert's report or summary disclosed pursuant to section (b) of this Rule and to information provided through any deposition of or interrogatory responses by the expert. Supplementation shall be performed in a timely manner.

(f) [No Colorado Rule — See C.R.C.P. 16.]

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

(1) Every disclosure made pursuant to subsections (a)(1) or (a)(2) of this Rule shall be signed by at least one attorney of record in the attorney's individual name. An unrepresented party shall sign the disclosure and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

(2) Every discovery request, or response, or objection made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name. An unrepresented party shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information and belief, formed after a reasonable inquiry, the request, response or objection is:

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

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

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

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

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

Source: Entire rule repealed April 14, 1994, effective January 1, 1995; entire rule adopted April 14, 1994, effective January 1, 1995, for all cases filed on or after that date; committee comment approved June 10, 1994; (f) corrected and effective January 9, 1995; (g)(2) and (g)(3) amended and adopted October 30, 1997, effective January 1, 1998; entire rule and committee comment amended and adopted May 24, 2001, effective July 1, 2001; (b)(1) and committee comment amended and adopted November 15, 2001, effective January 1, 2002; (a)(4) amended and adopted October 20, 2005, effective January 1, 2006; (a)(1) last paragraph, (2)(C)(I), (2)(C)(II), and (2)(C)(III) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

COMMITTEE COMMENT

SCOPE

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

COLORADO DIFFERENCES

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

The Colorado differences from the Fed.R.Civ.P. are: (1) timing and scope of mandatory automatic disclosures is different (C.R.C.P. 16(b)); (2) the two types of experts in the Federal Rule are clarified by the State Rule (C.R.C.P. 26(a)(2)(B)), and disclosure of expert opinions is made at a more realistic time in the proceedings (C.R.C.P. 26(a)(2)(C)); (3) se-

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

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

FEDERAL COMMITTEE NOTES

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

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

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

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

2001 COLORADO CHANGES

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

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

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

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

ANNOTATION

I. GENERAL CONSIDERATION.

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

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

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

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

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

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

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

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

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

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

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

Co. v. Blue River Irr., 782 P.2d 792 (Colo. 1989).

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

Since use of all discovery methods is sanctioned, the frequency of use of these methods should not be limited, unless there is a showing of good cause in the particular circumstances of the case. Sanchez v. District Court, 624 P.2d 1314 (Colo. 1981).

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

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

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

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

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

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

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

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

Board of assessment appeals erred in denying a board of equalization request for loan appraisals, because, even if such documents were not admissible in evidence at the board of assessment appeals hearing, they were discoverable under the broad standards applicable to district court discovery proceedings. FirstBank Longmont v. Boulder County Bd. of Equaliz., 990 P.2d 1109 (Colo. App. 1999).

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

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

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

II. METHODS.

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

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

The appropriate analysis in deciding whether to allow a destructive test as part of discovery where the owner of the object sought the testing was parallel to that involved in a conventional request for inspection under C.R.C.P. 34 and a resulting motion for a protective order under this rule. Cameron v. District Court, 193 Colo. 286, 565 P.2d 925 (1977).

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

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

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

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

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

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

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

III. SCOPE.

A. In General.

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

Scope of discovery is very broad. The information sought need only be relevant to the subject matter. It need not be admissible as long as it is reasonably calculated to lead to admissible evidence. Kerwin v. District Court, 649 P.2d 1086 (Colo. 1982); In re A.H. Robins Co., Inc., 681 P.2d 540 (Colo. App. 1984).

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

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

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

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

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

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

The purpose of the final sentence of subsection (b)(1) of this rule, which provides that "it is not ground for objection that testimony will be inadmissible at a trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence" is not to limit the scope of examination, but rather to enlarge it by eliminating the objection that the testimony sought would not be admissible at a trial. It is not intended to limit the preceding clause of this rule which conditions discovery to that which is "relevant to the subject matter involved in the pending action", so that it embraces only that testimony calculated to lead to the discovery of admissible evidence. Lucas v. District Court, 140 Colo. 510, 345 P.2d 1064 (1959).

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

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

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

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

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

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

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

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

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

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

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

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

B. Materials.

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

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

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

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

The work-product privilege is perverted if it is used to further illegal activities, and there are no overpowering considerations that would justify the shielding of evidence that aids continuing or future criminal activity. Law Offices of Bernard D. Morley, P.C. v. MacFarlane, 647 P.2d 1215 (Colo. 1982).

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

The work-product exemption is applicable even when the client is a corporation. A v. District Court, 191 Colo. 10, 550 P.2d 315

(1976), cert. denied, 429 U.S. 1040, 97 S. Ct. 737, 50 L. Ed. 2d 751 (1977).

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

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

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

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

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

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

Applicability of crime-fraud exception within trial court's discretion. Whether the prosecution has established a proper foundation in fact for the application of the crime-fraud exception is best left for determination by the trial court, whose exercise of discretion will not be overturned unless the record shows an abuse of that discretion. People v. Board, 656 P.2d 712 (Colo. App. 1982).

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

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

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

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

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

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

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

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

Petitioner may obtain discovery. Even if an insurance company demonstrates that the requested documents constitute trial preparation materials, a petitioner nevertheless may obtain discovery upon a showing of substantial need of the materials in the preparation of his case and an inability without undue hardship to obtain

the substantial equivalent of the requested information by other means. Hawkins v. District Court, 638 P.2d 1372 (Colo. 1982).

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

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

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

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

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

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

C. Experts.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. Other Illustrative Cases.

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

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

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

Certain factors shall be considered where official information privilege claimed for police files. In a litigation arising from allegations of police misconduct, when the official informa-

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

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

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

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

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

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

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

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

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

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

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

Because tax returns are confidential in nature, a court may compel discovery of tax returns only if the returns are relevant to the subject matter of the case and there is a compelling need for the returns because specific information contained in the returns is not otherwise readily obtainable. Even if the need for discovery of tax returns is established, the court should limit discovery to those portions of the returns relevant and necessary to the assertion

of the legal claims or defenses of the party seeking discovery. Stone v. State Farm Mut. Auto. Ins. Co., 185 P.3d 150 (Colo. 2008).

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

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

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

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

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

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

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

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

Blood donor's privacy interest in remaining anonymous to avoid embarrassment and humiliation associated with being identified as a carrier of the AIDS virus does not outweigh the recipient's interest in seeking information necessary to adequately pursue a claim. Nor does societal interest in maintaining abundant supply of volunteer blood outweigh society's interest in assuring that such blood is free from contamination. Belle Bonfils Mem'l Blood Ctr. v. District Court, 763 P.2d 1003 (Colo. 1988).

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

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

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

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

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

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

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

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

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

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

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

IV. PROTECTIVE ORDERS.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Financially stressed nonresident need not incur unnecessarily expense of cross-country trip to take his deposition. Where one desires in good faith the deposition of a party living in another state before trial, he should have it, but not at a time or place involving the expense of a cross-country trip when it is shown that the nonresident party is without funds for the expense of such journey and a deposition taken shortly before the trial, which the nonresident party agrees to, will adequately serve the ends of justice. Manning v. Manning, 136 Colo. 380, 317 P.2d 329 (1957).

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

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

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

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

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

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

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

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

Petitioners waive physician-patient or psychologist-patient privilege by placing their mental condition at issue. When petitioners place their mental condition into issue by bringing a personal injury action to recover damages for mental suffering and expenses for psychiatric counseling, they waive the physician-patient

or psychologist-patient privilege. Bond v. District Court, 682 P.2d 33 (Colo. 1984).

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

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

V. SUPPLEMENTATION.

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

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

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

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

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

Rule 26.1. Special Provisions Regarding Limited and Simplified Discovery

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

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

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

Rule 26.3. Limited Monetary Claim Actions

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

Rule 27. Depositions Before Action or Pending Appeal

(a) Before Action.

(1) **Petition; Order; Notice.** A person who desires to perpetuate his own testimony or that of other persons may file in a district court a petition verified by his oath (or, if there be more than one petitioner, then by the oath of at least one of them) stating either: (1) That the petitioner expects to be a party to an action in a court in this state and, in such case, the name of the persons who he expects will be adverse parties; or (2) that the proof of some facts is necessary to perfect the title to property in which petitioner is interested or others similarly situated may be interested or to establish any other matter which it may hereafter become material to establish, including marriage, divorce, birth, death, descent or heirship,

though no action may at any time be anticipated, or, if anticipated, the expected adverse parties to such action are unknown to petitioner. The petition shall also state the names of the witnesses to be examined and their places of residence and a brief outline of the facts expected to be proved, and if any person named in the petition as an expected adverse party is known to the petitioner to be an infant or incompetent person the petition shall state such fact. If the expected adverse parties are unknown, it shall be so stated. The court shall make an order allowing the examination and directing notice to be given, which notice, if the expected adverse parties are named in the petition, shall be personally served on them in the manner provided in Rule 4(e) and, if the expected adverse parties are stated to be unknown, and if real property is to be affected by such testimony a copy of such notice shall be served on the county clerk and recorder, or his deputy, of the county where the property to be affected by such testimony or some part of such property is situated but in any event said notice shall be published for not less than two weeks in some newspaper to be designated by the court making the order in such manner as may be designated by such court. If service of said notice cannot with due diligence be made, in the manner provided in Rule 4(e), upon any expected adverse party named in the petition, the court may make such order as is just for service upon him by publication or otherwise and shall appoint, for persons named in the petition as expected adverse parties who are not served in the manner provided in Rule 4(e), an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the witness. Such notice shall state the title of the proceeding, including the court and county in which it is pending, the time and place of the examination and either a brief outline of the facts expected to be proved or a description of the property to be affected by such testimony. Any notice heretofore given which contains the above required matters shall be deemed sufficient. Any personal service required by the provisions hereof shall be made at least 14 days before the testimony is taken. If any person named in the petition as an expected adverse party is stated in any paper filed in such proceeding to be an infant or incompetent person, the provisions of Rule 17(c) apply, but no guardian ad litem need be appointed for any expected adverse party whose name is unknown.

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

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

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

(b) After Judgment or After Appeal. If an appeal of a judgment is pending, or, if none is pending, then at any time within 35 days from the entry of such judgment, the court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in such court. In such case the party who desires to perpetuate the testimony may make a motion in such

court for leave to take the depositions, upon the same notice and service thereof as if the action were pending in such court. The motion shall show: (1) The names and addresses of the persons to be examined and the substance of the testimony, so far as known, which he expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in trial courts.

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

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

ANNOTATION

I. GENERAL CONSIDERATION.

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

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

At common law, in actions at law, it was deemed the right of the parties to have witnesses produced and examined viva voce and the right to take depositions was unknown; litigants, therefore, were obliged to resort to chancery or to procure the consent of the adverse party, which the court could compel by deferring the trial or by refusing to render judgment. Rozek v. Christen, 153 Colo. 597, 387 P.2d 425 (1963).

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

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

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

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

II. BEFORE ACTION.

A. Petition; Order; Notice.

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

Present authority for perpetuating testimony supplants the ancient chancery equita-

ble procedures, inherent in the use of which is the element of good faith, seeking justice. Rozek v. Christen, 153 Colo. 597, 387 P.2d 425 (1963).

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

In a proceeding to perpetuate testimony,a court of equity will not entertain the bill if it is possible that the matter in controversy can be made the subject of immediate judicial investigation by the party who seeks to perpetuate the testimony, and it must appear that the testimony may be lost by delay. Rozek v. Christen, 153 Colo. 597, 387 P.2d 425 (1963).

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

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

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

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

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

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

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

Where the record was convincing that petitioner was not proceeding in good faith to perpetuate testimony in an expected libel suit, but rather as a guise to embark upon a "fishing expedition" on matters wholly unrelated to libel and to conduct an inquisition designed to help resolve a "political" matter in a manner acceptable to petitioner, the court could not grant a petition under this rule. Rozek v. Christen, 153 Colo. 597, 387 P.2d 425 (1963).

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

B. How and When Used.

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

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

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

Rule 28. Persons Before Whom Depositions May Be Taken

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

before a person appointed by the court in which the action is pending. A person so appointed has the power to administer oaths and take testimony.

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

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

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

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

COMMITTEE COMMENT

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

The Federal Rules of Civil Procedure specifically define court-appointed persons or stipulated persons as "officers" under rules 30, 31 and 32. The Committee follows this principle but feels that it need not be specifically set forth in the Colorado rule.

ANNOTATION

I. General Consideration.
II. Outside of Colorado.
III. Disqualification for Interest.

I. GENERAL CONSIDERATION.

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

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

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

II. OUTSIDE OF COLORADO.

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

There is no way by which depositions of witnesses living out of the state can be taken except on due observance of the statutory course; any deviation from the statutory provisions on this subject is fatal, and the use of

depositions erroneously taken constitutes an error for which a cause has to be reversed. Argentine Falls Silver Mining Co. v. Molson, 12 Colo. 405, 21 P. 190 (1889); Gibbs v. Gibbs, 6 Colo. App. 368, 40 P. 781 (1895).

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

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

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

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

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

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

III. DISQUALIFICATION FOR INTEREST.

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

Rule 29. Stipulations Regarding Discovery Procedure

Unless otherwise directed by the court, the parties may by written stipulation: (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions; and (2) modify other procedures governing the timing of discovery, except that stipulations extending the time provided in C.R.C.P. Rules 33, 34, and 36 for responses to discovery may, if they would interfere with any time set for completion of discovery, for hearing of a motion, or for trial, be made only with the approval of the court.

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

Cross references: For stipulations extending time in interrogatories for responses to discovery, see C.R.C.P. 33; for stipulations extending time in the production of documents and things and entry upon land for inspection and other purposes for responses to discovery, see C.R.C.P. 34; for stipulations extending time in admissions for responses to discovery, see C.R.C.P. 36.

ANNOTATION

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

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

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

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

Rule 30. Depositions Upon Oral Examination

(a) When Depositions May Be Taken. (1) Subject to the provisions of C.R.C.P. Rules 26(b)(2)(A) and 26(d), a party may take the testimony of any person, including a party, by deposition upon oral examination without leave of court except as provided in paragraph (2) of this section. The attendance of witnesses may be compelled by subpoena as provided in C.R.C.P. 45.

(2) Leave of court must be obtained pursuant to C.R.C.P. Rules 16(b)(1) and 26(b) if:

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

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

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

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

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

(1) Consistent with C.R.C.P. 121, sec. 1-12, a party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

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

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

(4) Unless otherwise agreed by the parties, a deposition shall be conducted before an officer appointed or designated pursuant to C.R.C.P. 28 and shall begin with a statement on the record by the officer that includes (a) the officer's name and business address; (b) the date, time, and place of the deposition; (c) the name of the deponent; (d) the administration of the oath or affirmation to the deponent; and (e) an identification of all persons present. If the deposition is recorded other than stenographically, items (a) through (c) shall be repeated at the beginning of each unit of recorded tape or other recording medium. The appearance or demeanor of deponents or attorneys shall not be distorted by the use of camera or sound-recording techniques. At the conclusion of the deposition, the officer shall state on the record that the deposition is complete and shall set forth any stipulations made by counsel concerning the custody of the transcript or recording, the exhibits, or other pertinent matters.

(5) The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the request.

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

(7) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone or other remote electronic means. For the purposes of this rule and C.R.C.P. Rules 28(a), 37(a)(1), and 37(b)(1), a deposition taken by telephone or other remote electronic means is taken at the place where the deponent is to answer questions propounded to the deponent. The stipulation or order shall include the manner of recording the proceeding.

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

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

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

(2) Unless otherwise authorized by the court or stipulated by the parties, a deposition is limited to one day of seven hours. By order, the court may limit the time permitted for the conduct of a deposition to less than seven hours, or may allow additional time if needed for a fair examination of the deponent and consistent with C.R.C.P. 26(b)(2), or if the deponent or another person impedes or delays the examination, or if other circumstances warrant. If the court finds such an impediment, delay, or other conduct that frustrates the fair examination of the deponent, it may impose upon the person responsible therefor an appropriate sanction, including the reasonable costs and attorney fees incurred by any parties as a result thereof.

(3) At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in C.R.C.P. 26(c). If the order made terminates the examination, it may be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of C.R.C.P. 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(e) Review by Witness; Changes; Signing. If requested by the deponent or a party before completion of the deposition, the deponent shall be notified by the officer that the

transcript or recording is available. Within 35 days of receipt of such notification the deponent shall review the transcript or recording and, if the deponent makes changes in the form or substance of the deposition, shall sign a statement reciting such changes and the deponent's reasons for making them and send such statement to the officer. The officer shall indicate in the certificate prescribed by subsection (f)(1) of this rule whether any review was requested and, if so, shall append any changes made by the deponent.

(f) Certification and Filing by Officer; Exhibits; Copies; Notice of Filing. (1) The officer shall certify that the witness was duly sworn and that the deposition is a true record of the testimony given by the witness. This certificate shall be set forth in writing and accompany the record of the deposition. Unless otherwise ordered by the court, the officer shall securely seal the deposition in an envelope or package endorsed with the title of the action and marked "deposition of (here insert name of witness)" and shall promptly transmit it to the attorney who arranged for the transcript or recording. The receiving attorney shall store the deposition under conditions that will protect it against loss, destruction, tampering, or deterioration.

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

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

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

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

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

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

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

Source: (a), (b)(1) to (b)(4), (b)(7), (c), (d), (e), and (f) amended and adopted April 14, 1994, effective January 1, 1995, for all cases filed on or after that date; committee comment approved June 10, 1994; (a)(1) corrected and effective January 9, 1995; entire rule corrected and effective June 4, 2001; (d) amended and adopted November 15, 2001, effective January 1, 2002; (e) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

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

COMMITTEE COMMENT

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

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

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

ANNOTATION

I. General Consideration.
II. When May be Taken.
III. Notice.
IV. Motion to Terminate or Limit.
V. Submission to Witness.
VI. Certification and Filing.

I. GENERAL CONSIDERATION.

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

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

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

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

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

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

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

Allowing a company to designate a witness under subsection (b)(6) who is unprepared or

not knowledgeable would simply defeat the purpose of the rule and sandbag the opposition. D.R. Horton, Inc. v. D&S Landscaping, LLC, 215 P.3d 1163 (Colo. App. 2008).

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

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

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

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

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

II. WHEN MAY BE TAKEN.

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

III. NOTICE.

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

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

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

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

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

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

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

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

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

Governmental officials of foreign state cannot be compelled to appear in Colorado to take depositions. Where the attorney general and tax commissioner of another state had been ordered to appear in Colorado for the purpose of taking depositions, the court could not compel them to so appear, and this fact is true even though the foreign state had brought the action in which defendant sought these depositions,

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

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

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

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

IV. MOTION TO TERMINATE OR LIMIT.

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

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

V. SUBMISSION TO WITNESS.

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

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

Object of reading deposition to witness is to give opportunity to correct. The object of the requirement that the interrogatories and answers submitted to the witness on the taking of his deposition should be first carefully read to him before he signed is that the witness might know what the scrivener had written down, and he might, before his deposition is complete, have an opportunity to correct any errors or inaccuracies of statement which might have occurred. Cheney v. Woodworth, 13 Colo. App. 176, 56 P. 979 (1899).

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

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

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

VI. CERTIFICATION AND FILING.

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

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

Officer's certificate is not required to state that deposition was "carefully" read to witness before signing. The requirement that in taking depositions the interrogatories and answers should be carefully read to the witness before signing does not require the certificate of the officer to state that they were "carefully" read to the witness before signing. A certificate that certified simply that the deposition was

read to the witness before signing is sufficient, as it would be presumed that it was read with that care required. Cheney v. Woodworth, 13 Colo. App. 176, 56 P. 979 (1899) (decided under § 378 of the former code of civil procedure, which was replaced by rules of civil procedure in 1941).

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

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

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

Rule 31. Depositions Upon Written Questions

(a) Serving Questions; Notice. (1) A party may take the testimony of any person, including a party, by deposition upon written questions without leave of court except as provided in paragraph (2) of this section. The attendance of witnesses may be compelled by the use of subpoena as provided in C.R.C.P. 45.

(2) Leave of court must be obtained pursuant to C.R.C.P. Rules 16(B)(1) and 26(B), if:

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

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

(C) A party seeks to take a deposition before the time specified in C.R.C.P. 26(d); or

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

(3) A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating: (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs; and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation, or a partnership, or association, or governmental agency in accordance with the provision of C.R.C.P. 30(b)(6).

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

(b) Officer to Take Responses and Prepare Record. A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30 (c), (e), and (f), to take the testimony of the witness in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions received by him.

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

Source: (a) amended and adopted April 14, 1994, effective January 1, 1995, for all cases filed on or after that date; committee comment approved June 10, 1994; (a)(4) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

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

COMMITTEE COMMENT

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

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

ANNOTATION

Law reviews. For article, "Depositions and Discovery, Rules 26 to 37", see 28 Dicta 375 (1951). For article, "Depositions and Discovery: Rules 26-37", see 23 Rocky Mt. L. Rev. 562 (1951). For article, "Plaintiff's Advantageous Use of Discovery, Pre-Trial and Summary Judgment", see 40 Den. L. Ctr. J. 192 (1963). For article, "A Deposition Primer, Part I: Setting Up the Deposition", see 11 Colo. Law. 938 (1982). For article, "Alternative Depositions: Practice and Procedure", see 19 Colo. Law. 57 (1990).

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

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

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

Rule 32. Use of Depositions in Court Proceedings

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

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

(2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent of a public or private corporation, partnership, or association, or a governmental agency, which is a party, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf thereof may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:

(A) That the witness is dead; or

(B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or

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

(D) [There is No Colorado (D).]

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

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

A deposition taken without leave of court pursuant to C.R.C.P. 30(a)(2)(C) shall not be used against a party who demonstrates that, when served with the notice, the party was unable through the exercise of diligence to obtain counsel to represent the party at the taking of the deposition.

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

Substitution of parties pursuant to Rule 25 does not affect the right to use depositions previously taken; and, when an action in any court of the United States or of any state has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

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

(b) Objections to Admissibility. Subject to the provisions of Rules 28(b) and subsection (d)(3) of this Rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

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

(d) Effect of Errors and Irregularities in Depositions.

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

(2) **As to Disqualification of Officer.** Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

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

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

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

(C) Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 7 days after service of the last questions authorized.

(4) **As to Completion and Return of Deposition.** Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof

is made with reasonable promptness after such defect is, or with due diligence might have been ascertained.

Source: IP(a) and (a)(3) amended and adopted April 14, 1994, effective January 1, 1995, for all cases filed on or after that date; committee comment approved June 10, 1994; (a)(5) added and adopted June 25, 1998, effective January 1, 1999; (d)(3)(C) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

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

COMMITTEE COMMENT

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

ANNOTATION

I. GENERAL CONSIDERATION.

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

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

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

II. USE.

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

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

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

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

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

Should a party attempt to offer a portion of a deposition into evidence rather than call

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

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

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

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

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

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

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

It cannot be said that a showing of unavailability by means of attempted subpoena is indispensable in connection with the 100-mile provision, since it is for the court to decide whether this rule has been complied with. Campbell v. Graham, 144 Colo. 532, 357 P.2d 366 (1960).

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

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

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

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

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

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

Governmental officials of foreign states cannot be compelled to appear in Colorado to take depositions. Despite the fact that section (a)(2) of this rule states, in relevant part, that: "The depositions of ... an officer, director, or managing agent of a ... (governmental agency which is a party) ... may be used by an adverse party ...", it has been held that the attorney general and tax commissioner of another state could not be compelled to appear in Colorado for the purpose of taking depositions, and that this fact was true even though the foreign state had brought the action in which defendant sought their depositions, inasmuch as no state court or government has authority beyond its own borders, each state being sovereign as to its own territory and those residing therein; rather, such recognition as is given Colorado laws or court orders by other states must be based solely upon full faith and credit, comity, contract due to uniform acts, or compact. Minnesota ex rel. Minnesota Att'y Gen. v. District Court, 155 Colo. 521, 395 P.2d 601 (1964).

Deposition may not be used by adverse party for "any purpose". Blind reliance on the portion of this rule in section (a)(2) that the deposition of a party "may be used by an adverse party for any purpose" does not establish

error when the court refuses to admit portions of a deposition, for the permissive rule of this statute does not override the other rules of evidence and the discretion of the trial court. Stauffer v. Karabin, 30 Colo. App. 357, 492 P.2d 862 (1971).

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

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

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

Depositions held admissible to prove plaintiff's claim where plaintiff not personally present. Where at the trial plaintiff did not appear in person, being then a resident of another state, and defendant's counsel moved that the action be dismissed for the reason that defendant would have no opportunity to cross-examine the witness who was the real party in interest and the jury would have no basis upon which to weigh the testimony or to judge the credibility of the witness, it was held that whether plaintiff could produce sufficient evidence to avert a motion for dismissal at the conclusion of her case was beside the question, but clearly she was entitled to introduce whatever evidence was available in support of her claim, and thus the depositions and interrogatories taken in the case were admissible as evidence in support of plaintiff's cause of action, and it was error to dismiss plaintiff's suit because plaintiff was not personally present to assert it. Hiltibrand v. Brown, 124 Colo. 52, 234 P.2d 618 (1951).

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

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

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

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

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

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

III. OBJECTIONS.

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

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

The court cannot determine admissibility or relevancy if not given specific purpose or purposes for reading portions of a deposition when faced with an objection from the oppos-

ing party. Stauffer v. Karabin, 30 Colo. App. 357, 492 P.2d 862 (1971).

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

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

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

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

For purposes of section (d)(1), court endorses interpretation of "promptly" that calls for notice within a reasonable time under all the facts and circumstances of the case. This interpretation, allowing for more flexibility, is more in keeping with the scheme of the state's discovery rules. The nonexclusive list of factors identified in Todd v. Bear Valley Village Apartments, 980 P.2d 973 (Colo. 1999), may be considered to determine whether an objection to the inadequacy of a deposition notice is prompt. A party should not be denied the ability to defend himself or herself in court because of an inflexible application of a procedural rule. Keenan ex rel. Hickman v. Gregg, 192 P.3d 485 (Colo. App. 2008).

IV. EFFECT OF TAKING OR USING.

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

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

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

V. ERRORS AND IRREGULARITIES.

A. Taking.

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

B. Completion and Return.

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

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

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

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

It was error for the trial court to order a deposition suppressed upon the basis of the first appearance of irregularities in the deposition of not being properly certified and filed where counsel for defendants was merely seeking to establish an impeaching foundation by asking the plaintiff whether she had made particular statements on the occasion of the giving of the deposition, since under no circumstances

would a motion to suppress be proper at this point. Rather, the question of the inadmissibility of the deposition would not be a valid issue until such time as defendant's counsel proposed to impeach plaintiff by introducing the deposition. Appelhans v. Kirkwood, 148 Colo. 92, 365 P.2d 233 (1961).

Rule 33. Interrogatories to Parties

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

(b) Answers and Objections. (1) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable.

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

(3) The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 35 days after the service of the interrogatories. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties pursuant to C.R.C.P. 29.

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

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

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

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

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

(e) Pattern and Non-Pattern Interrogatories; Limitations. The pattern interrogatories set forth in the Appendix to Chapter 4, Form 20, are approved. Any pattern interrogatory and its subparts shall be counted as one interrogatory. Any subpart to a non-pattern interrogatory shall be considered as a separate interrogatory.

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

Cross references: For protective orders concerning discovery, see C.R.C.P. 26(c); for answer to a motion for order compelling discovery, see C.R.C.P. 37(a); for sanctions for failure of party to serve answers to interrogatories, see C.R.C.P. 37(b)(2) and (d); for scope of discovery, see C.R.C.P. 26(b).

COMMITTEE COMMENT

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

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

ANNOTATION

I. General Consideration.
II. Availability and Procedure.
III. Scope and Use.
IV. Option to Produce Business Records.

I. GENERAL CONSIDERATION.

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

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

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

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

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

II. AVAILABILITY AND PROCEDURE.

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

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

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

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

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

Interrogatories may be served on governmental official of another state though they cannot be compelled to appear in Colorado for taking depositions. Minnesota ex rel. Minnesota Att'y Gen. v. District Court, 155 Colo. 521, 395 P.2d 601 (1964).

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

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

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

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

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

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

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

III. SCOPE AND USE.

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

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

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

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

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

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

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

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

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

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

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

Court need not reject testimony of witnesses which contradicts answers. Where a defendant answers interrogatories under this rule, making admissions therein against his own interest, and thereafter does not appear upon the trial, with plaintiff offering the answers to the interrogatories in evidence, the trial court need not reject the evidence of witnesses, who are called by counsel appearing for defendant, if the testimony of such witnesses contradicts the statements of defendant as contained in the answers to the interrogatories. Ridley v. Young, 127 Colo. 46, 253 P.2d 433 (1953).

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

Interrogatory answers for discovery should not be irrevocably binding. Answers to interrogatories propounded primarily for the purpose of discovery and to prevent surprise should not be held to be irrevocably binding

upon the person making said answers. Ridley v. Young, 127 Colo. 46, 253 P.2d 433 (1953).

IV. OPTION TO PRODUCE BUSINESS RECORDS.

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

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

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

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

(1) To produce and permit the party making the request, or someone acting on the party's behalf, to inspect and copy any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of C.R.C.P. 26(b) and which are in the possession, custody, or control of the party upon whom the request is served; or

(2) To permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of C.R.C.P. 26(b).

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

The party upon whom the request is served shall serve a written response within 35 days after the service of the request. A shorter or longer time may be directed by the court or agreed to in writing by the parties pursuant to C.R.C.P. 29. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order pursuant to C.R.C.P. 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

(c) Persons Not Parties. This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

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

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

COMMITTEE COMMENT

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

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

ANNOTATION

I. General Consideration.
II. Scope.
III. Procedure.

I. GENERAL CONSIDERATION.

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

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

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

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

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

II. SCOPE.

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

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

If a litigant is entitled to the production of documents, he must bring himself within the provisions of this rule. McCoy v. District Court, 126 Colo. 32, 246 P.2d 619 (1952).

The limitations set forth in this rule are: (1) Relevancy under C.R.C.P. 26(b); and (2)

possession, custody, or control. Michael v. John Hancock Mut. Life Ins. Co., 138 Colo. 450, 334 P.2d 1090 (1959).

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

Denial of motion to compel production of documents on grounds that voluminous documentation had been provided and that the attorney-client privilege had not been waived was not an abuse of the trial court's discretion in discovery matters. Hill v. Boatright, 890 P.2d 180 (Colo. App. 1994), aff'd in part and rev'd in part on other grounds sub nom. Boatright v. Derr, 919 P.2d 221 (Colo. 1996).

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

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

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

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

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

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

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

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

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

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

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

tiff's suit is nonfrivolous and brought in good faith; (9) whether the information sought is available through other discovery or from other sources; and (10) the importance of the information sought to the plaintiff's case. Martinelli v. District Court, 199 Colo. 163, 612 P.2d 1083 (1980).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. PROCEDURE.

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

A party seeking a subpoena duces tecum requiring production of documents by the other party at a deposition hearing must show good cause for the issuance of such a subpoena, and under such circumstances, C.R.C.P. 45(b), which provides for subpoena for the production of documentary evidence, must be read in conjunction with this rule. Lee v. Missouri P. R. R., 152 Colo. 179, 381 P.2d 35 (1963).

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

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

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

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

Rule 35. Physical and Mental Examination of Persons

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

(b) **Report of Examiner.**

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

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

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

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

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

ANNOTATION

I. General Consideration.
II. Order.
III. Report.

I. GENERAL CONSIDERATION.

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

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

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

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

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

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

II. ORDER.

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

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

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

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

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

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

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

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

Defendant's right to select a doctor to testify is subject to protective orders by the trial court such as, among others: Those limiting the number of doctors who may examine; those providing who may be present at the examinations, including plaintiffs' attorneys if the court

deems it wise; and those setting the time, type, place, scope, and conduct of the examination. Timpte v. District Court, 161 Colo. 309, 421 P.2d 728 (1966); Hayes v. District Court, 854 P.2d 1240 (Colo. 1993).

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

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

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

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

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

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

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

"In controversy" and "good cause" requirements. This rule requires that either the party's physical or mental condition be "in controversy" and that the movant show "good cause" before the court may order that a party submit to a physical or mental examination. Tyler v. District Court, 193 Colo. 31, 561 P.2d 1260 (1977).

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

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

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

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

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

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

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

Dismissal of case with prejudice held justified. Where plaintiff at no time objected to an examination, sought to cancel or change the appointments, or offered any excuse for his failure to keep at least six scheduled appointments, since the claim was based entirely on the personal injuries he allegedly suffered, and since

he repeatedly failed to appear for examination without giving any reason therefor, the trial court was justified in dismissing the case with prejudice. Braxton v. Luff, 38 Colo. App. 451, 558 P.2d 444 (1976).

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

III. REPORT.

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

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

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

Rule 36. Requests for Admission

(a) Request for Admission. Subject to the limitations contained in the Case Management Order, a party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of C.R.C.P. 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Leave of court must be obtained, consistent with the principles stated in C.R.C.P. Rules 16(b)(1) and 26(b), to serve more requests for admission than the number set forth in the Case Management Order. Without leave of court or written stipulation, requests for admission may not be served before the time specified in C.R.C.P. 26(d).

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 35 days after service of the request, or within such shorter or longer time as the court may allow or as the parties may agree to in writing pursuant to C.R.C.P. 29, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of C.R.C.P. 37(c), deny the matter or set forth reasons why the party cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answer or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this Rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pretrial conference or at a designated time prior to

trial. The provisions of C.R.C.P. 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(b) Effect of Admission. Any matter admitted under this Rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this Rule is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

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

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

COMMITTEE COMMENT

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

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

ANNOTATION

I. General Consideration.
II. Request.

I. GENERAL CONSIDERATION.

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

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

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

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

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

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

II. REQUEST.

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

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

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

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

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

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

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

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

The only exception to this rule is where an allegation has been made and there is a clear showing of illegal or unlawful action, misconduct, bias, or bad faith on the part of the administrative officials or a specific violation of an applicable statute. P.U.C. v. District Court, 163 Colo. 462, 431 P.2d 773 (1967).

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

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

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

(2) **Motion.** (A) If a party fails to make a disclosure required by C.R.C.P. 26(a), any other party may move to compel disclosure and for appropriate sanctions. The motion shall be accompanied by a certification that the movant in good faith has conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

(B) If a deponent fails to answer a question propounded or submitted pursuant to C.R.C.P. Rules 30 or 31, or a corporation or other entity fails to make a designation pursuant to C.R.C.P. Rules 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted pursuant to C.R.C.P. 33, or if a party, in response to a request for inspection submitted pursuant to C.R.C.P. 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in

accordance with the request. The motion shall be accompanied by a certification that the moving party in good faith has conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

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

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

(B) If a motion is denied, the court may make such protective order as it could have made on a motion filed pursuant to C.R.C.P. 26(c) and may, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(C) If the motion is granted in part and denied in part, the court may make such protective order as it could have made on a motion filed pursuant to C.R.C.P. 26(c) and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to Comply with Order.

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

(2) **Party Deponents — Sanctions by Court.** If a party or an officer, director, or managing agent of a party, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under section (a) of this Rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

COMMITTEE COMMENT

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

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

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

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

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

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

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order, or the attorney advising him, or both, to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Failure to Disclose; False or Misleading Disclosure; Refusal to Admit. (1) A party that without substantial justification fails to disclose information required by C.R.C.P. Rules 26(a) or 26(e) shall not, unless such failure is harmless, be permitted to present any evidence not so disclosed at trial or on a motion made pursuant to C.R.C.P. 56. In addition to or in lieu of this sanction, the court, on motion after affording an opportunity to be heard, may impose other appropriate sanctions, which, in addition to requiring payment of reasonable expenses including attorney fees caused by the failure, may include any of the actions authorized pursuant to subsections (b)(2)(A), (b)(2)(B), and (b)(2)(C) of this Rule.

(2) If a party fails to admit the genuineness of any document or the truth of any matter as requested pursuant to C.R.C.P. 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that

(A) the request was held objectionable pursuant to C.R.C.P. 36(a), or

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

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

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

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated pursuant to C.R.C.P. Rules 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice; or (2) to serve answers or objections to interrogatories submitted pursuant to C.R.C.P. 33, after proper service of the interrogatories; or (3) to serve a written response to a request for inspection submitted pursuant to C.R.C.P. 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized by subparagraphs (A), (B), and (C) of subsection (b)(2) of this Rule. Any motion specifying a failure under clauses (2) or (3) of this subsection shall be accompanied by a certification that the movant in good faith has conferred or attempted to confer with the party failing to answer or respond in an effort to obtain such answer or response without court action. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney fees, caused by the failure unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subsection may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has previously filed a motion for a protective order as provided by C.R.C.P. 26(c).

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

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

COMMITTEE COMMENT

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

ANNOTATION

I. GENERAL CONSIDERATION.

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

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

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

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

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

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

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

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

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

with respect to the right to confidentiality? Martinelli v. District Court, 199 Colo. 163, 612 P.2d 1083 (1980).

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

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

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

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

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

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

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

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

II. MOTION FOR ORDER.

A. In General.

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

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

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

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

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

B. Failure to Answer.

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

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

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

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

C. Award of Expenses of Motion.

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

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

III. FAILURE TO COMPLY.

A. Sanctions by Court in District.

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

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

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

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

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

B. Sanctions by Court in Which Action is Pending.

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

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

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

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

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

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

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

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

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

Dismissal is not required where corporation's C.R.C.P. 30 (b)(6) deponent failed to have personal knowledge regarding the question specified in the deposition subpoena, despite the fact that the district court's sanction of an award of costs did not cure the prejudice to the party noticing the deposition. Mun. Subdist., Northern Colo. Water Conservancy Dist. v. OXY USA, Inc., 990 P.2d 701 (Colo. 1999).

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

IV. EXPENSES ON FAILURE TO ADMIT.

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

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

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

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

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

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

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

V. FAILURE TO DISCLOSE.

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

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

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

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

Because section (c) expressly requires the court to afford an opportunity to be heard,

on remand, trial court must hold a hearing on defendant's motion seeking sanctions and attorney fees from plaintiff's attorneys. In doing so, the court must determine whether the disclosures were misleading or there was a failure seasonably to supplement misleading disclosures and, if so, whether the failure was either substantially justified or harmless, employing the factors outlined in Todd v. Bear Valley Vill. Apts., 980 P.2d 973 (Colo 1999); Brown v. Silvern, 141 P.3d 871 (Colo. App. 2005).

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

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

Trial court did not abuse its discretion in striking affirmative defenses where defendant failed to respond to motion for limited sanctions and thereby failed to show that its failure to make initial disclosure was harmless. Furthermore, in striking the affirmative defenses the court did not deny defendants the opportunity to be heard because there were still issues of fact that could be challenged. Weize Co., LLC v. Colo. Reg'l Constr., 251 P.3d 489 (Colo. App. 2010).

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

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

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

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

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

VI. FAILURE OF PARTY TO ATTEND DEPOSITION.

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

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

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

Under this rule if the failure to appear before the officer who is to take the deposition is willful, the court, on notice and motion, may strike out all or any part of the pleadings,

dismiss the action or proceeding, or enter judgment by default against the party so failing. Reserve Life Ins. Co. v. District Court, 126 Colo. 217, 247 P.2d 903 (1952).

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

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

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

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

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

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

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

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

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

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

The trial court must consider whether a party's failure to comply with discovery was willful or in bad faith in determining which sanctions should be applied under section (d). Petrini v. Sidwell, 38 Colo. App. 454, 558 P.2d 447 (1976).

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

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

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

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

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

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

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

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

CHAPTER 5

Trials

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TRIALS

Rule 38. Right to Trial by Jury

(a) Exercise of Right. Upon the filing of a demand and the simultaneous payment of the requisite jury fee by any party in actions wherein a trial by jury is provided by constitution or by statute, including actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due on contract, or as damages for breach of contract, or for injuries to person or property, all issues of fact shall be tried by a jury. The jury fee is not refundable; however, a demanding party may waive that party's demand for trial by jury pursuant to section (e) of this rule.

(b) Demand. Any party may demand a trial by jury of any issue triable by a jury by filing and serving upon all other parties, pursuant to Rule 5(d), a demand therefor at any time after the commencement of the action but not later than 14 days after the service of the last pleading directed to such issue, except that in actions subject to mandatory arbitration under Rule 109.1 the demand for trial by jury shall be filed and served not later than 14 days following a demand for trial de novo. A demand for trial by jury may be endorsed upon a pleading. The demanding party shall pay the requisite jury fee upon the filing of the demand.

(c) Jury Fees. When a party to an action has exercised the right to demand a trial by jury, every other party to such action shall also pay the requisite jury fee unless such other party, pursuant to Rule 5(d), files and serves a notice of waiver of the right to trial by jury within 14 days after service of the demand.

(d) Specification of Issues. A demand may specify the issues to be tried to the jury; in the absence of such specification, the party filing the demand shall be deemed to have demanded trial by jury of all issues so triable. If a party demands trial by jury on fewer than all of the issues so triable, any other party, within 14 days after service of the demand, may file and serve a demand for trial by jury of any other issues so triable.

(e) Waiver; Withdrawal. The failure of a party to file and serve a demand for trial by jury and simultaneously pay the requisite jury fee as required by this Rule constitutes a waiver of that party's right to trial by jury. A demand for trial by jury made pursuant to this rule may not subsequently be withdrawn in the absence of the written consent of every party who has demanded a trial by jury and paid the requisite jury fee and of every party who has failed to waive the right to trial by jury and paid the requisite jury fee.

Source: Entire rule repealed and reenacted July 12, 1990, effective September 1, 1990; (b), (c), and (d) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Cross references: For jurors, see C.R.C.P. 47 and 48; for trial by jury or by the court, see C.R.C.P. 39; for consolidation and separate trial, see C.R.C.P. 42; for filing and serving, see C.R.C.P. 5(d).

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, "Trials: Rules 38-53", see 23 Rocky Mt. L. Rev. 571 (1951). For article, "One Year Review of Civil Procedure and Appeals", see 37 Dicta 21 (1960). For article, "One Year Review of Civil Procedure and

Appeals", see 38 Dicta 133 (1961). For article, "One Year Review of Civil Procedure and Appeals", see 39 Dicta 133 (1962). For article, "One Year Review of Contracts", see 39 Dicta 161 (1962). For note, "One Year Review of Colorado Law — 1964", see 42 Den. L. Ctr. J. 140 (1965). For article, "Will Contests — Some Procedural Aspects", see 15 Colo. Law. 787 (1986). For article, "Right to a Civil Jury Trial: State Versus Federal Court", see 17 Colo. Law. 39 (1988).

Applied in Shively v. Bd. of County Comm'rs, 159 Colo. 353, 411 P.2d 782 (1966); Shuman v. Tuxhorn, 29 Colo. App. 152, 481 P.2d 741 (1971); Gleason v. Guzman, 623 P.2d 378 (Colo. 1981); Nat'l Acceptance Co. of Am. v. Mars, 780 P.2d 59 (Colo. App. 1989).

II. WHERE JURY RIGHT EXISTS.

A. In General.

Law reviews. For article, "One Year Review of Domestic Relations", see 39 Dicta 102 (1962).

Annotator's note. Since section (a) of this rule is similar to § 191 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Under the Colorado constitution, trial by a jury in a civil action is not a matter of right. Parker v. Plympton, 85 Colo. 87, 273 P. 1030 (1928); Kahm v. People, 83 Colo. 300, 264 P. 718 (1928); Gibson v. Angros, 30 Colo. App. 95, 491 P.2d 87 (1971); Continental Title Co. v. District Court, 645 P.2d 1310 (Colo. 1982).

There is no constitutional right to a trial by jury in civil actions. Johnson v. Neel, 123 Colo. 377, 229 P.2d 939 (1951); Federal Lumber Co. v. Wheeler, 643 P.2d 31 (Colo. 1981); Kaitz v. District Court, 650 P.2d 553 (Colo. 1982); Snow Basin, Ltd. v. Boettcher & Co., 805 P.2d 1151 (Colo. App. 1990); First Nat. Bank of Meeker v. Theos, 794 P.2d 1055 (Colo. App. 1990).

The right to jury trials in civil cases is regulated by this rule. Gibson v. Angros, 30 Colo. App. 95, 491 P.2d 87 (1971).

Where an action is purely legal in nature, the parties are entitled to a jury trial. Miller v. Carnation Co., 33 Colo. App. 62, 516 P.2d 661 (1973); Zimmerman v. Mozer, 10 Bankr. 1002 (Bankr. D. Colo. 1981).

No other rule of civil procedure enlarges the category of cases in which the right to jury trial shall be had. Miller v. District Court, 154 Colo. 125, 388 P.2d 763 (1964).

This rule itself does not enlarge upon the right to jury trial as those rights were fixed by the former code provisions and the judicial pronouncements thereunder. Miller v. District Court, 154 Colo. 125, 388 P.2d 763 (1964).

Law-equity distinction survives for determination of right to jury. Although law and equity have been merged under the Colorado rules of civil procedure, the law-equity distinction continues to survive for the purpose of determining whether there is a right to a jury trial in a civil action. Kaitz v. District Court, 650 P.2d 553 (Colo. 1982).

Issue of fact must be tried to jury upon demand. Although there is no constitutional right to a jury trial in civil cases in Colorado, an issue of fact must be tried to a jury upon demand in an action for personal injuries. Gleason v. Guzman, 623 P.2d 378 (Colo. 1981).

Generally in purely equitable cases, the trial must be to the court. Sieber v. Frink, 7 Colo. 148, 2 P. 901 (1883); Dohner v. Union Cent. Life Ins. Co., 109 Colo. 35, 121 P.2d 661 (1942).

When the action is an equitable proceeding, the issues joined are to be tried by the court. Federal Lumber Co. v. Wheeler, 643 P.2d 31 (Colo. 1981).

Equity claims are triable by the court and not by jury. Claims sounding in equity are triable by the court and not by a jury. Worchester v. State Farm Mut. Auto. Ins. Co., 172 Colo. 352, 473 P.2d 711 (1970); Faucett v. Hamill, 815 P.2d 989 (Colo. App. 1991).

In equity cases, neither party is entitled to a jury trial as a matter of right. Selfridge v. Leonard-Heffner Co., 51 Colo. 314, 117 P. 158 (1911).

There is no right to a jury trial in actions which historically were brought before courts of equity. Kaitz v. District Court, 650 P.2d 553 (Colo. 1982); Difede v. Mountain States Tel. & Tel., 763 P. 2d 298 (Colo. App. 1988), rev'd on other grounds, 780 P.2d 533 (Colo. 1989).

The right to trial by jury is guaranteed only in actions at law specifically named in section (a). Setchell v. Dellacroce, 169 Colo. 212, 454 P.2d 804 (1969); Gibson v. Angros, 30 Colo. App. 95, 491 P.2d 87 (1971).

Whether an issue of fact must be tried to a jury depends upon the character of the action in which the issue is joined. Setchell v. Dellacroce, 169 Colo. 212, 454 P.2d 804 (1969); Gibson v. Angros, 30 Colo. App. 95, 491 P.2d 87 (1971); Miller v. Carnation Co., 33 Colo. App. 62, 516 P.2d 661 (1973); Zimmerman v. Mozer, 10 Bankr. 1002 (Bankr. D. Colo. 1981).

The character of the action determines whether an issue of fact is to be tried to a court or to a jury. Kaitz v. District Court, 650 P.2d 553 (Colo. 1982); Snow Basin Ltd. v. Boettcher & Co., 805 P.2d 1151 (Colo. App. 1990).

Where there were no disputed facts with respect to the plaintiff's forcible entry and detainer claim, and the factual issues to be tried related only to equitable defenses asserted by the defendant, no jury was required. RTV,

L.L.C. v. Grandote Int'l Ltd., 937 P.2d 768 (Colo. App. 1996).

It is the nature of the relief sought or defense asserted, not the nature of the factual issues presented, that determines whether the right to a jury exists. RTV, L.L.C. v. Grandote Int'l Ltd., 937 P.2d 768 (Colo. App. 1996).

Nature of issue does not determine trial by jury. The right to have an issue of fact tried by a jury is not determined by the nature of the issue. Danielson v. Gude, 11 Colo. 87, 17 P. 283 (1887); United Coal Co. v. Canon City Coal Co., 24 Colo. 116, 48 P. 1045 (1897); Cree v. Lewis, 49 Colo. 186, 112 P. 326 (1910).

"Basic thrust" doctrine involves a determination of whether a lawsuit, characterized as a whole, will be entitled to a jury under this rule, rather than applying the rule at the outset to each issue within the case. Zimmerman v. Mozer, 10 Bankr. 1002 (Bankr. D. Colo. 1981).

The original complaint filed in an action fixes the nature of the suit, by what arm of the court it should be tried, and whether either party is entitled to a jury trial. Miller v. District Court, 154 Colo. 125, 388 P.2d 763 (1964).

The complaint fixes the nature of a suit. Miller v. Carnation Co., 33 Colo. App. 62, 516 P.2d 661 (1973); Zimmerman v. Mozer, 10 Bankr. 1002 (Bankr. D. Colo. 1981).

Where the original petition and the third-party complaint states actions sounding in equity, it is proper to deny the third-party respondent's jury demand. In re Malone v. Colo. Nat'l Bank, 658 P.2d 284 (Colo. App. 1982).

It is the character of the complaint, rather than that of any counterclaims or defenses subsequently asserted, that fixes the nature of the suit and determines whether it should be tried in equity or at law. First Nat. Bank of Meeker v. Theos, 794 P.2d 1055 (Colo. App. 1990).

A cross-complaint may present issues properly triable to a jury. Miller v. District Court, 154 Colo. 125, 388 P.2d 763 (1964).

There is no material difference between this rule and the provision of the former Code of Civil Procedure on the subject of compulsory counterclaims to justify abandonment of the rule limiting the right to a jury. Miller v. District Court, 154 Colo. 125, 388 P.2d 763 (1964).

Where legal and equitable claims are joined in a complaint, the court must determine whether the basic thrust of the action is equitable or legal in nature. Miller v. Carnation Co., 33 Colo. App. 62, 516 P.2d 661 (1973); Zimmerman v. Mozer, 10 Bankr. 1002 (Bankr. D. Colo. 1981); Motz v. Jammaron, 676 P.2d 1211 (Colo. App. 1983), cert. dismissed, 680 P.2d 238 (Colo. 1984); First Nat. Bank of Meeker v. Theos, 794 P.2d 1055 (Colo. App. 1990); Zick v. Krob, 872 P.2d 1290 (Colo. App. 1993).

Where plaintiff demands damages only in the event that equitable relief is impossible, he is not entitled as a matter of law to demand a jury. Setchell v. Dellacroce, 169 Colo. 212, 454 P.2d 804 (1969).

Until the plaintiff amends his complaint to strip him of his initial demand for equitable relief, he must be held to be pressing for that relief, in which case he is not entitled to demand jury trial. Setchell v. Dellacroce, 169 Colo. 212, 454 P.2d 804 (1969).

If a third-party defendant makes a timely demand for a jury trial, the third-party defendant would be entitled to a jury trial on the issues raised between him and the defendant, although not on those issues between the defendant and the plaintiff. Simpson v. Digiallonardo, 29 Colo. App. 556, 488 P.2d 208 (1971).

Where a third-party defendant properly demands a jury trial on issues raised by the parties concerning a matter clearly within the scope of this rule, it is error not to have its liability under the third-party complaint determined by a jury, and the fact that the other parties do not desire a jury trial is of no moment. Simpson v. Digiallonardo, 29 Colo. App. 556, 488 P.2d 208 (1971).

Either party on appeal from a county court to a district court should be entitled to a jury trial in the district court in actions set forth in this rule. Rupp v. Cool, 147 Colo. 18, 362 P.2d 396 (1961).

B. Application of Right.

Where plaintiffs seek damages and subsequent injunctive relief, there is a right to a jury trial on the legal issues. Miller v. Carnation Co., 33 Colo. App. 62, 516 P.2d 661 (1973).

Where plaintiffs pray primarily for equitable relief, and only in the alternative for a remedy at law, the character of the suit is equitable, and plaintiffs therefore are not entitled to a jury trial. Miller v. Carnation Co., 33 Colo. App. 62, 516 P.2d 661 (1973).

Trial court's characterization of an action as equitable was not contrary to law where the primary remedy sought resembled that afforded in actions for partition and where there were also claims for an accounting and for unjust enrichment, all of which are equitable claims. Zick v. Krob, 872 P.2d 1290 (Colo. App. 1993).

A suit for specific performance is an equitable action, and being such, it is triable to the court without a jury. Plains Iron Works Co. v. Haggott, 72 Colo. 228, 210 P. 696 (1922).

Suit for specific performance is not "for the recovery of specific personal property". While the recovery of specific personal property may result from the successful prosecution of a suit for specific performance of a contract to transfer such personal property, the suit, never-

theless, is not one "for the recovery of specific personal property" within the meaning of this section. Plains Iron Works Co. v. Haggott, 72 Colo. 228, 210 P. 696 (1922).

Similarly, the fact that the equitable relief sought would require the conveyance of land does not bring the case within that portion of this rule requiring a jury trial in actions for the recovery of specific real property, inasmuch as that portion deals only with actions at law for the recovery of real property. Setchell v. Dellacroce, 169 Colo. 212, 454 P.2d 804 (1969).

The foreclosure of a mortgage is an equitable proceeding, and the issues joined are to be tried by the court. Neikirk v. Boulder Nat'l Bank, 53 Colo. 350, 127 P. 137 (1912); Miller v. District Court, 154 Colo. 125, 388 P.2d 763 (1964).

Actions seeking judicial foreclosure of liens have traditionally been considered equitable proceedings. Although such actions typically involve determinations of the existence and amount of indebtedness, and although any ensuing foreclosure decree typically includes a personal monetary award against the debtor founded in contract, the basic thrust of foreclosure proceedings has nevertheless been held to be equitable. First Nat. Bank of Meeker v. Theos, 794 P.2d 1055 (Colo. App. 1990).

Where the relief sought is an injunction, the action is therefore equitable in nature, and a defendant has no right to a jury trial. Gibson v. Angros, 30 Colo. App. 95, 491 P.2d 87 (1971).

Attachment and garnishment proceedings submitted to court. The remedies of attachment and garnishment were unknown at common law and exist only by reason of statute or rules of procedure enacted pursuant to statutory authority, and it is not error to submit fact issues in a garnishment proceeding to the court rather than to a jury. Worchester v. State Farm Mut. Auto. Ins. Co., 172 Colo. 352, 473 P.2d 711 (1970).

Right to jury in replevin action. A replevin action is an action at law and traditionally carries with it the right to a jury trial. Zimmerman v. Mozer, 10 Bankr. 1002 (Bankr. D. Colo. 1981).

Defendant entitled to jury trial where plaintiff's claims for relief, including replevin, conversion, theft, and fraud, are all traditionally triable to a jury. Citicorp Acceptance Co., Inc., v. Sittner, 772 P.2d 655 (Colo. App. 1989).

The Colorado Supreme Court denied certiorari in the case annotated under this catchline in the 1990 replacement volume. See Citicorp Acceptance Co., Inc. v. Sittner, 783 P.2d 838 (Colo. 1989).

The fact that an action is for a declaratory judgment is not, in and of itself, determinative of the type of action brought for purposes of determining whether there is a right to a trial by jury. Zick v. Krob, 872 P.2d 1290 (Colo. App. 1993).

If the issue of fact involves a trust, it is triable to the court. Cree v. Lewis, 49 Colo. 186, 112 P. 326 (1910).

There is no right to jury trial in action to declare trust invalid. The right to jury trial granted by section (a) does not extend to actions to declare a trust invalid. Ayres v. King, 665 P.2d 594 (Colo. 1983).

Actions by beneficiary or ward against trustee or guardian in an existing trust or guardianship are generally, but not always, equitable in nature. Kaitz v. District Court, 650 P.2d 553 (Colo. 1982).

Where fraud in both the execution and the inducement is available as a defense in an action at law, then under this rule, the defendant is entitled to have this issue go to the jury in an action on a note. Atkinson v. Englewood State Bank, 141 Colo. 436, 348 P.2d 702 (1960).

The fact that plaintiff asks for a money judgment is by no means decisive that the action is one at law. Cree v. Lewis, 49 Colo. 186, 112 P. 326 (1910).

This rule does not prescribe a jury trial in an annulment proceeding as a matter of right. Young v. Colo. Nat'l Bank, 148 Colo. 104, 365 P.2d 701 (1961).

There is no right to jury trial in action to set aside fraudulent transfer. An action to set aside a fraudulent transfer is traditionally equitable and thus carries with it no right to a jury trial. Zimmerman v. Mozer, 10 Bankr. 1002 (Bankr. D. Colo. 1981).

In litigation involving statutorily required uninsured motorist coverage, a tort claim against the uninsured motorist is distinct from the insured motorist's contract claim against his or her insurer. In the former case, where the uninsured motorist's liability has been determined by default, public policy precludes the insurer from insisting upon a jury trial although in some respects the insurer may be considered a codefendant. In the latter case, however, the amount of damages payable under the contract is an issue on which the insurer may demand a jury trial. State Farm Mut. Ins. Co. v. Brekke, 105 P.3d 177 (Colo. 2004).

There is no right to a jury trial in a mechanic's lien case. Federal Lumber Co. v. Wheeler, 643 P.2d 31 (Colo. 1981).

The air pollution control act contains no provision for trial by a jury or for penalty assessment by a jury. Lloyd A. Fry Roofing Co. v. State Dept. of Health Air Pollution Variance Bd., 191 Colo. 463, 553 P.2d 800 (1976).

There is not jury trial provision in action for repossession of collateral by secured party. Although this rule provides that a party is entitled to a jury trial upon demand in an action for the recovery of specific real or per-

sonal property, the rule is not intended to extend to actions involving the repossession of collateral by a secured party. Western Nat'l Bank v. ABC Drilling Co., 42 Colo. App. 407, 599 P.2d 942 (1979).

III. DEMAND.

Upon compliance with this rule a party, to an action may have a jury trial as a matter of right. Jaynes v. Marrow, 144 Colo. 138, 355 P.2d 529 (1960).

Right to jury trial, once proper demand is made and fee is paid, may be lost only for reasons stated in C.R.C.P. 39(a). The trial court, in an action for payment of medical benefits, erred in denying the insured a jury trial on the basis that the insured failed to file jury instructions in accordance with C.R.C.P. 121. Neither C.R.C.P. 39(a) nor C.R.C.P. 121 includes a waiver provision on such basis. Whaley v. Keystone, 811 P.2d 404 (Colo. App. 1989).

This rule does not specifically cover the time within which demand for jury trial should be made in cases appealed from a county court to a district court. Rupp v. Cool, 147 Colo. 18, 362 P.2d 396 (1961).

If the demand for a jury trial in cases appealed from county court is made within a reasonable time prior to trial, and the trial court, under C.R.C.P. 40, is afforded an opportunity to arrange its trial calendar in an expeditious manner, the request for jury trial should be granted. Rupp v. Cool, 147 Colo. 18, 362 P.2d 396 (1961).

IV. WAIVER.

Law reviews. For note, "Does a Motion for a Directed Verdict by Both Parties Constitute a Waiver of the Jury?", see 3 Rocky Mt. L. Rev. 67 (1930). For article, "Selection of a Jury in a Civil Case", see 33 Dicta 179 (1956).

Plaintiff specifically waived her right to a jury trial by not paying the jury fee in a timely manner. The second sentence of section (e) applies when a defendant timely requests a jury trial and, in response, a plaintiff then timely pays the jury fee. In that situation, the plaintiff would still be entitled to a jury trial even if the defendant attempts to withdraw his or her request for a jury trial. Crawford v. Melby, 89 P.3d 451 (Colo. App. 2003).

Failure to act in accordance with this rule waives right to jury trial regardless of the reasons given in excuse or for neglect. Jaynes v. Marrow, 144 Colo. 138, 355 P.2d 529 (1960).

One requesting a jury trial may not later withdraw that request unless his desire for a nonjury trial is acceded to by the remaining parties to the lawsuit. Forster v. Superior Court, 175 Colo. 444, 488 P.2d 202 (1971).

Rule 39. Trial by Jury or by the Court

(a) By Jury. When trial by jury has been demanded and the requisite jury fee has been paid pursuant to Rule 38, the action shall be designated upon the register of actions as a jury action. The trial shall be by jury of all issues so demanded unless (1) all parties who have demanded a trial by jury and paid the requisite jury fee and all parties who have failed to waive the right to trial by jury and paid the requisite jury fee have, in writing, waived their rights to trial by jury, or (2) the court upon motion or on its own initiative finds that a right to trial by jury of some or all of those issues does not exist, or (3) all parties demanding trial by jury fail to appear at trial.

(b) By the Court. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court.

(c) Advisory Jury and Trial by Consent. In all actions not triable by a jury the court upon motion or on its own initiative may try any issue with an advisory jury, or, except in actions against the State of Colorado when a statute provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury.

Source: Entire rule repealed and reenacted July 12, 1990, effective September 1, 1990.

Cross references: For motion for directed verdict, see C.R.C.P. 50; for jury trial of right, see C.R.C.P. 38.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, "Trials: Rules 38-53", see 23 Rocky Mt. L. Rev. 571 (1951). For article, "One Year Review of Civil Procedure and Appeals", see 38 Dicta 133 (1961). For article, "One Year Review of Civil Procedure and Appeals", see 39 Dicta 133 (1962).

Applied in Kaitz v. District Court, 650 P.2d 553 (Colo. 1982).

II. BY JURY.

Agreement of parties regarding jury trial not binding on court. The trial court is not bound by the agreement of the parties regarding a jury trial if no right to a jury trial exists. Federal Lumber Co. v. Wheeler, 643 P.2d 31 (Colo. 1981).

Although a trial court may empanel an advisory jury over the objections of a party in an equitable action, the jury's findings in such advisory capacity do not constitute final or binding resolutions of disputed issues. Rather, the court remains the ultimate fact finder and is required to make findings and conclusions in support of its judgment. First Nat. Bank of Meeker v. Theos, 794 P.2d 1055 (Colo. App. 1990).

Failure to comply with demand is no grounds for reversal where no objection. Where formal demand for jury trial is made by a party, the cause thereafter proceeds to trial by the court without a jury, and there is no objection to such trial by either party, the unsuccessful party cannot thereafter secure reversal of the judgment entered against him upon the ground that there was no formal disposition of the demand for jury trial in strict compliance with section (a) of this rule. Johnson v. Neel, 123 Colo. 377, 229 P.2d 939 (1951).

Before the issue of proximate cause can be taken from the jury, the evidence must be undisputed and such that reasonable minds could reach but one conclusion. Roth v. Stark Lumber Co., 31 Colo. App. 121, 500 P.2d 145 (1972).

For cases construing § 196 of the former code of civil procedure which was supplanted by this rule, see Leahy v. Dunlap, 6 Colo. 552, (1883); Cerussite Mining Co. v. Anderson, 19 Colo. App. 307, 75 P. 158 (1903); Frank v. Bauer, 19 Colo. App. 445, 75 P. 930 (1904); Parker v. Plympton, 85 Colo. 87, 273 P. 1030 (1928); Hiner v. Cassiday, 92 Colo. 78, 18 P.2d 309 (1932); In re Estate of Eder, 94 Colo. 173, 29 P.2d 631 (1934).

This rule grants broad powers to a district judge to order a jury trial. Once a master is appointed, however, the district judge cannot summarily reject the master's report and order a jury trial in derogation of the requirement of C.R.C.P. 53 (e)(2). Dobler v. District Court, 806 P.2d 944 (Colo. 1991).

Right to jury trial, once proper demand is made and fee is paid, may be lost only for reasons stated in section (a) of this rule. The trial court, in an action for payment of medical benefits, erred in denying the insured a jury trial on the basis that the insured failed to file jury instructions in accordance with C.R.C.P. 121. Neither this rule nor C.R.C.P. 121 includes a waiver provision on such basis. Whaley v. Keystone, 811 P.2d 404 (Colo. App. 1989).

III. BY COURT.

Where a litigant acquiesces in a trial before the court, thereby consenting thereto, he cannot thereafter contend for the first time on appeal that a jury should have been called. Johnson v. Neel, 123 Colo. 377, 229 P.2d 939 (1951).

This rule permits the trial court, in its discretion, to order a jury trial of any and all issues. Jaynes v. Marrow, 144 Colo. 138, 355 P.2d 529 (1960).

If the trial court orders a jury trial, it may exercise its discretion without interference from the supreme court. Jaynes v. Marrow, 144 Colo. 138, 355 P.2d 529 (1960).

Trial courts may order a jury trial with a belated motion or none at all. Trial courts, either with a belated motion before them, with or without reasons stated therein, or without any motion at all, may order a jury trial, because it is within their discretion so to do. Jaynes v. Marrow, 144 Colo. 138, 355 P.2d 529 (1960).

A trial court is within its right and power in ordering a jury trial without a timely formal request therefor. Butters v. Wann, 147 Colo. 352, 363 P.2d 494 (1961).

Section (b) of this rule affords the court no discretion to grant an untimely request for a jury trial. Machol v. Sancetta, 924 P.2d 1197 (Colo. App. 1996).

Unlike federal practice, reasons for belated demand are unnecessary. In applying this rule, Colorado does not follow the interpretation of the federal trial courts that where a belated jury demand is made, counsel must give valid reasons for the request or else the trial court will not choose to exercise its discretion to consider it. Jaynes v. Marrow, 144 Colo. 138, 355 P.2d 529 (1960).

Judge need not give any reasons why he desires jury. The rule that "judicial discretion must have some rational basis; it is not synonymous with judicial whim or caprice" does not mean that a trial judge under section (b) of this rule has to give any reasons why he desires a jury in a case. Jaynes v. Marrow, 144 Colo. 138, 355 P.2d 529 (1960).

Since no reason need be given, the fact that the wrong reason is given for granting the motion is immaterial, because the trial court on its own motion can order a jury trial without

giving any reason whatsoever. Jaynes v. Marrow, 144 Colo. 138, 355 P.2d 529 (1960).

Where the petitioner fails to tender the jury fee required by local district court rules, he is deemed to have waived his demand for a jury trial and this rule should not be used to overcome the waiver. McConnell v. District Court, 680 P.2d 528 (Colo. 1984).

Although this rule grants discretion to trial court to order a trial by jury without demand, such discretion is bounded by the proviso that the order be made only in an action in which the demand might have been made in the first place. Nowhere is discretion or authority given to trial court to grant a jury trial over a litigant's meritorious motion to strike demand. Motz v. Jammaron, 676 P.2d 1211 (Colo. App. 1983), cert. dismissed, 680 P.2d 238 (Colo. 1984).

Applied in Butters v. Wann, 147 Colo. 352, 363 P.2d 494 (1961).

IV. ADVISORY JURY AND TRIAL BY CONSENT.

Law reviews. For article, "One Year Review of Domestic Relations", see 39 Dicta 102 (1962).

This rule refers to two kinds of trials: (1) Cases not triable by a jury may, on motion or on the court's own initiative, be tried with an "advisory jury"; (2) nonjury cases including nonjury statutory actions (with an exception) may, by consent of court and the parties, be tried with a "jury". Young v. Colo. Nat'l Bank, 148 Colo. 104, 365 P.2d 701 (1961).

In the first, an "advisory jury" acts; in the second, a "jury" acts. Young v. Colo. Nat'l Bank, 148 Colo. 104, 365 P.2d 701 (1961).

This rule takes care of two differing situations: In the first, a party may request that a nonjury case be tried to a jury and the adversary party may resist, and in such case, the court may grant the request but, since it has been resisted, may use the services of the jury in an advisory capacity only; in the second, parties and court consenting, the jury's verdict has the effect of a common-law verdict. Young v. Colo. Nat'l Bank, 148 Colo. 104, 365 P.2d 701 (1961).

Handling of issues of fact in equitable cause discretionary with court. It is discretionary with the court in equitable causes of action whether issues of fact shall be tried by the court or sent to a jury. Zimmerman v. Mozer, 10 Bankr. 1002 (Bankr. D. Colo. 1981).

In an equity cause, where issues are submitted to a jury, its verdict is merely advisory to the court and may be disregarded. McKelvy v. Cooper, 165 Colo. 102, 437 P.2d 346 (1968); Zimmerman v. Mozer, 10 Bankr. 1002 (Bankr. D. Colo. 1981).

Court never has been bound by conclusions of an advisory jury. In the trial of equity cases, the court may, on its own motion, invoke the aid of a jury to determine specific questions of fact. Such findings are, however, no more binding now than they were when the old chancery practice prevailed. Conclusions of the jury are in such cases simply advisory; they may be accepted and form the basis of decree or judgment, or they may be entirely disregarded. When the Code of Civil Procedure was first adopted, the contrary suggestion on this subject in the note on page 376 of "Adams' Equity" may have been applicable, but the enactment in 1879 clearly established the practice of trying chancery cases to the court without a jury; and it cannot now be correctly claimed that special findings of a jury in such cases are as binding as verdicts in actions in law. Hall v. Linn, 8 Colo. 264, 5 P. 641 (1885); Selfridge v. Leonard-Heffner Co., 51 Colo. 314, 117 P. 158, 1913B Ann. Cas. 282 (1911) (decided under § 191 of the former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941).

The mere fact that an action is in equity does not bar the parties from a jury trial by consent wherein the jury's verdict has the same effect as it would at common law. Shuman v. Tuxhorn, 29 Colo. App. 152, 481 P.2d 741 (1971).

Where one party demands a jury trial of a nonjury case, neither the other party nor court objects, and trial so proceeds, consent to such trial is deemed to have been given. Young v. Colo. Nat'l Bank, 148 Colo. 104, 365 P.2d 701 (1961); Shuman v. Tuxhorn, 29 Colo. App. 152, 481 P.2d 741 (1971).

Trial of nonjury action to a jury is jury trial in regular sense. Under this rule, the trial of a nonjury action to a jury, with the consent of both parties and the trial judge, is a jury trial in its regular sense as if trial to a jury had been a matter of right. Young v. Colo. Nat'l Bank, 148 Colo. 104, 365 P.2d 701 (1961).

In a trial by consent, the jury's verdict should have the same effect as if it were a common-law verdict. Young v. Colo. Nat'l Bank, 148 Colo. 104, 365 P.2d 701 (1961); Shuman v. Tuxhorn, 29 Colo. App. 152, 481 P.2d 741 (1971).

Consent to binding jury. Where complex procedural history of cases did not make clear that failure to object at each pretrial proceeding would be treated as consent to binding jury and where defendants made pretrial objections to binding jury in motion to bifurcate two cases, defendants did not consent to binding jury. Mountain States Tel. & Tel. v. DiFede, 780 P.2d 533 (Colo. 1989).

Status of jury may not be changed except by agreement. Once court and counsel embark upon a nonjury statutory proceeding in such

manner as to treat it as a jury case, the status of the jury may not be changed except by agreement. Young v. Colo. Nat'l Bank, 148 Colo. 104, 365 P.2d 701 (1961); Shuman v. Tuxhorn, 29 Colo. App. 152, 481 P.2d 741 (1971).

The unilateral act of a trial court in changing the case from one of trial by consent to one in which an advisory verdict would be received is error, as such change could only have been accomplished by agreement of the parties and the court. Young v. Colo. Nat'l Bank, 148 Colo. 104, 365 P.2d 701 (1961); Shuman v. Tuxhorn, 29 Colo. App. 152, 481 P.2d 741 (1971).

A trial court does not err in refusing to try the issues with an advisory jury pursuant to the discretionary powers conferred upon the trial court by section (c) of this rule. Gibson v. Angros, 30 Colo. App. 95, 491 P.2d 87 (1971).

The air pollution control act contains no provision for trial by a jury or for penalty assessment by a jury. Lloyd A. Fry Roofing Co. v. State Dept. of Health Air Pollution Variance Bd., 191 Colo. 463, 553 P.2d 800 (1976).

Rule 40. Assignment of Cases for Trial

Subject to the directives of the Chief Justice of the Colorado Supreme Court, trial courts shall provide by rule for the placing of actions upon the trial calendar in such manner as they deem expedient. Precedence shall be given to actions entitled thereto.

Cross references: For precedence of motions for temporary injunctions, see C.R.C.P. 65(b).

ANNOTATION

Law reviews. For article, "Trials: Rules 38-53", see 23 Rocky Mt. L. Rev. 571 (1951).

Annotator's note. Since this rule is similar to § 193 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

In the interests of justice, trials must be expedited. Benster v. Bell, 83 Colo. 587, 267 P. 792 (1928); Scofield v. Scofield, 89 Colo. 409, 3 P.2d 794 (1931).

The right to a jury trial may not be utilized to disrupt a trial calendar and to obtain delay. Murray v. District Court, 189 Colo. 217, 539 P.2d 1254 (1975).

If it may be said that the setting of the cause for trial by the court of its own motion without notice is erroneous, a party must show where he was prejudiced by such action. Lux v. McLeod, 19 Colo. 465, 36 P. 246 (1894).

Where counsel is present at the time a cause is set for trial and makes no objection to the setting of the case, all irregularities in the notice of such setting and the service thereof are waived. Cerussite Mining Co. v. Anderson, 19 Colo. App. 307, 75 P. 158 (1903).

The fact that an attorney has other cases set for trial in another court at the same time does not excuse him or his client from being in attendance at the trial of a case regularly reached on the calendar of the court where no motion for a continuance or showing is made why the case should not proceed to trial; under such circumstances there is no abuse of discretion in the refusal of the trial court to set aside a judgment regularly entered. Diebold v. Diebold, 79 Colo. 7, 243 P. 630 (1926).

Applied in Continental Title Co. v. District Court, 645 P.2d 1310 (Colo. 1982).

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal: Effect Thereof.

(1) **By Plaintiff; By Stipulation.** Subject to the provisions of Rule 23(e), of Rule 66, and of any statute, an action may be dismissed by the plaintiff without order of court upon payment of costs: (A) By filing a notice of dismissal at any time before filing or service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs; or (B) by filing a stipulation of dismissal signed by all parties who have appeared in the action or by their attorneys. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once previously dismissed in any court an action based on or including the same claim.

(2) **By Order of Court.** Except as provided in subsection (a)(1) of this subdivision of this Rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to

dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this subsection (2) is without prejudice.

(b) Involuntary Dismissal: Effect Thereof.

(1) **By Defendant.** For failure of a plaintiff to prosecute or to comply with these Rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this section (b) and any dismissal not provided for in this Rule, other than a dismissal for failure to prosecute, for lack of jurisdiction, for failure to file a complaint under Rule 3, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

(2) **By the Court.** Actions not prosecuted or brought to trial with due diligence may be dismissed by the court with prejudice after reasonable notice by the court and in accordance with Rule 121, section 1-10.

(3) All motions for dismissal for failure to prosecute shall be presented in accordance with Rule 121, section 1-10 and shall specify whether the movant requests dismissal with or without prejudice. All orders dismissing for failure to prosecute shall specify whether the dismissal is with or without prejudice. Motions or orders that do not so specify shall be deemed motions for dismissal without prejudice or orders for dismissal without prejudice as appropriate.

(c) Dismissal of Counterclaim, Cross Claim, or Third-Party Claim. The provisions of this Rule apply to the dismissal of any counterclaim, cross claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to subsection (a)(1) of this Rule shall be made before a responsive pleading is filed or served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) Costs of Previously Dismissed Action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

Cross references: For dismissal of class actions, see C.R.C.P. 23(e); for dismissal of receivership action, see C.R.C.P. 66(c); for findings by the court, see C.R.C.P. 52; for commencement of action, see C.R.C.P. 3; for joinder of persons needed for just adjudication, see C.R.C.P. 19.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, "Notes on Proposed Amendments to Colorado Rules of Civil Procedure", see 27 Dicta 165 (1950). For article, "Trials: Rules 38-53", see 23 Rocky Mt. L. Rev. 571 (1951). For article, "Amendments to the Colorado Rules of Civil Procedure", see 28 Dicta 242 (1951). For note, "Comments on Last Clear Chance — Procedure and Substance", see 32 Dicta 275 (1955). For article, "One Year Review of Civil Procedure and Appeals", see 39 Dicta 133 (1962). For note, "One Year Review of Civil Procedure", see 41 Den. L. Ctr. J. 67 (1964). For article, "Federal Practice and Procedure", which discusses a recent Tenth Circuit decision dealing with conversion of a motion to dismiss into a motion for summary judgment, see 62 Den. U. L. Rev. 220 (1985).

Annotator's note. Since sections (a) and (b) of this rule are similar to § 184 of the former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Under section 184 of the former Code of Civil Procedure, which was supplanted by this rule, the plaintiff, where no counterclaim had been set up in the answer, was entitled to dismiss his action. Tabor v. Sullivan, 12 Colo. 136, 20 P. 437 (1888); Long v. McGowan, 16 Colo. App. 540, 66 P. 1076 (1901); Doll v. Slaughter, 39 Colo. 51, 88 P. 848 (1907); Colo. Util. Corp. v. Pizor, 99 Colo. 294, 62 P.2d 570 (1936).

It was within the discretion of the court to dismiss the plaintiff's suit without prejudice, where motion for dismissal was made before trial and no counterclaim had been filed. Denver & Rio Grande Ry. v. Cobley, 9 Colo. 152, 10 P. 669 (1886); Schechter v. Denver, L. & G. R. R., 8 Colo. App. 25, 44 P. 761 (1896); Teller v. Sievers, 20 Colo. App. 109, 77 P. 261 (1904); Miller v. East Denver Mun. Irrigation Dist., 83 Colo. 406, 266 P. 211 (1928).

A dismissal without prejudice is not a final order for purposes of appellate review. Bock v. Brody, 8870 P.2d 530 (Colo. App. 1993).

The court may dismiss a claim without prejudice at the close of plaintiff's evidence if it concluded that indispensable parties have not been included. Bock v. Brody, 870 P.2d 530 (Colo. App. 1993).

Standard in ruling on motion to dismiss shall be considered. In ruling on a motion to dismiss, the standard is not whether the plaintiff established a prima facie case, but whether judgment in favor of defendant is justified on the evidence presented. Campbell v. Commercial Credit Plan, Inc., 670 P.2d 813 (Colo. App. 1983); Gapter v. Kocjancic, 703 P.2d 660 (Colo. App. 1985); Pub. Serv. Co. v. Bd. of Water Works, 831 P.2d 470 (Colo. 1992).

Water court did not err in requiring applicants for conditional rights of exchange to establish more than a prima facie case at mid-trial to avoid judicial fact finding and dismissal pursuant to section (b) when no other rule or statute alters the application of said section in regard to this matter. Pub. Serv. Co. v. Bd. of Water Works, 831 P.2d 470 (Colo. 1992).

"Motion for directed verdict" is motion to dismiss. When the court is the trier of fact, a motion denominated a "motion for directed verdict" is actually a motion to dismiss pursuant to section (b) of this rule. Campbell v. Commercial Credit Plan, Inc., 670 P.2d 813 (Colo. App. 1983); Gapter v. Kocjancic, 703 P.2d 660 (Colo. App. 1985).

Rule as basis for jurisdiction. See Lurvey v. Phil Long Ford, Inc., 37 Colo. App. 11, 541 P.2d 114 (1975); Bd. of County Comm'rs v. City & County of Denver, 190 Colo. 347, 547 P.2d 249 (1976).

Applied in Lehman v. Williamson, 35 Colo. App. 372, 533 P.2d 63 (1975); Webermeier v. Pace, 37 Colo. App. 546, 552 P.2d 1021 (1976); People v. In Interest of D.A.K., 198 Colo. 11, 596 P.2d 747 (1979); Romero v. Rossmiller, 43 Colo. App. 215, 603 P.2d 964 (1979); Hanks v. Green, 44 Colo. 80, 607 P.2d 1034 (1980); Trustees of Mtg. Trust of Am. v. District Court, 621 P.2d 310 (Colo. 1980); People ex rel. MacFarlane v. Delaware Corp., 626 P.2d 1144 (Colo. App. 1980); Rossmiller v. Romero, 625 P.2d 1029 (Colo. 1981); Fish v. Charnes, 652 P.2d 598 (Colo. 1982); Crocker v. Colo. Dept. of Rev., 652 P.2d 1067 (Colo. 1982); Conrad v. City & County of Denver, 656 P.2d 662 (Colo. 1982); Lucero v. Martin, 660 P.2d 902 (Colo. 1983); Foothills Meadow v. Myers, 832 P.2d 1097 (Colo. App. 1992).

II. VOLUNTARY DISMISSAL.

A. By Plaintiff.

Law reviews. For article, "What Divorce Statutes Are Now in Effect in Colorado?", see 21 Dicta 68 (1944).

By the salutary provisions of this rule, a plaintiff is given the right to dismiss a first suit at an early stage. Alexander v. Morrison-Knudsen Co., 166 Colo. 118, 444 P.2d 397 (1968), cert. denied, 393 U.S. 1063, 89 S. Ct. 715, 21 L. Ed. 2d 706 (1969).

A party that obtains a voluntary dismissal of its claims subject to terms and conditions to which it consistently maintains its objections may challenge those terms and conditions as legally impermissible or as an abuse of discretion on appellate review. Am. Water Dev., Inc. v. City of Alamosa, 874 P.2d 352 (Colo. 1994).

An action may be dismissed prior to answer or motion for summary judgment. An action may be dismissed by notice, without court order, at any time before the adverse party files an answer or motion for summary judgment. Alexander v. Morrison-Knudsen Co., 166 Colo. 118, 444 P.2d 397 (1968), cert. denied, 393 U.S. 1063, 89 S. Ct. 715, 21 L. Ed. 2d 706 (1969); Powers v. Prof'l Rodeo Cowboys, 832 P.2d 1099 (Colo. App. 1992).

Filing of motion under rule 12 (b)(2) alleging lack of subject matter jurisdiction does not bar plaintiff from filing of notice to dismiss under rule 41 (a)(1). Burden v. Greeven, 953 P.2d 205 (Colo. App. 1998).

Determination of the terms and conditions of dismissal under subsection (a)(2) is discretionary with the trial court and will not be disturbed on review absent an abuse of that discretion. Subsection (a)(2) expressly gives the court power to grant a motion for dismissal

under the rule upon such terms and conditions as the court deems proper. Am. Water Dev., Inc. v. City of Alamosa, 874 P.2d 352 (Colo. 1994).

Under this section, payment of costs is a condition to a dismissal by a plaintiff. Scofield v. Scofield, 89 Colo. 409, 3 P.2d 794 (1931).

A requirement for payment of attorney fees and expenses as a term or condition of an order granting voluntary dismissal of a claim may be imposed without evidence and findings satisfying the requirements of § 13-17-102 (5) and C.R.C.P. 11. Am. Water Dev., Inc. v. City of Alamosa, 874 P.2d 352 (Colo. 1994).

When a voluntary motion to dismiss is with prejudice, there is no authority to condition the granting of the motion upon the payment of attorney fees. Groundwater Appropriators of the S. Platte River Basin, Inc. v. City of Boulder, 73 P.3d 22 (Colo. 2003).

The party requesting an award of attorney fees bears the burden of proving by a preponderance of the evidence its entitlement to such an award. Am. Water Dev., Inc. v. City of Alamosa, 874 P.2d 352 (Colo. 1994).

Award of attorney fees and expenses are not precluded by the special nature of water right adjudication proceedings. Am. Water Dev., Inc. v. City of Alamosa, 874 P.2d 352 (Colo. 1994); Application of Hines Highlands P'ship, 929 P.2d 718 (Colo. 1996).

Plaintiff may do so without prejudice and with no terms or conditions attached thereto. Alexander v. Morrison-Knudsen Co., 166 Colo. 118, 444 P.2d 397 (1968), cert. denied, 393 U.S. 1063, 89 S. Ct. 715, 21 L. Ed. 2d 706 (1969).

Subsection (a)(2) is intended to give the right to dismiss a claim that may later become viable or may be asserted later in a different forum, provided that the defendant will not be unfairly prejudiced. The purpose of the rule is different from the objectives of § 13-17-102 (5) and C.R.C.P. 11, which are intended to protect a plaintiff from imposition of attorney fees upon dismissal of an unmeritorious claim provided that the plaintiff seeks dismissal promptly after learning that the claim cannot prevail. Am. Water Dev., Inc. v. City of Alamosa, 874 P.2d 352 (Colo. 1994).

A plaintiff need do no more than file a notice of dismissal with the clerk; that document itself closes the file, and the court has no role to play; there is not even a perfunctory order of court closing the file. Alexander v. Morrison-Knudsen Co., 166 Colo. 118, 444 P.2d 397 (1968), cert. denied, 393 U.S. 1063, 89 S. Ct. 715, 21 L. Ed. 2d 706 (1969).

The filing of a notice to dismiss, even pending actual transfer to court of proper venue, is effective. Since the transferor court, until the certification and actual transfer of the case to a different venue, has physical control over the files, the clerk of the transferor court may accept the filing of an answer and place it in the file, and the filing of a notice to dismiss, pending the actual transfer of the proceedings to a court of proper venue, is likewise effective. Alexander v. Morrison-Knudsen Co., 166 Colo. 118, 444 P.2d 397 (1968), cert. denied, 393 U.S. 1063, 89 S. Ct. 715, 21 L. Ed. 2d 706 (1969).

The action stands dismissed without an order of court. Where defendant has not interposed any cross-complaint or answer and plaintiff seeks to dismiss the proceeding, then upon the filing of the dismissal, the action stands dismissed without order of court, and the court errs in declining to dismiss the case. Chamberlain v. Chamberlain, 108 Colo. 538, 120 P.2d 641 (1941).

By filing a notice to dismiss, the court's jurisdiction does not immediately terminate for all purposes. Alexander v. Morrison-Knudsen Co., 166 Colo. 118, 444 P.2d 397 (1968), cert. denied, 393 U.S. 1063, 89 S. Ct. 715, 21 L. Ed. 2d 706 (1969).

Plaintiff's voluntary dismissal does divest a court of jurisdiction to grant defendant's motion to dismiss plaintiff's claims. Alpha Spacecom, Inc. v. Hu, 179 P.3d 62 (Colo. App. 2007).

Appropriate orders may be entered. The filing of the notice of dismissal closes the file, but the trial court may enter appropriate orders subsequent to the notice, as practical considerations must prevail. Alexander v. Morrison-Knudsen Co., 166 Colo. 118, 444 P.2d 397 (1968), cert. denied, 393 U.S. 1063, 89 S. Ct. 715, 21 L. Ed. 2d 706 (1969).

When a plaintiff has once dismissed, a second dismissal operates as an adjudication on the merits. Alexander v. Morrison-Knudsen Co., 166 Colo. 118, 444 P.2d 397 (1968), cert. denied, 393 U.S. 1063, 89 S. Ct. 715, 21 L. Ed. 2d 706 (1969).

This rule also protects a defendant by providing that if the plaintiff takes advantage of his right of early dismissal on one occasion, he may not repeat the process with impunity. Alexander v. Morrison-Knudsen Co., 166 Colo. 118, 444 P.2d 397 (1968), cert. denied, 393 U.S. 1063, 89 S. Ct. 715, 21 L. Ed. 2d 706 (1969).

Where the answer filed in a state court is after the first notice of dismissal and before a second notice of dismissal in a federal court, then at the time the answer is filed, defendant cannot have anticipated that a notice of dismissal would subsequently be filed in the federal court, and so, because the right to invoke the "double dismissal" rule does not arise until after defendant's answer is filed in the state court and since the answer is not directed to the federal court complaint, the filing thereof does not constitute a waiver of defendant's right to move for dismissal, as it would on the basis of the rule. A defendant cannot invoke the right prior to the filing of the second notice of dis-

missal, because the right does not exist, nor can he logically waive a right prior to the time it comes into existence. Alexander v. Morrison-Knudsen Co., 166 Colo. 118, 444 P.2d 397 (1968), cert. denied, 393 U.S. 1063, 89 S. Ct. 715, 21 L. Ed. 2d 706 (1969).

Dismissal order held not to contravene this rule. Hilliard v. Klein, 124 Colo. 479, 238 P.2d 882 (1951).

When from the very nature of the transaction the intent to preserve the right to sue other tortfeasors is apparent, the intent of a written agreement to release some of the joint tortfeasors will be given the same effect as if it were a pure covenant not to sue; there is to be a dismissal as to such parties and a preservation of the right to continue the action with respect to the remaining defendants where it is clear that the intent of the plaintiff is to preserve any rights the plaintiff might have to recover against the remaining defendants. Farmers Elevator Co. v. Morgan, 172 Colo. 545, 474 P.2d 617 (1970).

Stipulated judgment of dismissal held final. Where the parties to litigation, dealing at arm's length, stipulate for the entry of a judgment of dismissal under section (a)(1), and they do not claim mistake, inadvertence, surprise, or excusable neglect, nor are any of the parties to the action seeking to have the order set aside, that judgment is final. Columbia Sav. & Loan Ass'n v. District Court, 186 Colo. 212, 526 P.2d 661 (1974).

"Meeting of minds" necessary before stipulation of dismissal. Where parties do not have a "meeting of the minds" as to the terms of a proposed compromise and settlement, there is no settlement which would serve as a basis for a stipulation of dismissal under section (a)(1)(B). H.W. Houston Constr. Co. v. District Court, 632 P.2d 563 (Colo. 1981).

Where no comment made as to whether first dismissal was with or without prejudice that dismissal was without prejudice. Where no comment by counsel or the court was made as to whether the dismissal prior to the trial of the first action was with or without prejudice, by the clear language of section (a)(1) of this rule, that dismissal was without prejudice. Vigil v. Lewis Maint. Serv., Inc., 38 Colo. App. 209, 554 P.2d 703 (1976); FSDW, LLC v. First Nat'l Bank, 94 P.3d 1260 (Colo. App. 2004).

Water court did not abuse its discretion by not awarding attorney fees because it was reasonable to continue to assert the claim until the eve of trial. Application of Hines Highlands P'ship, 929 P.2d 718 (Colo. 1996).

B. By Court.

A plaintiff is not entitled to dismiss his action as a matter of right after the trial has begun, but only as a matter of favor. Reagan v. Dyrenforth, 87 Colo. 126, 285 P. 775 (1931); Scofield v. Scofield, 89 Colo. 409, 3 P.2d 794 (1931).

If he wishes to escape the effect of the "two dismissal rule", he is required to obtain a dismissal by the court under section (a)(2) of this rule upon such terms and conditions as the court deems proper. Alexander v. Morrison-Knudsen Co., 166 Colo. 118, 444 P.2d 397 (1968), cert. denied, 393 U.S. 1063, 89 S. Ct. 715, 21 L. Ed. 2d 706 (1969).

Dismissal discretionary. Although section (a)(2) gives the court discretion to grant or deny a motion to dismiss, a plaintiff's motion to dismiss voluntarily without prejudice generally should be granted, unless granting the motion will cause some legal prejudice to the defendant. Tillery v. District Court, 692 P.2d 1079 (Colo. 1984); Powers v. Prof'l Rodeo Cowboys, 832 P.2d 1099 (Colo. App. 1992).

Trial court has discretionary authority to convert a voluntary proceeding to dismiss without prejudice to an involuntary dismissal with prejudice under rule governing voluntary dismissal of actions by order of the court. Powers v. Prof'l Rodeo Cowboys, 832 P.2d 1099 (Colo. App. 1992).

Fact that plaintiff may later bring the same suit against defendant in another court in and of itself is not sufficient prejudice to defendant to warrant denying motion to dismiss; however, if a dismissal would unfairly prejudice defendant, then it should be denied. Powers v. Prof'l Rodeo Cowboys, 832 P.2d 1099 (Colo. App. 1992).

Before granting a plaintiff's motion for voluntary dismissal without prejudice, the trial court must determine that any harm to the defendant may be avoided by imposing terms and conditions of dismissal. FSDW, LLC v. First Nat'l Bank, 94 P.3d 1260 (Colo. App. 2004).

In determining whether a dismissal without prejudice would cause harm to a defendant, the trial court should consider: Duplicative expense of separate litigation; extent to which current suit has progressed, including effort and expenses incurred by defendant; adequacy of plaintiff's explanation for need to dismiss; plaintiff's diligence in bringing motion to dismiss; and any undue vexatiousness on plaintiff's part. Powers v. Prof'l Rodeo Cowboys, 832 P.2d 1099 (Colo. App. 1992).

When a trial court grants a plaintiff's motion for voluntary dismissal without prejudice under subsection (a)(2) and does so over the defendant's objection, without imposing terms and conditions that the defendant requests, or without making allowances for the defendant's counterclaims, the court's order is sufficiently final to support the defendant's appeal. FSDW, LLC v. First Nat'l Bank, 94 P.3d 1260 (Colo. App. 2004).

Denial of plaintiff's motion to dismiss without prejudice not an abuse of discretion where: Case had languished for a year; plaintiff failed to verify his claim that he was financially unable to proceed; defendant incurred legal expenses of over $30,000; trial on the merits was imminent and would have been relatively simple and inexpensive; and the trial court was likely to rule in favor of defendant on the remaining legal issue. Powers v. Prof'l Rodeo Cowboys, 832 P.2d 1099 (Colo. App. 1992).

It is within discretion of district court to dismiss appeal from state administrative agency action if the appellant has not complied with the statutory time limitations for filing briefs. Warren Vill., Inc. v. Bd. of Assmt. Appeals, 619 P.2d 60 (Colo. 1980).

Trial court has implicit authority to order dismissal with prejudice under rule governing voluntary dismissal of actions by order of the court. Powers v. Prof'l Rodeo Cowboys, 832 P.2d 1099 (Colo. App. 1992).

Terms and conditions of dismissal may include award of costs and fees. Powers v. Prof'l Rodeo Cowboys, 832 P.2d 1099 (Colo. App. 1992).

Award of costs and fees may not include work that will be useful in continuing litigation, as the policy of the rule is to fashion a remedy for the defendant rather than to punish the plaintiff. The court's order must include competent evidence supporting the allocation of fees and costs. Haystack Ranch, LLC v. Fazzio, 997 P.2d 548 (Colo. 2000).

Once an adverse party has answered or filed a motion for summary judgment, section (a) requires that a stipulation of dismissal must be signed by all parties who have appeared in the action or by their attorneys. Because the city of Westminster was not a party to the stipulation of dismissal, the dismissal was not done pursuant to section (a)(1), and, therefore, under section (a)(2), a court order of dismissal was necessary. The running of the 45-day period for filing an appeal does not begin until a court order of dismissal as to all parties is filed. Trinity Broad. of Denver, Inc. v. City of Westminster, 848 P.2d 916 (Colo. 1993).

If court places terms and conditions upon voluntary dismissal by order of the court which are unacceptable to plaintiff, plaintiff is entitled to proceed with litigation. Accordingly, plaintiff was entitled to elect to proceed to trial rather than to accept dismissal with prejudice as a term and condition of dismissal. Powers v. Prof'l Rodeo Cowboys, 832 P.2d 1099 (Colo. App. 1992).

A court's decision on a section (b) motion will not be overruled on appeal unless it is shown that the findings and conclusions of the trial court were so manifestly against the weight of the evidence as to compel a contrary result. Smith v. Weindrop, 833 P.2d 856 (Colo. App. 1992).

III. INVOLUNTARY DISMISSAL BY DEFENDANT.

A. Failure to Prosecute.

Law reviews. For article, "One Year Review of Civil Procedure and Appeals", see 36 Dicta 5 (1959).

The plaintiff and not the defendant must prosecute the case in due course and without unusual delay under this rule. Johnson v. Westland Theatres, Inc., 117 Colo. 346, 187 P.2d 932 (1947).

The burden rests upon the plaintiff to prosecute a case in due course without unusual delay. Koon v. Barmettler, 134 Colo. 221, 301 P.2d 713 (1956); Cervi v. Town of Greenwood Vill., 147 Colo. 190, 362 P.2d 1050 (1961).

The burden is on the plaintiff to prosecute a case in due course and without unusual delays. BA Leasing Corp. v. Bd. of Assmt. Appeals, 653 P.2d 80 (Colo. App. 1982).

It is not the defendant's duty to make any move whatever, except such as the law requires him to make in response to the steps of the plaintiff. Rathbun v. Sparks, 162 Colo. 110, 425 P.2d 296 (1967).

It is unnecessary for the party moving to dismiss to show inconvenience or injury suffered by reason of the delay because the law presumes injury from unreasonable delay. BA Leasing Corp. v. Bd. of Assmt. Appeals, 653 P.2d 80 (Colo. App. 1982).

A plaintiff who does not move forward with reasonable dispatch demanded by this rule can find no solace in the activity of his opponent unless it has somehow hindered his own ability to proceed. Rathbun v. Sparks, 162 Colo. 110, 425 P.2d 296 (1967).

Defendant is estopped by his waiver. Where the record indicates that any laches on the part of plaintiffs was waived by defendant and his conduct in the matter, defendant is estopped to urge dismissal. Cervi v. Town of Greenwood Vill., 147 Colo. 190, 362 P.2d 1050 (1961).

Where both parties fail in their duty to observe the steps to be taken to bring their claims to a speedy trial or termination, neither should be given an advantage over the other because of this fact, and dismissal of an action for failure to prosecute should be denied upon a proper showing. Rudd v. Rogerson, 152 Colo. 370, 381 P.2d 995 (1963).

This rule which permits a court to dismiss a case for inactivity is not meant to be a rule of forfeiture, but rather a guide for the efficient and orderly administration of the courts. Mizar v. Jones, 157 Colo. 535, 403 P.2d 767 (1965).

If a person starts the law in motion and does not with reasonable promptness pursue all the steps necessary to bring the litigation to an end, he should suffer the penalty of a default

and a dismissal of the action. Rathbun v. Sparks, 162 Colo. 110, 425 P.2d 296 (1967).

A trial court has the inherent power to dismiss a claim for failure to prosecute. Cervi v. Town of Greenwood Vill., 147 Colo. 190, 362 P.2d 1050 (1961); Rudd v. Rogerson, 152 Colo. 370, 381 P.2d 995 (1963); Schleining v. Estate of Sunday, 163 Colo. 424, 431 P.2d 464 (1967); Lake Meredith Reservoir Co. v. Amity Mut., 698 P.2d 1340 (Colo. 1985); Cullen v. Phillips, 30 P.3d 828 (Colo. App. 2001).

Power to dismiss for failure to prosecute in sound discretion of trial court. The inherent power to dismiss an action for failure to prosecute rests in the sound discretion of a trial court. Cervi v. Town of Greenwood Vill., 147 Colo. 190, 362 P.2d 1050 (1961); Rudd v. Rogerson, 152 Colo. 370, 381 P.2d 995 (1963); Tell v. McElroy, 39 Colo. App. 431, 566 P.2d 374 (1977).

The decision whether there has been a failure to prosecute which warrants dismissal lies within the sound discretion of the trial court. BA Leasing Corp. v. Bd. of Assmt. Appeals, 653 P.2d 80 (Colo. App. 1982); Lake Meredith Reservoir Co. v. Amity Mut., 698 P.2d 1340 (Colo. 1985); Maxwell v. W.K.A. Inc., 728 P.2d 321 (Colo. App. 1986).

Discretion not without bounds. The discretion to dismiss an action for failure to prosecute is not without bounds and it must be borne in mind that courts "exist primarily to afford a forum to settle litigable matters between disputing parties". Farber v. Green Shoe Mfg. Co., 42 Colo. App. 255, 596 P.2d 398 (1979).

Power to dismiss for failure to prosecute is not an unlimited power. Cervi v. Town of Greenwood Vill., 147 Colo. 190, 362 P.2d 1050 (1961); Rudd v. Rogerson, 152 Colo. 370, 381 P.2d 995 (1963); Tell v. McElroy, 39 Colo. App. 431, 566 P.2d 374 (1977).

The power should not be exercised where the record shows that both parties nursed the case along with the court's approval, for in such circumstances, it is an abuse of discretion to order a dismissal. Cervi v. Town of Greenwood Vill., 147 Colo. 190, 362 P.2d 1050 (1961).

An appellate court cannot say that, as a matter of law, a plaintiff either was or was not diligent, since this conclusion was for the trial court to make within the radius of its sound discretion. Rathbun v. Sparks, 162 Colo. 110, 425 P.2d 296 (1967).

A trial court retains the discretion to dismiss an action with or without prejudice. Cornelius v. River Ridge Ranch Landowners Ass'n, 202 P.3d 564 (Colo. 2009).

Dismissal with prejudice held proper. Where there is no explanation whatsoever for plaintiff's delay of over two years in prosecuting tort action, and there was a sufficient showing to satisfy the requirement of willful default, it was a proper case for dismissal with prejudice. Kappers v. Thomas, 32 Colo. App. 200, 511 P.2d 910 (1973).

A water court does not abuse its discretion in dismissing a case with prejudice when an applicant for adjudication of water rights does not comply with the civil disclosure rules and fails to provide any information related to the applications other than that contained in the initial application. Given the large-scale nondisclosure, the water court's conclusion that the applicant's failure to comply with disclosure requirements constitutes a failure to prosecute was not an abuse of discretion. Cornelius v. River Ridge Ranch Landowners Ass'n, 202 P.3d 564 (Colo. 2009).

Serious wilful default should be shown. Courts have the responsibility to do justice between disputing parties, and one's day in court should not be denied except upon a serious showing of wilful default. Mizar v. Jones, 157 Colo. 535, 403 P.2d 767 (1965); Levine v. Colo. Transp. Co., 163 Colo. 215, 429 P.2d 274 (1967).

Where there are facts that serve as mitigating circumstances for delay, they should be considered by the court, and a motion for dismissal of an action for failure to prosecute denied upon a proper showing. Rudd v. Rogerson, 152 Colo. 370, 381 P.2d 995 (1963); Mizar v. Jones, 157 Colo. 535, 403 P.2d 767 (1965).

Where the plaintiff put forth every effort to have her case prosecuted and finally obtained new counsel in order to speed the proceedings, it cannot be said that she was guilty of failing to prosecute. Johnson v. Westland Theatres, Inc., 117 Colo. 346, 187 P.2d 932 (1947).

A statement on the day set for trial that plaintiff does not wish to proceed with the suit is sufficient to justify dismissal for want of prosecution. Merwin v. Ideal Cement Co., 128 Colo. 503, 263 P.2d 1021 (1953).

Where the supreme court reversed a judgment and remanded the cause for further proceedings and plaintiff failed for eight years to take any steps to have the cause retried, a motion to dismiss for want of prosecution should have been sustained, no reasonable excuse for the delay being shown. Yampa Valley Coal Co. v. Velotta, 83 Colo. 235, 263 P. 717 (1928).

A case disclosed a reasonable excuse for the delay where there were mitigating circumstances involved in the delay of the suit when: First, the parties were engaged in negotiation toward a settlement for three years for passage of time alone does not, under such circumstances, show that the action has not been prosecuted with reasonable diligence; second, plaintiffs were required to obtain new counsel after their former attorney had been elected county judge, for this occasioned per-

missible delay as counsel was required to familiarize himself with the facts and details of the case; and third, there was substantial evidence in the record indicating that defendant was equally responsible with plaintiffs for delaying trial of the action, since several of the later trial dates were vacated because defendant's counsel either requested postponement or failed to appear. Cervi v. Town of Greenwood Vill., 147 Colo. 190, 362 P.2d 1050 (1961).

Where the first attorney became ill for months and was unable to work and the plaintiffs were unable to retain other attorneys until they acquired the necessary funds, these facts show a reasonable excuse for the delays in prosecuting an action, particularly when, by the time the motion to dismiss for lack of prosecution was heard, the plaintiffs were ready and anxious to proceed and were not trying to delay the cause. Mizar v. Jones, 157 Colo. 535, 403 P.2d 767 (1965).

When dismissal for failure to prosecute unjustified. Where the motion to dismiss is made after the plaintiff has resumed his efforts to prosecute, has set the case for trial, and, indeed, is ready for trial on the very day the motion is heard, the policy underlying the dismissal rule to prevent unreasonable delays is less compelling than the policy favoring resolution of disputes on the merits, and the court errs in dismissing the action. Farber v. Green Shoe Mfg. Co., 42 Colo. App. 255, 596 P.2d 398 (1979).

There is no abuse of discretion in dismissing for lack of prosecution where plaintiff had not prosecuted action for thirty-seven years. Lake Meredith Reservoir Co. v. Amity Mut., 698 P.2d 1340 (Colo. 1985).

Where defendant in prior action sought and obtained dismissal for failure to prosecute but did not specifically request dismissal with prejudice, order of dismissal did not so specify, and no good cause was shown for defendant's failure to request dismissal with prejudice, subsequent "clarification" of order to specify dismissal with prejudice was ineffective. McElvaney v. Batley, 824 P.2d 73 (Colo. App. 1991).

B. No Right to Relief.

In ruling on a motion to dismiss for failure to prove a prima facie case, the proper test is whether plaintiff produced some evidence which, when taken most favorably to him, proved a claim upon which relief could be granted. Brown v. Central City Opera House Ass'n, 36 Colo. App. 334, 542 P.2d 86 (1975), aff'd, 191 Colo. 372, 553 P.2d 64 (1976).

Trial court's decision regarding whether to grant a motion for dismissal should not be disturbed on appeal unless findings of trial court are clearly against the weight of the evidence. Smith v. Weindrop, 833 P.2d 856 (Colo. App. 1992); Zick v. Krob, 872 P.2d 1290 (Colo. App. 1993).

Under this rule a trial court is empowered to determine a case on its merits at the conclusion of plaintiff's evidence and to render a judgment upon findings based thereon. Edwards Post No. 252, Regular Veterans Ass'n v. Gould, 144 Colo. 334, 356 P.2d 908 (1960).

Trial court may sit as the trier of facts. Under section (b)(1) of this rule, a trial court sitting as the trier of the facts may at the conclusion of plaintiff's presentation of evidence determine the facts and render judgment against the plaintiff. Rowe v. Bowers, 160 Colo. 379, 417 P.2d 503 (1966).

The trial court is the finder of fact. When the trial is to the court, the trial court is the finder of fact and may make its findings and render judgment against the plaintiff at the close of the plaintiff's case. Teodonno v. Bachman, 158 Colo. 1, 404 P.2d 284 (1965); Hoeprich v. Cummiskey, 158 Colo. 365, 407 P.2d 28 (1965); Kvols v. Lonsdale, 164 Colo. 125, 433 P.2d 330 (1967); Rubens v. Pember, 170 Colo. 182, 460 P.2d 803 (1969).

Where there is an issue of fact to be resolved, a trial court errs in dismissing plaintiff's complaint under this rule. Reed v. United States Fid. & Guar. Co., 176 Colo. 568, 491 P.2d 1377 (1971).

A complaint cannot be dismissed unless it appears that plaintiff is entitled to no relief under any state of facts which may be proved in support of the claim. Millard v. Smith, 30 Colo. App. 466, 495 P.2d 234 (1972).

When a trial judge, after considering all of the evidence, is convinced that there is no basis upon which a verdict in favor of the plaintiff could be supported, it is his duty as a matter of law to sustain a motion for dismissal. McSpadden v. Minick, 159 Colo. 556, 413 P.2d 463 (1966).

The correct test for determining the issues raised by a motion to dismiss in a trial without jury is whether a judgment in favor of the defendant is justified on the plaintiff's evidence and not whether plaintiff has presented a "prima facie" case. Am. Nat'l Bank v. First Nat'l Bank, 28 Colo. App. 486, 476 P.2d 304 (1970); Smith v. Weindrop, 833 P.2d 856 (Colo. App. 1992).

Where defendant's motion to reopen the divorce decree was not a motion pursuant to section (b) of this rule, no findings of fact and conclusions of law were required to accompany the ruling on this motion. McNeece v. McNeece, 39 Colo. App. 160, 562 P.2d 767 (1977).

The question on review of such action is not whether the plaintiff made a "prima facie" case, but whether a judgment in favor of the defendant was justified on the plaintiff's

evidence. Teodonno v. Bachman, 158 Colo. 1, 404 P.2d 284 (1965); Hoeprich v. Cummiskey, 158 Colo. 365, 407 P.2d 28 (1965); Rowe v. Bowers, 160 Colo. 379, 417 P.2d 503 (1966); Kvols v. Lonsdale, 164 Colo. 125, 433 P.2d 330 (1967); Rubens v. Pember, 170 Colo. 182, 460 P.2d 803 (1969); South Carolina Ins. Co. v. Fisher, 698 P.2d 1369 (Colo. App. 1984).

This is not a situation where the evidence is to be viewed in the light most favorable to plaintiffs. Rowe v. Bowers, 160 Colo. 379, 417 P.2d 503 (1966).

When reviewing a dismissal entered in jury trial, the evidence must be viewed in light most favorable to plaintiff. Teodonno v. Bachman, 158 Colo. 1, 404 P.2d 284 (1965); Kvols v. Lonsdale, 164 Colo. 125, 433 P.2d 330 (1967); Rubens v. Pember, 170 Colo. 182, 460 P.2d 803 (1969); First Nat'l Bank v. Groussman, 29 Colo. App. 215, 483 P.2d 398, aff'd, 176 Colo. 566, 491 P.2d 1382 (1971).

Every favorable inference oftentimes is indulged. Comprehended in a ruling on a motion for dismissal is oftentimes the indulgence by the trial court of every favorable inference of fact which can legitimately be drawn from plaintiff's evidence. A. D. Jones & Co. v. Parsons, 136 Colo. 434, 319 P.2d 480 (1957).

When passing upon a motion for a dismissal where the court is also the trier of fact, then, at the conclusion of plaintiffs' evidence, the trial judge may weigh the evidence, determine issues of credibility, and reach all permissible inferences, including those favoring defendants. First Nat'l Bank v. Groussman, 29 Colo. App. 215, 483 P.2d 398, aff'd, 176 Colo. 566, 491 P.2d 1382 (1971).

In granting a motion to dismiss under this rule, the court necessarily finds on the factual questions that the plaintiff has shown no right to relief. Sedalia Land Co. v. Robinson Brick & Tile Co., 28 Colo. App. 550, 475 P.2d 351 (1970).

In reviewing such findings, all conflicting evidence and possible inferences therefrom must be resolved by the appellate court in favor of the trial court's judgment. Sedalia Land Co. v. Robinson Brick & Tile Co., 28 Colo. App. 550, 475 P.2d 351 (1970).

If reasonable men could differ in the inferences and conclusions to be drawn from the evidence as it stood at the close of the plaintiff's case, then an appellate court cannot interfere with the findings and conclusions of the trial court. Teodonno v. Bachman, 158 Colo. 1, 404 P.2d 284 (1965); Hoeprich v. Cummiskey, 158 Colo. 365, 407 P.2d 28 (1965); Kvols v. Lonsdale, 164 Colo. 125, 433 P.2d 330 (1967); Rubens v. Pember, 170 Colo. 182, 460 P.2d 803 (1969); R.A. Reither Const. Co. v. Wheatland Rural Elec. Ass'n, 680 P.2d 1342 (Colo. App. 1984); Colo. Coffee Bean v. Peaberry Coffee, 251 P.3d 9 (Colo. App. 2010).

Where the question depends on a state of facts from which different minds could honestly draw different conclusions on that issue, then, under the (former) Code of Civil Procedure, the question must have been submitted to the jury for determination. Whitehead v. Valley View Consol. Gold Mining Co., 26 Colo. App. 114, 141 P. 138 (1914); City of Longmont v. Swearingen, 81 Colo. 246, 254 P. 1000 (1927); Arps v. City & County of Denver, 82 Colo. 189, 257 P. 1094 (1927); Robinson v. Belmont-Buckingham Holding Co., 94 Colo. 534, 31 P.2d 918 (1934); Lesser v. Porter, 94 Colo. 348, 30 P.2d 318 (1934).

Previously, such a motion admitted the truth of the evidence produced by plaintiff, in sense most unfavorable to defendant, and every inference legitimately deducible therefrom. Allen v. Florence & C. C. R. R., 15 Colo. App. 213, 61 P. 491 (1900); Whitehead v. Valley View Consol. Gold Mining Co., 26 Colo. App. 114, 141 P. 138 (1914); Mulford v. Nickerson, 76 Colo. 404, 232 P. 674 (1925).

Ordinarily, a denial of a defendant's motion to dismiss entitles him to go forward with proof in support of his denials and the affirmative matter set up in his answer, as it is tantamount to a finding that a plaintiff has made out a "prima facie" case. A. D. Jones & Co. v. Parsons, 136 Colo. 434, 319 P.2d 480 (1957).

Dismissal ends defendant's right to introduce evidence. In the absence of anything in the order for dismissal indicating otherwise, defendant's right thereafter to introduce additional evidence is lost. Carlile v. Zink, 130 Colo. 451, 276 P.2d 554 (1954).

A motion for nonsuit is not proper under this rule, since the motion should be for dismissal. Toy v. Rogers, 114 Colo. 432, 165 P.2d 1017 (1946); Shearer v. Snyder, 115 Colo. 232, 171 P.2d 663 (1946); W. T. Grant Co. v. Casady, 117 Colo. 405, 188 P.2d 881 (1948).

On appeal the court will treat a motion for nonsuit as one to dismiss under this rule. Shearer v. Snyder, 115 Colo. 232, 171 P.2d 663 (1946).

C. Adjudication on Merits.

An order of dismissal under this rule is an adjudication on the merits. Graham v. District Court, 137 Colo. 233, 323 P.2d 635 (1958).

Order is adjudication whether the dismissal is directed to counterclaims, cross-claims, or third-party claims. Graham v. District Court, 137 Colo. 233, 323 P.2d 635 (1958).

Jurisdictional or procedural grounds considered before substantive merits examined. Jurisdictional or procedural grounds for dismissal will be considered prior to examination of the substantive merits of a case. Summerhouse Condo. Ass'n v. Majestic Sav. & Loan Ass'n, 660 P.2d 16 (Colo. App. 1982).

A mere dismissal without prejudice is no bar to another action for the same cause. Hallack v. Loft, 19 Colo. 74, 34 P. 568 (1893); Martin v. McCarthy, 3 Colo. App. 37, 32 P. 551 (1893); First Nat'l Bank v. Mulich, 83 Colo. 518, 266 P. 1110 (1928).

A dismissal without prejudice does not operate as "res judicata". Wistrand v. Leach Realty Co., 147 Colo. 573, 364 P.2d 396 (1961).

A dismissal based upon preliminary, subsidiary, technical, or jurisdictional grounds or lack of standing does not operate as "res judicata". Batterman v. Wells Fargo AG Credit Corp., 802 P.2d 1112 (Colo. App. 1990).

Where the order of dismissal expressly specifies that it is without prejudice, the plaintiff has a right to have his claim adjudicated by amending his complaint or standing on the complaint and appealing. Wistrand v. Leach Realty Co., 147 Colo. 573, 364 P.2d 396 (1961).

Amendment at close of evidence is error. At the close of the evidence, it is error to grant plaintiff, over defendant's objection, leave to amend the complaint to allege a new matter; instead of allowing the amendment, the trial court, under section (b)(1) of this rule, could dismiss plaintiff's complaint with a specification that such dismissal would not operate as an adjudication upon the merits. Barnes v. Wright, 123 Colo. 462, 231 P.2d 794 (1951).

A judgment upon the merits is final and conclusive upon the parties, unless suspended or set aside by some proper proceeding. Hallack v. Loft, 19 Colo. 74, 34 P. 568 (1893).

Dismissal "with prejudice" under C.R.C.P. 3(a) is a nullity. Section (b)(1) of this rule makes it clear that dismissals under C.R.C.P. 3(a), are without prejudice and do not operate as an adjudication on the merits; therefore the words "with prejudice" in an order of dismissal are a nullity and would in no way bar a subsequent action asserting the same claim for relief as set forth in the complaint. Morehart v. Nat'l Tea Co., 29 Colo. App. 465, 485 P.2d 907 (1971); Market Eng'g v. Monogram Software, 805 P.2d 1185 (Colo. App. 1991).

Where a complaint is dismissed as to certain defendants and judgment of dismissal entered, a court has no power, after the time to file a motion for a new trial has expired as to such defendants, to grant a motion for a new trial as to all defendants, such dismissal constituting a judgment on the merits under this rule. Graham v. District Court, 137 Colo. 233, 323 P.2d 635 (1958).

Dismissal as to decedent under C.R.C.P. 25(a)(1) does not absolve remaining defendants who may be liable on a theory of respondeat superior. Cheney v. Hailey, 686 P.2d 808 (Colo. App. 1984).

Where an action is dismissed because of the absence of proper parties, there is no decision on the merits. Summerhouse Condo. Ass'n v. Majestic Sav. & Loan Ass'n, 660 P.2d 16 (Colo. App. 1982).

If a plaintiff wishes to contest such a dismissal as error, a timely motion for a new trial must be filed. Graham v. District Court, 137 Colo. 233, 323 P.2d 635 (1958).

Where a motion to dismiss is based upon failure of a plaintiff to establish a claim since he has released some joint tortfeasors, there is nothing in the record and the law to justify any conclusion other than that the action should proceed against the remaining joint tortfeasors where it is clear from a written agreement that they are not to be released as defendants. Farmers Elevator Co. v. Morgan, 172 Colo. 545, 474 P.2d 617 (1970).

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

Applied in O'Done v. Shulman, 124 Colo. 445, 238 P.2d 1117 (1951); City & County of Denver v. Stanley Aviation Corp., 143 Colo. 182, 352 P.2d 291 (1960); Marcotte v. Olin Mathieson Chem. Corp., 162 Colo. 131, 425 P.2d 37 (1967).

IV. INVOLUNTARY DISMISSAL BY COURT.

This rule contemplates that notice precede an order of dismissal. Schleining v. Estate of Sunday, 163 Colo. 424, 431 P.2d 464 (1967); Maxwell v. W.K.A. Inc., 728 P.2d 321 (Colo. App. 1986).

Courts of record have power to make and enforce rules for the transaction of their business, the only restriction upon such power being that the rules shall be reasonable and shall not contravene a statute. Cone v. Jackson, 12 Colo. App. 461, 55 P. 940 (1899); Hoy v. McConaghy, 14 Colo. App. 372, 60 P. 184 (1900).

The rule of a trial court providing for the dismissal of causes for failure of prosecution is valid, and the court has power to enforce it. Carnahan v. Connolly, 17 Colo. App. 98, 68 P. 836 (1902).

The rule can be enforced for failing to timely perform act required by law. A rule of court providing for the dismissal of cases for want of prosecution can only be enforced against a party for a failure to perform, within the prescribed time, some act required of him by law. Hoy v. McConaghy, 14 Colo. App. 372, 60 P. 184 (1900).

Where the facts to which a court applied the rule in dismissing a case are not before an appellate court, it cannot be said that the trial court abused its discretion or violated the

law in applying the rule. Carnahan v. Connolly, 17 Colo. App. 98, 68 P. 836 (1902).

A judgment of dismissal entered without notice is void and is subject to direct or collateral attack. Thompson v. McCormick, 138 Colo. 434, 335 P.2d 265 (1959).

Where a trial court's own rules give the court authority to set a case for trial without notice other than that explicit in the rule itself, then, although this rule governing dismissals requires actual notice to show cause why the case should not be dismissed before a court can entertain a show cause order, the trial court should adhere to its own published rules, a departure constituting an abuse of its discretion. Schleining v. Estate of Sunday, 163 Colo. 424, 431 P.2d 464 (1967).

Where a local rule of a trial court provides that at the opening of a term all matters ready for trial will be set therefor, but the evidence discloses that a plaintiff was diligent in his desire to have his action tried and concluded and there appears no explanation why the case, being at issue, was not originally set for trial by the trial court pursuant to its rule, then dismissal of the action for failure to prosecute is an abuse of discretion. Rudd v. Rogerson, 152 Colo. 370, 381 P.2d 995 (1963).

Dismissal of action improper where court allowed an additional time period within which the plaintiffs were to effect service and amend the complaint and plaintiffs met the time deadline imposed by the court. Nelson v. Blacker, 701 P.2d 135 (Colo. App. 1985).

In addition, it was an abuse of discretion for court to impose a sanction for both parties' failure to file trial data certificates which was detrimental only to plaintiff, and benefitted the equally noncomplying defendants. Maxwell v. W.K.A. Inc., 728 P.2d 321 (Colo. App. 1986).

It is error to dismiss where plaintiffs are seeking to proceed. Where no party has sought a dismissal, plaintiffs are seeking to proceed, no hearing is had on the question of justifiable cause for dismissal and no findings of wilful default are made by the court, it is error for a trial court to dismiss the action. Levine v. Colo. Transp. Co., 163 Colo. 215, 429 P.2d 274 (1967); Maxwell v. W.K.A. Inc., 728 P.2d 321 (Colo. App. 1986).

Mere "activity" in a case under a local court rule is not sufficient to protect against motions to dismiss for failure to prosecute, where the rule refers to "progress" and not simply "activity". "Progress" is a particular type of activity, to move forward, and clearly what is envisaged by such a rule is progress in prosecuting to a conclusion some claim for relief. Rathbun v. Sparks, 162 Colo. 110, 425 P.2d 296 (1967).

A district court dismissal with prejudice in one county is "res judicata" to the same proceeding in another county and will support dismissal without prejudice in the second county; to hold otherwise would constitute a collateral attack on the first judgment. Smith v. Bott, 169 Colo. 133, 454 P.2d 82 (1969).

Court's sua sponte order of dismissal for failure to prosecute cannot stand if it is not preceded by the notice required by this section and C.R.C.P. 121 § 1-10. In re Custody of Nugent, 955 P.2d 584 (Colo. App. 1997); Koh v. Kumar, 207 P.3d 900 (Colo. App. 2009).

A delay reduction order does not suffice to provide reasonable notice of dismissal for purposes of section (b)(2). Koh v. Kumar, 207 P.3d 900 (Colo. App. 2009).

Claims asserted barred by doctrine of res judicata. Where plaintiff originally brought claims in federal court and asked federal court to assert its discretionary pendent jurisdiction over claims, failed to request federal court to assert diversity jurisdiction, and failed to respond to federal court's order to show cause why it should assert its pendent jurisdiction and federal court dismissed claims based on default of plaintiff, plaintiff's claims are barred in state court by res judicata because plaintiff failed to show that the federal court would have refused to exercise its pendent jurisdiction. Whalen v. United Air Lines, Inc., 851 P.2d 251 (Colo. App. 1993).

The substance of the doctrine of "res judicata", that any right, fact, or legal matter which is put in issue and directly adjudicated or necessarily determined by a court of competent jurisdiction is conclusively settled by such judgment and cannot afterwards be litigated or raised again by the same parties applies in criminal proceedings with the same conclusive effect as in civil proceedings. Trujillo v. People, 178 Colo. 136, 496 P.2d 1026 (1972).

Applied in Hatcher v. Hatcher, 169 Colo. 174, 454 P.2d 812 (1969); Streu v. City of Colo. Springs ex rel. Colo. Springs Utils., 239 P.3d 1264 (Colo. 2010).

V. DISMISSAL OF COUNTERCLAIM, CROSS CLAIM, OR THIRD-PARTY CLAIM.

This rule is applicable where multiple claims may be involved. Graham v. District Court, 137 Colo. 233, 323 P.2d 635 (1958).

This rule is controlling where a complaint is dismissed as to less than all defendants. There is apparent conflict in the directions contained in sections (b)(1) and (2) and (c) of this rule concerning dismissals and C.R.C.P. 54(a) and (b) relating to judgments on multiple claims. The latter rule requires an express determination that a claim has been adjudicated, while section (b)(1) of this rule provides that in the absence of a specific direction, an order of dismissal operates as an adjudication. However, this rule is controlling where a complaint is

dismissed as to less than all of the defendants in a case. Graham v. District Court, 137 Colo. 233, 323 P.2d 635 (1958).

This rule gives plaintiff right to dismiss only plaintiff's own claims and not separate and independent claims brought by another party. Accordingly, plaintiff's voluntary dismissal did not preclude a court from ruling on defendant's motion for a special shareholder meeting when the motion, despite not being pled as a separate complaint or counterclaim, was best characterized as a separate cause of action independent of plaintiff's action. Alpha Spacecom, Inc. v. Hu, 179 P.3d 62 (Colo. App. 2007).

Rule 42. Consolidation; Separate Trials

(a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) Separate Trials. The court in furtherance of convenience, or to avoid prejudice, or when separate trials will be conducive to expedition or economy may order a separate trial of any separate issue or of any number of claims, cross claims, counterclaims, third-party claims, or issues.

(c) Court Sessions Public; When Closed. All sessions of court shall be public, except that when it appears to the court that the action will be of such character as to injure public morals, or when orderly procedure requires it, it shall be its duty to exclude all persons not officers of the court or connected with such case.

Cross references: For judgement on a counterclaim or cross claim if separate trial is ordered, see C.R.C.P. 13(i); for separate trial of third-party issues, see C.R.C.P. 14(a); for separate judgments, see C.R.C.P. 54(b); for harmless error, see C.R.C.P. 61.

ANNOTATION

I. General Consideration.
II. Consolidation.
III. Separate Trials.
IV. Court Sessions Public.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Trials: Rules 38-53", see 23 Rocky Mt. L. Rev. 571 (1951). For article, "One Year Review of Civil Procedure and Appeals", see 38 Dicta 133 (1961).

The submission of issues for special verdicts is appropriate, especially when the issues are complicated or likely to confuse the jury. Thus, the submission of special issues of fact to the jury lies within the sound discretion of the trial court. Molnar v. Law, 776 P.2d 1156 (Colo. App. 1989).

Applied in Dolan v. Mitchell, 179 Colo. 359, 502 P.2d 72 (1972); Gleason v. Guzman, 623 P.2d 378 (Colo. 1981); Judd Constr. Co. v. Evans Joint Venture, 642 P.2d 922 (Colo. 1982).

II. CONSOLIDATION.

This rule for consolidation of causes of actions is a departure from the former Code of Civil Procedure. Willy v. Atchison, T. & S. F. Ry., 115 Colo. 306, 172 P.2d 958 (1946).

Consolidated suits do not merge into a single cause or make those who are parties in one suit parties in another. Nat'l Farmers Union Prop. & Cas. Co. v. Frackelton, 645 P.2d 1321 (Colo. App. 1981); Nat'l Farmers Union Prop. & Cas. Co. v. Frackelton, 650 P.2d 571 (Colo. App. 1981), aff'd, 662 P.2d 1056 (Colo. 1983).

A discretionary order of consolidation does not merge the consolidated suits into a single cause of action. Nat'l Farmers Union Prop. & Gas. Co. v. Frackelton, 662 P.2d 1056 (Colo. 1983).

It gives to the trial judge discretionary authority to consolidate actions. Willy v. Atchison, T. & S. F. Ry., 115 Colo. 306, 172 P.2d 958 (1946).

Consolidation is a matter of the trial court's discretion. Nat'l Farmers Union Prop. & Cas. Co. v. Frackelton, 650 P.2d 571 (Colo. App. 1981), aff'd, 662 P.2d 1056 (Colo. 1983).

Consolidation is a matter within the discretion of a trial court, and its exercise of that discretion will not be distributed absent a clear showing of abuse. People ex rel. J.F., 672 P.2d 544 (Colo. App. 1983).

Consolidation is not an abuse of discretion where common questions of law and fact were present. Mortgage Inv. Corp. v. Battle Mountain Corp., 56 P.3d 1104 (Colo. App. 2001), rev'd on

other grounds, 70 P.3d 1176 (Colo. 2003).

Consolidation not abuse of court's discretion where husband and wife were alleging that same defendant had been negligent to both parties, the same questions of law relating to proximate cause and damages were raised by both plaintiffs, and both plaintiffs were represented by same attorney. Askew v. Gerace, 851 P.2d 199 (Colo. App. 1992).

Standard of review shall be used by courts of review. It is only when it clearly appears that discretionary authority has been abused that courts of review will hold that the consolidation was prejudicial to a complaining party. Willy v. Atchison, T. & S. F. Ry., 115 Colo. 306, 172 P.2d 958 (1946).

Consolidating several tort actions growing out of one accident was proper. The trial judge did not abuse his discretion in consolidating actions by a widow for the death of her husband, for medical care of her minor child, and, as next friend of her minor child, for injuries suffered by the child, all of which actions grew out of the same accident. Willy v. Atchison, T. & S. F. Ry., 115 Colo. 306, 172 P.2d 958 (1946).

Consolidation would have been proper course of action, rather than dismissing one of two cases on the day of trial, if both actions involve common question of law or fact. Weyerhaeuser Mortgage Co. v. Equitable Gen. Ins. Co., 686 P.2d 1357 (Colo. App. 1983).

Consolidation does not change different appeal procedures applicable to individual cases. Denver v. Bd. of Assessment Appeals, 748 P.2d 1306 (Colo. App. 1987).

Applied in Schimmel v. District Court, 155 Colo. 240, 393 P.2d 741 (1964).

III. SEPARATE TRIALS.

Law reviews. For note, "Res Judicata — Should It Apply to a Judgment Which is Being Appealed?", see 33 Rocky Mt. L. Rev. 95 (1960). For article, "One Year Review of Civil Procedure and Appeals", see 40 Den. L. Ctr. J. 66 (1963). For article, "One Year Review of Torts", see 40 Den. L. Ctr. J. 160 (1963).

This rule vests discretion in the trial court as to whether there shall be separate trials of multiple claims. Moseley v. Lamirato, 149 Colo. 440, 370 P.2d 450 (1962); Prudential Prop. & Cas. Ins. Co. of Am. v. District Court, 617 P.2d 556 (Colo. 1980); People in Interest of D.M.W., 752 P.2d 587 (Colo. App. 1987).

A trial judge is permitted wide discretion when he finds that the necessary prerequisites to separate trials laid down by the rules exist. Sutterfield v. District Court ex rel. County of Arapahoe, 165 Colo. 225, 438 P.2d 236 (1968).

Upon finding that the jury might improperly use the evidence to show a propensity of negligent driving, the court properly bifurcated separate claims of negligence and negligent hiring and supervision. Martin v. Minnard, 862 P.2d 1014 (Colo. App. 1993).

This rule is permissive, not mandatory. Moseley v. Lamirato, 149 Colo. 440, 370 P.2d 450 (1962).

This rule is permissive and not mandatory, and the trial court has wide discretion in its application. Kielsmier v. Foster, 669 P.2d 630 (Colo. App. 1983).

This section provides a remedy to prevent prejudice to parties resulting from joinder. Sutterfield v. District Court ex rel. County of Arapahoe, 165 Colo. 225, 438 P.2d 236 (1968).

Court order as to joint or separate trial will not be disturbed in the absence of a clear showing that there has been an abuse of discretion. Prudential Prop. & Cas. Ins. Co. of Am. v. District Court, 617 P.2d 556 (Colo. 1980); O'Neal v. Reliance Mortg. Corp., 721 P.2d 1230 (Colo. App. 1986); Colo. Coffee Bean v. Peaberry Coffee, 251 P.3d 9 (Colo. App. 2010).

Standard of review of discretionary power shall be used on appeal. A ruling by the trial court under this rule where it has discretionary power will not be disturbed on review, unless it be clearly shown that there was an abuse of such discretionary power. Moseley v. Lamirato, 149 Colo. 440, 370 P.2d 450 (1962).

Severance without findings improper. Where the trial court made no finding that any of the conditions permitting separate trials of properly joined claims were present, the severance cannot be sustained until proper findings are made. Sutterfield v. District Court ex rel. County of Arapahoe, 165 Colo. 225, 438 P.2d 236 (1968); Gaede v. District Court, 676 P.2d 1186 (Colo. 1984).

Belated request properly denied. A request for a separate trial of the second claim of a complaint made moments before commencement of trial, where the case had been at issue more than seven months, was properly denied. Moseley v. Lamirato, 149 Colo. 440, 370 P.2d 450 (1962).

Abuse of discretion in ordering joint trial occurs where the court's failure to order separate proceedings virtually assures prejudice to a party. Prudential Prop. & Cas. Ins. Co. of Am. v. District Court, 617 P.2d 556 (Colo. 1980).

Denial of motion for separate hearings not an abuse of discretion, where juvenile court found that issues concerning both parents were interlocked and that court as trier of fact would not have difficulty separating issues and evidence as to each party, and where no showing of actual prejudice was made. People in Interest of D.M.W., 752 P.2d 587 (Colo. App. 1987).

Bifurcated trial on issue of liability for

punitive damages in products liability suit not granted. In products liability claim, defendant did not make an adequate showing of past punitive damages awards arising out of the same course of conduct to warrant granting a bifurcated trial on the issue of punitive damages in order to avoid any prejudice to the defendant on the issue of liability. Palmer v. A.H. Robins Co., Inc., 684 P.2d 187 (Colo. 1984).

IV. COURT SESSIONS PUBLIC.

Protective order would not violate section (c) in trade secrets trial. Proviso in protective order for exclusion of the public would not violate the mandate of section (c) relating to public sessions of court where the trial involves trade secrets. Curtis, Inc. v. District Court, 186 Colo. 226, 526 P.2d 1335 (1974).

Rule 42.1. Consolidated Multidistrict Litigation

(a) Definitions.

(1) "Panel" means the Panel on Consolidated Multidistrict Litigation. The Panel shall consist of not less than three nor more than seven district judges designated from time to time by the Chief Justice, no two of whom shall be from the same judicial district. One of the judges shall be appointed as Chairman by the Chief Justice. The Panel may sit in departments of three or more, as designated by the Chairman of the Panel. The concurrence of a majority of the members sitting in department shall be necessary to any action by the Panel, except that the chair may approve stipulations and recommend consolidation or order dismissal consistent with those stipulations, may rule on motions of a procedural nature, and may deny consolidation when it appears from the face of the motion that the panel does not have jurisdiction to recommend consolidation.

(2) "Clerk" means the Clerk of the Panel. The Clerk of the Colorado Supreme Court shall be the Clerk of the Panel.

(b) Transfer. When actions involving a common question of law or fact are pending in different judicial districts, such actions may be transferred to any judge for hearing or trial of any or all of the matters in issue in any action, provided however, (1) any jury trial shall be held in the place prescribed by Rule 98 C.R.C.P.; and (2) such actions shall be consolidated only as permitted by Rule 42 C.R.C.P.

(c) Initiation of Proceedings. Proceedings for the transfer of an action under this rule may be initiated by:

(1) The Panel upon its own initiative or upon the request of any court; or

(2) Upon a motion filed with the Panel by a party in any action in which transfer under this rule may be appropriate, which motion shall not be entertained unless filed more than 91 days (13 weeks) next preceding any trial date set in the affected actions, unless a showing of good cause is made. A copy of such motion shall be filed in the district court in which the moving party's action is pending.

(d) Order to Show Cause; Hearing; Response. When the transfer of multidistrict litigation is being considered, an order shall be entered by the Panel directing the parties in each action to show cause why the action or actions should not be transferred. A hearing shall be set at the time the show cause order is entered. Any party may file a response to the show cause order and an accompanying brief within 14 days after the order is entered, unless otherwise provided in the order. Within 7 days of receipt of a party's response or brief, any party may file a reply brief limited to new matters.

(1) Except by permission of the Panel, briefs shall not exceed five (5) pages, exclusive of appendices. An original and seven (7) copies of each brief shall be filed with the Clerk of the Panel.

(2) Each side shall be allowed fifteen (15) minutes of oral argument at the hearing, unless extended by the Panel.

(e) Pending Motion or Order to Show Cause; No Effect. The pendency of a motion or order to show cause before the Panel concerning the transfer of an action pursuant to this rule shall not affect or suspend proceedings and orders in the district court and does not limit the jurisdiction of that court.

(f) Orders of Panel. The Panel may enter such orders as are appropriate including but not limited to staying proceedings in all actions until a determination is made whether the actions should be transferred under the rule and setting any matter for hearing.

(g) Standards Governing Transfer. Transfer of civil actions sharing a common question of law or fact is appropriate if one judge hearing all of the actions will promote the ends of justice and the just and efficient conduct of such actions. The factors to be considered shall include, but shall not be limited to, the following: (1) whether the common question of fact or law is predominating and significant to the litigation; (2) the convenience of the parties, witnesses and counsel; (3) the relative development of the action and the work product of counsel; (4) the efficient utilization of judicial facilities and manpower; (5) the calendar of the courts; (6) the disadvantages of duplicative and inconsistent rulings, orders or judgments; and (7) the likelihood of settlement of the actions without further litigation should transfer be denied.

(h) Certification to Chief Justice. Upon the determination by the Panel that the actions should be transferred under this rule, the Panel shall certify the actions to the Chief Justice and recommend the assignment of a specific judge to hear the actions.

(i) Appellate Review; Assignment of Judge. No proceedings for review of any certification order or other order entered by the Panel shall be permitted except as permitted by Rule 21 C.A.R. If no original proceedings are commenced in the Supreme Court or a show cause order is not issued by the Supreme Court within 21 days after entry of the certification order by the Panel, the Chief Justice shall assign the actions to a judge.

(j) Other Cases; Transfer by Clerk. Upon learning of the pendency of a civil action apparently sharing common questions of law or fact with actions previously transferred under this rule, an order may be entered by the Clerk transferring the action to the assigned judge. A copy of the order shall be served on each party to the litigation. The order shall not become final until 14 days after entry thereof. Any party opposing the transfer shall file a notice of opposition with the Clerk within 14 days from the date the order is entered. The notice of opposition shall be supported by a brief. Any party shall have 14 days to file an answer brief. The filing of a notice of opposition and brief shall suspend the finality of the Clerk's order pending action by the Panel.

(k) Procedure After Transfer.

(1) Upon receipt of an order from the Chief Justice assigning the actions to a judge, the clerk of the transferor court shall submit to the clerk of the court of the assigned judge copies of all papers contained in the original file and a certified copy of the register of actions.

(2) Original pleadings shall thereafter be filed with the clerk of the transferee court and copies filed with the clerk of the transferor court.

(l) Adoption of Rules. Subject to approval by the Colorado Supreme Court in accordance with Rule 121 C.R.C.P., the Panel may adopt rules of procedures on Consolidated Multidistrict Litigation consistent with this Rule.

Source: (a)(1) and (k) amended and effective October 22, 1992; (c)(2), IP(d), (i), and (j) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

ANNOTATION

Law reviews. For article, "Multidistrict Litigation: An Overview for Practitioners", see 11 Colo. Law. 2 (1982). For article, "Colorado's Multidistrict Litigation Panel", see 17 Colo. Law. 1981 (1988).

Nowhere does this rule expressly grant the transferee judge assigned to hear "all of the actions" the authority to transfer any of the actions or individual issues related to separate parties to another judge. Beckord v. District Court, 698 P.2d 1323 (Colo. 1985).

Rule 43. Evidence

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

(b) to (d) Repealed.

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

(f) to (h) Repealed.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Cross references: For general provisions concerning evidence and witnesses, see article 25 and part 1 of article 90 of title 13, C.R.S.; for rights of examination of party in interest by adverse party, see § 13-90-116, C.R.S.; for costs, see C.R.C.P. 54(d); for admissibility of evidence of lost instruments, see § 13-25-113, C.R.S.; for admissibility of copies of lost instruments and records, see §§ 24-72-101 and 24-72-111, C.R.S.; for admissibility of copies of documents kept by county officers, see § 30-10-103, C.R.S.

ANNOTATION

I. GENERAL CONSIDERATION.

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

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

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

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

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

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

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

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

II. FORM AND ADMISSIBILITY.

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

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

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

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

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

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

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

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

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

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

Trial court shall determine whether witness has the right to express an opinion. The sufficiency of the evidence to establish the

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

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

Where a witness has no personal knowledge of a fact, he should not be allowed to give testimony concerning that fact because there would then be reliance on the out-of-court declaration of another and the normal safeguards of oath, confrontation, and cross-examination would be precluded. Simonton v. Continental Cas. Co., 32 Colo. App. 138, 507 P.2d 1132 (1973).

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

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

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

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

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

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

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

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

Where witness is officer who conducted investigation of scene of accident minutes after accident is an expert as to point of impact and the extent of movement of vehicles is fully testified to by competent witness before officer's opinion is illicited, officer's testimony as to point of impact should be admitted despite absence of skid marks and fact that prior to officer's arrival at scene, automobiles had been moved slightly. Dolan v. Mitchell, 179 Colo. 359, 502 P.2d 72 (1972).

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

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

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

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

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

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

Where a photograph of the scene of an accident taken after vehicles had been removed is offered to show scene of accident and not the condition of the road surface, then the wetness or dryness of road surface is not significant, and the photograph should be admitted.

Dolan v. Mitchell, 179 Colo. 359, 502 P.2d 72 (1972).

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

Fact that photographic evidence may be cumulative is not alone ground for its rejection. Dolan v. Mitchell, 179 Colo. 359, 502 P.2d 72 (1972).

Testimony properly excluded as hearsay. Where the trial court refuses to permit witnesses to testify to conversations with other persons concerning the knowledge of such other persons about the activities of an individual, such testimony is properly excluded as hearsay. Am. Nat'l Bank v. Quad Constr., Inc., 31 Colo. App. 373, 504 P.2d 1113 (1972).

Past recollection recorded exception to hearsay rule. A determination by the trial court that a statement was made too remote in point of time to the date of an accident to be admissible under the past recollection recorded exception to the hearsay rule was a matter resting within the discretion of the trial court and such determination will be disturbed only if the trial court abused its discretion. McCall v. Roper, 32 Colo. App. 352, 511 P.2d 541 (1973).

Hearsay is admissible as evidence against the interest of a deceased. The testimony of an individual, who brings suit against the estate of a deceased for proceeds from the sale of property allegedly held in trust, to the effect that the deceased told the claimant that he was holding some property in trust for one of the claimant's parents is hearsay but admissible as evidence against the interest of the deceased. In re Estate of Granberry, 30 Colo. App. 550, 498 P.2d 960 (1972).

It is not error to admit hearsay to demonstrate intention or state of mind. Where the trial court took adequate precautions in admitting hearsay testimony, including instructing the jury as to the manner and purpose for which the evidence might be considered, the trial court did not err in admitting evidence of a declaration for the limited purpose of demonstrating intention or state of mind. Simonton v. Continental Cas. Co., 32 Colo. App. 138, 507 P.2d 1132 (1973).

A person's intentions may be reflected by the declarations of that person, and these declarations are therefore admissible not for the proof of the facts stated by the declaration but to demonstrate the state of mind of the declarant; when offered for this purpose, the hearsay rule is not applicable to such a declaration. Simonton v. Continental Cas. Co., 32 Colo. App. 138, 507 P.2d 1132 (1973).

In determining whether to admit hearsay evidence to establish state of mind, the court must make a judgment based on a weighing of the materiality and relevance of the testimony for a limited purpose against the possibility that, in spite of an instruction by the court to the contrary, the jury might consider a statement for the truth of the facts it contains. Simonton v. Continental Cas. Co., 32 Colo. App. 138, 507 P.2d 1132 (1973).

Where testimony is hearsay, its admission is harmless when the essential and operative facts upon which a judgment rests are established by competent evidence in the record. San Isabel Elec. Ass'n v. Bramer, 31 Colo. App. 134, 500 P.2d 821 (1972), aff'd, 182 Colo. 15, 510 P.2d 438 (1973).

Defendant could not predicate error on trial court's denial of admission of hearsay evidence; since defendant made no offer of proof, it was not apparent from the context what the substance of the testimony would have been, and defense counsel made no objection to the denial. People v. Hoover, 165 P.3d 784 (Colo. App. 2006).

A deed may be proven by parol evidence to be a mortgage, but the evidence must be clear, certain, and unequivocal as well as be convincing beyond a reasonable doubt. Padia v. Hobbs, 132 Colo. 165, 286 P.2d 613 (1955).

Admitting exhibits out of the usual order is immaterial where the objecting party is the only witness, the order of proof being in the sound discretion of the court. Shearer v. Snyder, 115 Colo. 232, 171 P.2d 663 (1946).

Applied in Hamilton v. Hardy, 37 Colo. App. 375, 549 P.2d 1099 (1976).

III. EVIDENCE ON MOTIONS.

Trial court erred in awarding fees and expenses to receiver over objection of an interested party, without a hearing, without any representation that fees and expenses were reasonable and necessary, and without receiving sworn testimony or verified documents. Cedar Lane Invs. v. St. Paul Fire & Marine Ins. Co., 883 P.2d 600 (Colo. App. 1994).

Applied in Sollitt v. District Court, 180 Colo. 114, 502 P.2d 1108 (1972).

Rule 44. Proof of Official Record

(a) Authentication.

(1) **Domestic.** An official record kept within the United States, or any state, district, or commonwealth, or within a territory subject to the administrative or judicial jurisdiction of the United States, or an entry therein, when admissible for any purpose, may be evidenced

by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by the officer's deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of the officer's office.

(2) **Foreign.** A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof; or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuiness of signature and official position relating to the attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (A) admit an attested copy without final certification or (B) permit the foreign official record to be evidenced by an attested summary with or without a final certification. The final certification is unnecessary if the record and the attestation are certified as provided in a treaty or convention to which the United States and the foreign country in which the official record is located are parties.

(b) Lack of Record. A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in subsection (a)(1) of this Rule in the case of a domestic record, or complying with the requirements of subsection (a)(2) of this Rule for a summary in the case of a foreign record, is admissible as evidence that the records contain no such record or entry.

(c) Other Proof. This Rule does not prevent the proof of official records or of entry or lack of entry therein by any method authorized by law.

(d) Seal Dispensed With. In the event any office or officer, authenticating any documents under the provisions of this Rule, has no official seal, then authentication by seal is dispensed with.

(e) Statutes and Laws of Other States and Countries. A printed copy of a statute, or other written law, of another state, or of a territory, or of a foreign country, or a printed copy of a proclamation, edict, decree, or ordinance by the executive power thereof, contained in a book or publication purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law in the judicial tribunals thereof, is presumptive evidence of the statute, law, proclamation, edict, decree, or ordinance. The unwritten or common law of another state, or of a territory, or of a foreign country, may be proved as a fact by oral evidence. The books of reports of cases adjudged in the courts thereof must also be admitted as presumptive evidence of the unwritten or common law thereof. The law of such state or territory or foreign country is to be determined by the court or master and included in the findings of the court or master or instructions to the jury, as the case may be. Such finding or instruction is subject to review. In determining such law, neither the trial court nor the appellate court shall be limited to the evidence produced on the trial by the parties, but may consult any of the written authorities above named in this section (e), with the same force and effect as if the same had been admitted in evidence.

Source: (a) amended October 8, 1992, effective January 1, 1993.

Cross references: For use of printed statutes and reports of decisions as evidence, see § 13-25-101, C.R.S.; for admissibility of evidence, see C.R.C.P. 43(a); for courts and clerks, see C.R.C.P. 77; for proof of parts of book, see C.R.C.P. 264.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, "Trials: Rules 38-53", see 23 Rocky Mt. L. Rev. 571 (1951). For article, "One Year Review of Civil Procedure and Appeals", see 38 Dicta 133 (1961). For note, "One Year Review of Colorado Law — 1964", see 42 Den. L. Ctr. J. 140 (1965). For article, "Authentication of Foreign Public Documents for Use in Trial", see 11 Colo. Law. 692 (1982).

Exclusion by trial judge of document admissible under this rule is not prejudicial error where the defendant was successful in introducing a similar exhibit from which the excluded document had been prepared and which contained exactly the same information as the excluded document. Polster v. Griff's of Am., Inc., 34 Colo. App. 161, 525 P.2d 1179 (1974).

II. AUTHENTICATION.

A. In General.

Law reviews. For article, "One Year Review of Civil Procedure and Appeals", see 40 Den. L. Ctr. J. 66 (1963).

B. Domestic.

Section (a)(1) not exclusive. While section (a)(1) of this rule established a method by which official records may be admitted into evidence as self-authenticating documents, it is not the exclusive method by which such documents can be introduced. People v. Rivera, 37 Colo. App. 4, 542 P.2d 90 (1975).

Where one claims that documents were not properly authenticated under this rule, but he testifies, as of his own knowledge, to every fact sought to have been established by the offered documents, any error is therefore harmless. Nieto v. People, 160 Colo. 179, 415 P.2d 531 (1966).

Applied in Hamilton v. Hardy, 37 Colo. App. 375, 549 P.2d 1099 (1976).

C. Foreign.

Law reviews. For comment on Walker v. Calada Materials Co., appearing below, see 35 U. Colo. L. Rev. 451 (1963).

This rule is plain and in full force and effect. Superior Distrib. Corp. v. Hargrove, 144 Colo. 115, 355 P.2d 312 (1960).

This rule prescribes how an official record may be evidenced. Walker v. Calada Materials Co., 150 Colo. 572, 375 P.2d 679 (1962).

It does not purport to prescribe what must be established in order to prevail in an action based upon a foreign judgment. Walker v. Calada Materials Co., 150 Colo. 572, 375 P.2d 679 (1962).

A foreign judgment is dependent for its effect and validity upon the record which precedes it. Walker v. Calada Materials Co., 150 Colo. 572, 375 P.2d 679 (1962).

The judgment roll should accompany copy of the judgment. In an action on a judgment of a foreign state an exemplified copy of the judgment, to be admissible in evidence, should be accompanied by the judgment roll, i.e., the record proper up to the time of judgment. The complaint, the summons, the return upon the summons, the affidavit for publication where constructive service is made, and papers of that sort constitute a part of the judgment roll. Walker v. Calada Materials Co., 150 Colo. 572, 375 P.2d 679 (1962).

There is a difference between a certified copy of a record and one made according to this rule. Superior Distrib. Corp. v. Hargrove, 144 Colo. 115, 355 P.2d 312 (1960).

The admission of certified copies of documents purporting to prove a foreign judgment is erroneous where such documents failed to comply with the provisions of this rule. Superior Distrib. Corp. v. Hargrove, 144 Colo. 115, 355 P.2d 312 (1960).

Where there is no attempt to comply with the provisions of this rule, a decree entered by a foreign court is not admissible in evidence for any purpose. Potter v. Potter, 131 Colo. 14, 278 P.2d 1020 (1955); In re Seewald, 22 P.3d 580 (Colo. App. 2001).

III. OTHER PROOF.

Copy of official record admissible. Where an individual with legal custody of the records testifies that the evidence offered is a true copy of an official record maintained in the ordinary course of business, it is admissible. People v. Roybal, 43 Colo. App. 483, 609 P.2d 1110 (1979).

Any method authorized. Section (c) of this rule provides expressly that proof of official records may be made by any method authorized by law. People v. Rivera, 37 Colo. App. 4, 542 P.2d 90 (1975).

A court may take judicial notice of any matters in its own records and files. Sakal v.

Donnelly, 30 Colo. App. 384, 494 P.2d 1316 (1972).

IV. STATUTES AND LAWS OF OTHER STATES AND COUNTRIES.

Annotator's note. Since section (e) of this rule is similar to § 396 of the former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Courts do not take judicial notice of the statutes of other states. Atchison, T. & S. F. R. R. v. Betts, 10 Colo. 431, 15 P. 821 (1887).

The statutes of a foreign state are sufficiently proven by testimony of a duly licensed practicing attorney of that state where such testimony is uncontradicted. Mosko v. Matthews, 87 Colo. 55, 284 P. 1021 (1930).

Applied in Spencer v. People in Interest of Spencer, 133 Colo. 196, 292 P.2d 971 (1956).

Rule 44.1. Determination of Foreign Law

A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 43. The court's determination shall be treated as a ruling on a question of law.

Cross references: For admissibility of evidence, see C.R.C.P. 43(a); for proof of parts of book, see C.R.C.P. 264.

Rule 45. Subpoena

(a) For Attendance of Witnesses; Form; Issue. Subpoenas may be issued under Rule 45 only to compel attendance of witnesses, with or without documentary evidence, at a deposition, hearing or trial. Every subpoena shall state the name of the court, and the title of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified.

(b) For Production of Documentary Evidence. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may: (1) Quash or modify the subpoena if it is unreasonable and oppressive; or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

(c) Service. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to such person the fees for 1 day's attendance and the mileage allowed by law. Service is also valid if the person named in the subpoena has signed a written admission or waiver of personal service. When the subpoena is issued on behalf of the state of Colorado, or an officer or agency thereof, fees and mileage need not be tendered. Proof of service shall be made as in Rule 4(h). Unless otherwise ordered by the court for good cause shown, such subpoena shall be served no later than forty-eight (48) hours before the time for appearance set out in said subpoena. The party issuing or causing the issuance of the subpoena pursuant to this rule, except in post-judgment proceedings, shall serve a copy of the subpoena (including a complete list of documents and things requested to be provided pursuant to the subpoena) upon all parties of record, including pro se parties, in the manner prescribed by C.R.C.P. 5(b). Service on the other parties shall be made promptly after the service of the subpoena upon the person named therein. Original subpoenas and returns of service of such subpoenas need not be filed with the court.

(d) Subpoena for Taking Depositions; Place of Examination.

(1) A Deposition subpoena, upon notice to all parties to the action, may require the production of documentary evidence which is within the scope of discovery permitted by Rule 26. Any party, the person to whom a deposition subpoena is directed, or any other person claiming an interest in the documents affected, may move for a protective order under Rule 26, in addition to any other remedy available under Rule 45. The person to

whom the subpoena is directed may, within 14 days after the service thereof or on or before the time specified in the subpoena for compliance if such time is less than 14 days after service, serve upon the attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena is not entitled to inspect and copy the materials except pursuant to an order of the court from which the subpoena was issued. The party serving the subpoena may, if objection has been made, move upon notice to the deponent for an order at any time before or during the taking of the deposition.

(2) A resident of this state may be required by subpoena to attend an examination upon deposition only in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of court. A nonresident of this state may be required by subpoena to attend only within forty miles from the place of service or in the county wherein he resides or is employed or transacts his business in person or at such other convenient place as is fixed by an order of court.

(e) Subpoena for Deposition, Hearing or Trial. Subpoenas for attendance at a deposition, hearing or trial shall be issued either by the clerk of the court in which the case is docketed, or by one of counsel whose appearance has been entered in the particular case in which the subpoena is sought. A subpoena requiring the attendance of a witness at a deposition, hearing or trial may be served any place within the state.

(f) Subpoena in Aid of Execution or Proceedings Subsequent to Judgment. Every subpoena or subpoena to produce issued in accordance with post-judgment proceedings of C.R.C.P. 69 shall comply with the provisions for service, attendance, production of documentary evidence and depositions required by this Rule 45. Written interrogatories pursuant to C.R.C.P. 69 shall be personally served on the judgment debtor in accordance with the requirements of, and in the manner provided for service of a subpoena under this Rule 45.

Source: (c) amended and adopted October 30, 1997, effective January 1, 1998; (c) and (d)(1) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Cross references: For manner of proof of service of process, see C.R.C.P. 4(i); for scope of discovery, see C.R.C.P. 26(b); for protective orders in discovery, see C.R.C.P. 26(c); for notice of taking depositions, see C.R.C.P. 30(b) and 31(a).

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, "Notes on Proposed Amendments to Colorado Rules of Civil Procedure", see 27 Dicta 165 (1950). For article, "Amendments to the Colorado Rules of Civil Procedure", see 28 Dicta 242 (1951). For article, "Trials: Rules 38-53", see 23 Rocky Mt. L. Rev. 571 (1951). For article, "A Deposition Primer, Part I: Setting Up the Deposition", see 11 Colo. Law. 938 (1982). For article, "Taking Evidence Abroad for Use in Litigation in Colorado", see 14 Colo. Law. 523 (1985). For article, "Rule 34(c): Discovery of Non-Party Land and Large Intangible Things", see 14 Colo. Law. 562 (1985). For article, "Securing the Attendance of a Witness at a Deposition", see 15 Colo. Law. 2000 (1986). For formal opinion of the Colorado Bar Association on Use of Subpoenas in Civil Proceedings, see 19 Colo. Law. 1556 (1990).

Applied in Stubblefield v. District Court, 198 Colo. 569, 603 P.2d 559 (1979); Black ex rel. Bayless v. Cullar, 665 P.2d 1029 (Colo. App. 1983).

II. ATTENDANCE OF WITNESSES.

Protections not grounds for quashing subpoena. It was error for trial court to quash subpoena of a witness on the basis of the attorney-client privilege and attorney work product doctrine. These protections may be asserted at trial as a bar to specific questions, but are not grounds for quashing a subpoena properly issued. South Carolina Ins. Co. v. Fisher, 698 P.2d 1369 (Colo. App. 1984).

A motion to quash subpoenas issued to third persons allegedly contributing to support of children is properly granted where the voluntary donations of such parties have nothing to do with a defendant's duty to support children. Garrow v. Garrow, 152 Colo. 480, 382 P.2d 809 (1963).

III. PRODUCTION OF DOCUMENTARY EVIDENCE.

A party seeking a "subpoena duces tecum" requiring production of documents by the other party must show good cause for the issuance of such a subpoena. Lee v. Missouri P. R. R. 152 Colo. 179, 381 P.2d 35 (1963).

A "tangible thing" described in section (b) does not include real estate or fixtures. Thompson v. Thornton, 198 P.3d 1281 (Colo. App. 2008).

For purposes of section (b), a subpoena duces tecum cannot compel the inspection of premises. Thompson v. Thornton, 198 P.3d 1281 (Colo. App. 2008).

This rule must be read in conjunction with C.R.C.P. 34, governing the production of documents. Lee v. Missouri P. R. R., 152 Colo. 179, 381 P.2d 35 (1963).

Colorado rules of civil procedure are not directly applicable to enforcement proceedings under the securities act. However, a court may consider the policies underlying section (b) of this rule in ruling on a motion for the advancement of costs incurred in complying with an administrative subpoena. Feigin v. Colo. Nat'l Bank, 897 P.2d 814 (Colo. 1995).

In the exercise of their equitable authority, district courts may quash an administrative subpoena found to be unreasonable or oppressive. Feigin v. Colo. Nat'l Bank, 897 P.2d 814 (Colo. 1995).

Where it was shown that a claim agent of a railroad could not give coherent story of an accident he investigated without first refreshing his memory from the file of such investigation, such evidence was sufficient to show good cause for the production of the file and it was error to quash a "subpoena duces tecum". Lee v. Missouri P. R. R., 152 Colo. 179, 381 P.2d 35 (1963).

Trial court did not have discretion to order disclosure of psychologist's records during discovery, even for in camera review. Absent a clear waiver of psychologist-patient privilege, a trial court may not review documents related to a patient's treatment even in camera. People v. Sisneros, 55 P.3d 797 (Colo. 2002).

Taxpayer has standing to raise legitimacy of access to records in motion to quash subpoena. Once the court allows intervention in a § 39-21-112 proceeding, it follows that a taxpayer with an expectation of privacy in his bank records has standing to raise the legitimacy of governmental access to the records in a motion to quash the subpoena for the records. Charnes v. DiGiacomo, 200 Colo. 94, 612 P.2d 1117 (1980).

As a general rule, recipients of subpoenas in criminal proceedings must assume the cost of compliance as a matter of civic responsibility. However, an individualized determination is called for when it is claimed that the cost of compliance with a subpoena renders the subpoena itself unreasonable and oppressive. The person seeking to quash an administrative subpoena on such grounds has the burden of establishing the precise amount of the cost and that such amount exceeds the amount the recipient would reasonably be expected to incur as a civic responsibility. Feigin v. Colo. Nat'l Bank, 897 P.2d 814 (Colo. 1995).

IV. SERVICE.

Failure to find "good cause" for serving subpoena fewer than 48 hours in advance of appearance or to grant continuance held abuse of discretion. Montoya v. Career Serv. Bd., 708 P.2d 478 (Colo. App. 1985).

Subpoenas that were served on Friday morning, directing the witnesses to appear on Monday morning, were not served 48 hours before the time the witnesses were to appear and were properly quashed. Wilkerson v. State, 830 P.2d 1121 (Colo. App. 1992).

Service on registered agent. Personal delivery of interrogatories on foreign corporation's registered agent constitutes effective service. Isis Litig., L.L.C., v. Svensk Filmindustri, 170 P.3d 742 (Colo. App. 2007).

V. DEPOSITIONS.

Section (d)(2) of this rule, relating to nonresidents, is limited solely to those persons who are either parties to the action or witnesses therein, both of which classes of nonresidents must first have been properly served in the action in order to subject them to the jurisdiction of the court, unless they have waived or consented to the jurisdiction of a Colorado court. Solliday v. District Court, 135 Colo. 489, 313 P.2d 1000 (1957); Minnesota ex rel. Minnesota Att'y Gen. v. District Court, 155 Colo. 521, 395 P.2d 601 (1964).

This rule, as applied to nonresidents not parties to an action in Colorado and not served in Colorado, is subject to the implied limitations that nonresidents are subject to jurisdiction due to mutual compact or uniform act. Solliday v. District Court, 135 Colo. 489, 313 P.2d 1000 (1957); Minnesota ex rel. Minnesota Att'y Gen. v. District Court, 155 Colo. 521, 395 P.2d 601 (1964).

Applied in CeBuzz, Inc. v. Sniderman, 171 Colo. 246, 466 P.2d 457 (1970).

VI. HEARING OR TRIAL.

The refusal to reopen a compensation case for the purpose of taking testimony from a witness is not error where there was no showing that any subpoena was issued under the provisions of section (e) of this rule. Pacific Employers Ins. Co. v. Kirkpatrick, 111 Colo. 470, 143 P.2d 267 (1943).

Rule 46. Exceptions Unnecessary

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

ANNOTATION

Law reviews. For article, "Colorado Criminal Procedure — Does It Meet Minimum Standards?", see 28 Dicta 14 (1951). For article, "Trials: Rules 38-53", see 23 Rocky Mt. L. Rev. 571 (1951). For article, "One Year Review of Civil Procedure", see 34 Dicta 69 (1957).

This rule is mandatory. Anderson v. Anderson, 124 Colo. 74, 234 P.2d 903 (1951).

An appellate court may refuse to consider a specification where this rule has not been complied with. Anderson v. Anderson, 124 Colo. 74, 234 P.2d 903 (1951); Allen v. Crouch, 134 Colo. 603, 307 P.2d 815 (1957).

Where a party is afforded no opportunity by the court to register an objection, the absence of an objection in the record does not prejudice the party upon review. Brakhahn v. Hildebrand, 134 Colo. 197, 301 P.2d 347 (1956).

A party who was afforded no opportunity to object to an instruction given orally outside his presence is not precluded from raising the point on review. Reimer v. Walker, 170 Colo. 149, 459 P.2d 274 (1969).

Failure of prosecution to object to trial court's action, which objection affords trial court opportunity to correct an alleged error, precludes review of merits on appeal. People v. Schweer, 775 P.2d 582 (Colo. 1989).

Applied in Menne v. Menne, 194 Colo. 304, 572 P.2d 472 (1977).

Rule 47. Jurors

(a) Orientation and Examination of Jurors. An orientation and examination shall be conducted to inform prospective jurors about their duties and service and to obtain information about prospective jurors to facilitate an intelligent exercise of challenges for cause and peremptory challenges.

(1) The jury commissioner is authorized to examine and, when appropriate, excuse prospective jurors who do not satisfy the statutory qualifications for jury service, or who are entitled to a postponement, or as otherwise authorized by appropriate court order.

(2) When prospective jurors have reported to the courtroom, the judge shall explain to them in plain and clear language:

(I) The grounds for challenge for cause;

(II) Each juror's duty to volunteer information that would constitute a disqualification or give rise to a challenge for cause;

(III) The identities of the parties and their counsel;

(IV) The nature of the case, utilizing the parties' CJI(3d) Instruction 2:1 or, alternatively, a joint statement of factual information intended to provide a relevant context for the prospective jurors to respond to questions asked of them. Alternatively, at the request of counsel and in the discretion of the judge, counsel may present such information through brief non-argumentative statements.

(V) General legal principles applicable to the case, including burdens of proof, definitions of preponderance and other pertinent evidentiary standards and other matters that jurors will be required to consider and apply in deciding the issues.

(3) The judge shall ask prospective jurors questions concerning their qualifications to serve as jurors. The parties or their counsel shall be permitted to ask the prospective jurors additional questions. In the discretion of the judge, juror questionnaires, posterboards and other methods may be used. The judge may limit the time available to the parties or their counsel for juror examination based on the needs of the case. Any party may request additional time for juror examination in the Trial Management Order, at the commencement of the trial, or during juror examination based on developments during such examination. Any such request shall include the reasons for needing additional juror examination time. Denial of a request for additional time shall be based on a specific finding of good cause reflecting the nature of the particular case and other factors that the judge determines are relevant to the particular case and are appropriate to properly effectuate the purposes of juror examination set forth in section (a) of this Rule. The court may limit or terminate repetitious, irrelevant, unreasonably lengthy, abusive, or otherwise improper examination.

(4) Jurors shall not be required to disclose personal locating information, such as address or place of business in open court and such information shall not be maintained in files open to the public. The trial judge shall assure that parties and counsel have access to appropriate and necessary locating information.

(5) Once the jury is impaneled, the judge will again explain in more detail the general principles of law applicable to civil cases, the procedural guidelines regarding conduct by jurors during the trial, case specific legal principles and definitions of technical or special terms expected to be used during the presentation of the case. Jurors shall be told that they may not discuss the case with anyone until the trial is over with one exception: jurors may discuss the evidence among themselves in the jury room when all jurors are present. Jurors shall also be told that they must avoid discussing any potential outcome of the case and must avoid reaching any conclusion until they have heard all the evidence, final instructions by the court and closing arguments by counsel. The trial court shall have the discretion to prohibit or limit pre-deliberation discussions of the evidence in a particular trial based on a specific finding of good cause reflecting the particular circumstances of the case.

(b) Alternate Jurors. The court may direct that one or two jurors in addition to the regular panel be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. An alternate juror who does not replace a principal juror shall not be discharged until the jury renders its verdict or until such time as determined by the court. If the court and the parties agree, alternate jurors may deliberate and participate fully with the principal jurors in considering and returning a verdict. If one or two alternate jurors are called each side is entitled to one peremptory challenge in addition to those otherwise allowed. The additional peremptory challenge may be exercised as to any prospective juror.

(c) Challenge to Array. Any party may challenge the array of jurors by motion setting forth particularly the causes of challenge; and the party opposing the challenge may join issue on the motion, and the issue shall be tried and decided by the court.

(d) Challenge to Individual Jurors. A challenge to an individual juror may be for cause or peremptory.

(e) Challenges for Cause. Challenges for cause may be taken on one or more of the following grounds:

(1) A want of any of the qualifications prescribed by the statute to render a person competent as a juror;

(2) Consanguinity or affinity within the third degree to any party;

(3) Standing in the relation of guardian and ward, master and servant, employer and clerk, or principal and agent to either party, or being a member of the family of any party; or a partner in business with any party or being security on any bond or obligation for any party;

(4) Having served as a juror or been a witness on a previous trial between the same parties for the same cause of action;

(5) Interest on the part of the juror in the event of the action, or in the main question involved in the action, except the interest of the juror as a member, or citizen of a municipal corporation;

(6) Having formed or expressed an unqualified opinion or belief as to the merits of the action;

(7) The existence of a state of mind in the juror evincing enmity against or bias to either party.

(f) Order and Determination of Challenges for Cause. The plaintiff first, and afterwards the defendant, shall complete challenges for cause. Such challenges shall be tried by the court, and the juror challenged, and any other person, may be examined as a witness.

(g) Order of Selecting Jury. The clerk shall draw by lot and call the number of jurors that are to try the cause plus such an additional number as will allow for all peremptory challenges permitted. After each challenge for cause sustained, another juror shall be called to fill the vacancy and may be challenged for cause. When the challenges for cause are completed, the clerk shall make a list of jurors remaining, in the order called, and each side, beginning with plaintiff, shall indicate thereon its peremptory challenge to one juror at a time in regular turn until all peremptory challenges are exhausted or waived. The clerk shall then swear the remaining jurors, or so many of them in the order listed as will make up the number fixed to try the cause, and these shall constitute the jury.

(h) Peremptory Challenges. Each side shall be entitled to four peremptory challenges, and if there is more than one party to a side they must join in such challenges. Additional peremptory challenges in such number as the court may see fit may be allowed to parties appearing in the action either under Rule 14 or Rule 24 if the trial court in its discretion determines that the ends of justice so require.

(i) Oath of Jurors. As soon as the jury is completed, an oath or affirmation shall be administered to the jurors in substance:

That you and each of you will well and truly try the matter at issue between _____, the plaintiff, and _____, the defendant, and a true verdict render, according to the evidence.

(j) When Juror Discharged. If, before verdict, a juror becomes unable or disqualified to perform his duty and there is no alternate juror, the parties may agree to proceed with the other jurors, or that a new juror be sworn and the trial begun anew. If the parties do not so agree the court shall discharge the jury and the case shall be tried anew.

(k) Examination of Premises by Jury. If in the opinion of the court it is proper for the jury to see or examine any property or place, it may order the jury to be conducted thereto in a body by a court officer. A guide may be appointed. The court shall, in the presence of the parties, instruct the officer and guide as to their duties. While the jury is thus absent, no person shall speak to it on any subject connected with the trial excepting only the guide and officer in compliance with such instructions. The parties and their attorneys may be present.

(l) Deliberation of Jury. After hearing the charge the jury may either decide in court or retire for deliberation. If it retires, except as hereinafter provided in this section (l), it shall be kept together in a separate room or other convenient place under the charge of one or more officers until it agrees upon a verdict or is discharged. While the jury is deliberating the officer shall, to the utmost of his ability, keep the jury together, separate from other persons. He shall not suffer any communication to be made to any juror or make any himself unless by order of the court except to ask it if it has agreed upon a verdict; and he shall not, before the verdict is rendered, communicate with any person the state of its deliberations or the verdict agreed upon. The court in its discretion in any individual case may modify the procedure under this Rule by permitting a jury which is deliberating to separate during the luncheon or dinner hour or separate for the night under appropriate cautionary instructions, with directions that they meet again at a time certain to resume deliberations again under the charge of the appropriate officer.

(m) Items Taken to Deliberation. Upon retiring, the jurors shall take the jury instructions, their juror notebooks and notes they personally made, if any, and to the extent feasible, those exhibits that have been admitted as evidence.

(n) Additional Instructions. After the jury has retired for deliberation, if it desires additional instructions, it may request the same from the court; any additional instructions shall be given it in court in the presence of or after notice to the parties.

(o) New Trial if No Verdict. When a jury is discharged or prevented from giving a verdict for any reason, the action shall be tried anew.

(p) When Sealed Verdict. While the jury is absent the court may adjourn from time to time, in respect to other business, but it shall be nevertheless deemed open for every purpose connected with the cause submitted to the jury, until a verdict is rendered or the jury discharged. The court may direct the jury to bring in a sealed verdict at the opening of court, in case of an agreement during a recess or adjournment for the day.

(q) Declaration of Verdict. When the jury has agreed upon its verdict it shall be conducted into court by the officer in charge. The names of the jurors shall be called, and the jurors shall be asked by the court or clerk if they have agreed upon a verdict, and if the answer is in the affirmative, they shall hand the same to the clerk. The clerk shall enter in his records the names of the jurors. Upon a request of any party the jury may be polled.

(r) Correction of Verdict. If the verdict is informal or insufficient in any particular, the jury, under the advice of the court, may correct it or may be again sent out.

(s) Verdict Recorded, Disagreement. The verdict, if agreed upon by all jurors, shall be received and recorded and the jury discharged. If all the jurors do not concur in the verdict, the jury may be again sent out, or may be discharged.

(t) Juror Notebooks. Juror notebooks shall be available during trial and deliberation to aid jurors in the performance of their duties.

(u) Juror Questions. Jurors shall be allowed to submit written questions to the court for the court to ask of witnesses during trial, in compliance with procedure established by the trial court. The trial court shall have the discretion to prohibit or limit questions in a particular trial based on a specific finding of good cause reflecting the particular circumstances of the case.

COMMENT

The amendments to this rule add language to require orientation of the prospective jurors. This case-specific orientation would be in addition to any general orientation the prospective jurors may have received. As set forth in the standardized outline that has been developed for use in the orientation, examination and selection processes, the imparted information and instructions should be clear and as neutral as possible.

The contents of any factual orientation information should be reviewed by the judge with counsel at a pre-trial conference to enable consensus concerning the information to be provided. It is recommended that the judge read a stipulated statement of what the case is about. If counsel cannot agree about the content of such a statement, the Judge may develop a preliminary statement of the case in the judge's own discretion. Alternatively, if both counsel desire to make brief, non-argumentative statements to the prospective jurors on what the case is about, the court should have discretion to permit such statements.

As part of the case-specific orientation, certain preliminary instructions should be used to help prospective jurors to understand the claims and defenses of the parties in the civil case. At a minimum, these instructions should address burden of proof, credibility, objections by counsel, bench conferences and whether jurors will be permitted to take notes and ask questions. In complex or technical cases, definitions of terms and other information that would help orient the jury to the case should be given. The trial judge, rather than counsel, should give these instructions as part of the before-examination orientation.

Provisions of the rules pertaining to examination of prospective jurors have been reorganized and clarified to emphasize certain objections. Specific authority is conferred on the jury commissioner to allow service "postponements" as contemplated by C.R.S. § 13-71-116 and to examine and excuse prospective jurors who do not satisfy statutory qualification requirements of C.R.S. § 13-71-105.

The court's role has been better defined. Because of the court's neutral role in the case, the trial judge should conduct the initial juror examination by asking standard questions and also those which relate to the specific case, but may be of a sensitive nature. A uniform outline of orientation, juror examination and juror selection procedures has been developed by the committee for both civil and criminal cases. Use of such outline would assure that all important information is covered, time is saved and that cases are handled uniformly throughout the state.

Counsel and pro se litigants would continue to have a part in the juror examination process by being allowed to question prospective jurors on relevant matters not covered by the trial judge. The judge, however, would continue to have authority to limit such examinations to avoid

repetition, irrelevant or improper inquiries and wasting of time.

In addition to the standardized outline of orientation, jury examination and jury selection, posterboards and questionnaires have been developed to enhance the process of acquiring information from prospective jurors. When and how posterboards and questionnaires are used in discretionary with the trial judge. Posterboard questions provide a method to obtain information from prospective jurors in a fast, neutral and flexible way. Such method gives counsel time to observe panelists and make notes, which is not always possible when the attorney is engrossed in asking questions directly. Questionnaires, while not normally used in routine cases, can be valuable in those cases involving high publicity and/or complex issues. Where used, questionnaires not only can obtain autobiographical information, but can also seek case-specific information to identify potential prejudice on sensitive issues.

Juror notebooks should be used in trials as an aid to jurors in the performance of their duties. The court should supply three-ring binders which can be retrieved and repeatedly reused. The court and counsel should provide the materials to be placed in the juror notebooks. The timing and placement of particular materials in the notebooks will be at the court's discretion. Juror notebooks should not be taken from the courtroom or jury room. They should be returned at the end of the trial so that notes can be destroyed and other materials replaced, recycled and/or reused. Sections should be tabbed with particular sections deleted or left empty as appropriate.

Juror notebooks should contain the following:

(1) Orientation materials;

(2) Preliminary jury instructions;

(3) A copy of the final instructions given by the court;

(4) Items ordered by the court; and

(5) Blank paper for juror notes (together with a copy of CJI(3D) 1:7).

Source: (a) repealed and readopted, (m) amended, and (t) and comment added June 25, 1998, effective January 1, 1999; (b) amended and adopted and (u) added and adopted February 19, 2003, effective July 1, 2003; (a)(5) and (u) amended and effective June 7, 2010; (a)(3) amended and effective September 16, 2010.

Cross references: For the "Colorado Uniform Jury Selection and Service Act", see article 71 of title 13, C.R.S.; for irregularity in selecting, summoning, and managing jurors, see § 13-71-140, C.R.S.; for motions for post-trial relief, see C.R.C.P. 59; for grounds for new trial, see C.R.C.P. 59(d); for third-party practice, see C.R.C.P. 14; for intervention, see C.R.C.P. 24.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, "Notes on Proposed Amendments to Colorado Rules of Civil Procedure", see 27 Dicta 165 (1950). For article, "Amendments to the Colorado Rules of Civil Procedure", see 28 Dicta 242 (1951). For article, "Jury Selection and Opening Statements", see 28 Dicta 383 (1951). For article, "Trials: Rules 38-53", see 23 Rocky Mt. L. Rev. 571 (1951).

Applied in City of Lakewood v. DeRoos, 631 P.2d 1140 (Colo. App. 1981).

II. EXAMINATION OF JURORS.

Law reviews. For article, "Colorado Criminal Procedure — Does It Meet Minimum Standards?", see 28 Dicta 14 (1951).

The purpose of a "voir dire" examination of the jury panel is to enable the court and counsel to select as fair and impartial a jury as possible. Oglesby v. Conger, 31 Colo. App. 504, 507 P.2d 883 (1972).

Collective or individual questioning not improper. It is not improper for plaintiff's counsel on "voir dire" to ask each prospective juror individually a question that could be properly asked of the panel collectively. Davis v. Fortino & Jackson Chevrolet Co., 32 Colo. App. 222, 510 P.2d 1376 (1973).

Considerable latitude must be allowed in "voir dire" examination, when made in good

faith, to enable counsel properly to exercise not only challenges for cause but also peremptory challenges. Oglesby v. Conger, 31 Colo. App. 504, 507 P.2d 883 (1972).

Permitting questions to jurors upon which to base a peremptory challenge is within the discretion of the trial court. Bonfils v. Hayes, 70 Colo. 336, 201 P. 677 (1921).

Counsel has right to inquire about relationship with insurance company. In "voir dire", counsel not only has the right to inquire if any prospective juror has any relationship to a defendant's insurance company, but counsel may also inquire into that relationship, if one exists. Oglesby v. Conger, 31 Colo. App. 504, 507 P.2d 883 (1972); Smith v. District Ct. of State of Colo., 907 P.2d 611 (Colo. 1994).

So long as counsel acts in good faith in a personal injury case, the counsel for plaintiff may interrogate prospective jurors respecting their interest in or connection with indemnity insurance companies apparently interested in the result of the case. Vindicator Consol. Gold Mining Co. v. Firstbrook, 36 Colo. 498, 86 P. 313 (1906); Independence Coffee & Spice Co. v. Kalkman, 61 Colo. 98, 156 P. 135 (1916).

Counsel for plaintiff may not interrogate defendant's counsel, either at the bar or as a witness, concerning whether an insurance company is interested in the case for the purpose of obtaining a basis for interrogating the jurors. Vindicator Consol. Gold Mining Co. v. Firstbrook, 36 Colo. 498, 86 P. 313 (1906); Independence Coffee & Spice Co. v. Kalkman, 61 Colo. 98, 156 P. 135 (1916).

Order preventing questioning on insurance not reversible error in a certain case. A protective order preventing plaintiff from questioning two prospective jurors regarding any interest in defendants' insurance company is not reversible error where prospective jurors had heard the insurance question asked of other jurors and prospective jurors stated there were no interests or other information which they felt ought to be known by plaintiff. Kaltenbach v. Julesburg Sch. Dist. RE-1, 43 Colo. App. 150, 603 P.2d 955 (1979).

Limitations on voir dire questions are within the discretion of the trial court and will not be overturned on appeal absent an abuse of discretion. People v. Greenwell, 830 P.2d 1116 (Colo. App. 1992).

Trial court may place reasonable restrictions on questioning of jurors if the voir dire process facilitates an intelligent exercise of a party's peremptory challenges and challenges for cause. People v. Greenwell, 830 P.2d 1116 (Colo App. 1992).

A trial court may properly restrict questions as to the content of publicity regarding defendants and their pasts. People v. Greenwell, 830 P.2d 1116 (Colo. App. 1992).

Whether community prejudice against a party exists is a question of fact that may be developed at "voir dire". Powell v. City of Ouray, 32 Colo. App. 44, 507 P.2d 1101 (1973).

Section 13-71-105 (2)(b) provides that a prospective juror shall be disqualified based on the inability to read, speak, and understand the English language. People v. Lee, 93 P.3d 544 (Colo. App. 2003).

Whether a prospective juror should be disqualified under § 13-71-105 (2)(b) is a question of fact for resolution by the trial court. People v. Lee, 93 P.3d 544 (Colo. App. 2003).

Alternatives to mistrial in context of prospective juror who has made prejudicial comments during voir dire. Curative instructions and jury canvassing are two alternatives to a mistrial that may remedy the prejudice to a defendant that results from a prospective juror's prejudicial comments during voir dire. People v. Mersman, 148 P.3d 199 (Colo. App. 2006).

The general rule that curative instructions will normally remedy any harm caused by a prejudicial statement is also applicable where a jury panel is exposed to prejudicial comments by a prospective juror. A trial court's instruction to the remaining jurors to disregard the statement and render a verdict based on the evidence presented in court will normally be sufficient to cure any harm to the defendant. To receive a curative instruction in this context, however, a defendant must request it, and a trial court does not commit plain error if it does not give a curative instruction sua sponte. People v. Mersman, 148 P.3d 199 (Colo. App. 2006).

In the alternative, the trial court could canvass the jury to see whether the jury actually heard the prejudicial comment and, if so, whether the comment affected the jurors ability to decide the case fairly. People v. Mersman, 148 P.3d 199 (Colo. App. 2006).

Where a juror is asked if he would be satisfied to have a man, with the same amount of prejudice that he had against defendants, try his case, an objection to such question is properly sustained. Bonfils v. Hayes, 70 Colo. 336, 201 P. 677 (1921).

The absence of a direct reference during voir dire to the name of the police officer defendant inmate had previously been convicted of murdering did not preclude a full and complete elaboration of defendant's defense theory that, because of the murder conviction, corrections personnel disliked him, and because of his testimony against a co-conspirator, other inmates considered home a snitch, someone placed the marihuana cigarette for which he was being prosecuted in his pocket without his knowledge. People v. Greenwell, 830 P.2d 1116 (Colo. App. 1992).

Right to demand a discharge for improper interrogation may be waived. Where during the examination of the jury counsel for defen-

dant announces that he does not wish to demand discharge of the jury on the ground of alleged improper interrogation of its members, the statement constitutes a waiver of the right to have the court declare a mistrial on such ground at that stage of the proceedings, if any such right existed. Rains v. Rains, 97 Colo. 19, 46 P.2d 740 (1935).

III. ALTERNATE JURORS.

Law reviews. For article, "Colorado Criminal Procedure — Does It Meet Minimum Standards?", see 28 Dicta 14 (1951).

The purpose of seating an alternate juror is to have available another juror when, through unforeseen circumstances, a juror is unable to continue to serve. People v. Abbott, 690 P.2d 1263 (Colo. 1984); Hardesty v. Pino, 222 P.3d 336 (Colo. App. 2009).

A trial court is in the best position to evaluate whether a juror is unable to serve, and its decision to excuse a juror will not be disturbed absent a gross abuse of discretion. People v. Abbott, 690 P.2d 1263 (Colo. 1984); Hardesty v. Pino, 222 P.3d 336 (Colo. App. 2009).

A trial court is not required to conduct a more thorough investigation to make a factual determination regarding an absent juror's physical inability to continue. Hardesty v. Pino, 222 P.3d 336 (Colo. App. 2009).

Where some unforeseen circumstance unrelated to the merits of a case hampers a juror's continued ability to sit, replacing a juror with an alternate is in the nature of an administrative task. People v. Anderson, 183 P.3d 649 (Colo. App. 2007); Hardesty v. Pino, 222 P.3d 336 (Colo. App. 2009).

IV. CHALLENGES FOR CAUSE.

Annotator's note. Since section (e) of this rule is similar to § 200 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Trial court entitled to accept statements of jurors made under oath in determining whether bias or enmity exists. Freedman v. Kaiser Fund. Health Plan, 849 P.2d 811 (Colo. App. 1992).

This rule specifies the grounds upon which a challenge for cause may be asserted. Safeway Stores, Inc. v. Langdon, 187 Colo. 425, 532 P.2d 337 (1975).

A party is not to be unreasonably denied a challenge for cause to which he shows himself entitled. Denver City Tramway Co. v. Carson, 21 Colo. App. 604, 123 P. 680 (1912).

Trial courts are afforded broad discretion in ruling on a challenge for cause to a potential juror, and a decision to deny a challenge will be set aside only when the record shows a clear abuse of that discretion. People v. Greenwell, 830 P.2d 1116 (Colo. App. 1992).

A party's right to a challenge is a substantial right which it is not within the discretion of the court to take away arbitrarily. Denver City Tramway Co. v. Carson, 21 Colo. App. 604, 123 P. 680 (1912).

While peremptory challenges are an important right of an accused, they are not constitutionally required. People v. Hollis, 670 P.2d 441 (Colo. App. 1983); People in Interest of M.M.O.P., 873 P.2d 24 (Colo. App. 1993).

The opportunity for such challenges must therefore be taken along with those limitations attendant upon the manner of its exercise. People v. Durre, 713 P.2d 1344 (Colo. App. 1985); People in Interest of M.M.O.P., 873 P.2d 24 (Colo. App. 1993).

The allocation of peremptory challenges is not a matter of judicial discretion. Blades v. DaFoe, 704 P.2d 317 (Colo. App. 1985); People in Interest of M.M.O.P., 873 P.2d 24 (Colo. App. 1993).

Juvenile's right to equal protection was not violated by trial court's refusal to grant juvenile, who was charged as being a violent juvenile offender, five rather than four peremptory challenges where juvenile failed to show that there was unequal treatment within the class of violent juvenile offenders. Although an aggravated juvenile offender is entitled to five peremptory challenges under § 19-2-804 (4)(b)(I), the elements constituting an aggravated juvenile offender differ from those constituting a violent juvenile offender. People in Interest of M.M.O.P., 873 P.2d 24 (Colo. App. 1993).

Trial court may place reasonable restrictions on the questioning of jurors if the voir dire process facilitates an intelligent exercise of a party's preemptory challenges and challenges for cause. People v. Greenwell, 830 P.2d 1116 (Colo. App. 1992).

Bias is implied under section (e) of this rule to insure that a jury is impartial, not only in fact, but in appearance. Safeway Stores, Inc. v. Langdon, 187 Colo. 425, 532 P.2d 337 (1975).

In cases of prospective jurors who fall within the categories listed in section (e)(1) to (5), bias is implied to avoid even the appearance of prejudice. Action Realty v. Brethouwer, 633 P.2d 522 (Colo. App. 1981).

Actual bias need not be shown. When a prospective juror falls within the class of persons designated within section (e) of this rule, subject to a challenge for cause, actual bias need not be shown. Safeway Stores, Inc. v. Langdon, 187 Colo. 425, 532 P.2d 337 (1975).

In determining whether a potential juror is biased toward any party, the trial court must consider the juror's voir dire statements as a

whole. People v. Greenwell, 830 P.2d 1116 (Colo. App. 1992).

The decision of the trial court on the challenge of a juror for cause is not ground for reversal unless manifestly erroneous and prejudicial to the party complaining of it. Salazar v. Taylor, 18 Colo. 538, 33 P. 369 (1893).

The ruling of the trial court should be sustained unless it clearly appears from the record that the requirements have been disregarded in the overruling of a challenge for cause. Denver, S. P. & P. R. R. v. Moynahan, 8 Colo. 56, 5 P. 811 (1884).

The decision of the trial court to deny a challenge for cause will not be disturbed on review in the absence of a manifest abuse of discretion. Blades v. DaFoe, 666 P.2d 1126 (Colo. App. 1983), rev'd on other grounds, 704 P.2d 317 (Colo. 1985); Denver & Rio Grande v. Forster, 773 P.2d 612 (Colo. App. 1989).

If the examination leaves the competency of a juror in doubt, the ruling of the trial court will not be disturbed, for before an appellate court will interfere, it must appear that some positive statute has been violated or that the court has abused its discretion. Rio Grande S. R. R. v. Nichols, 52 Colo. 300, 123 P. 318 (1912).

For an assignment of error for overruling a challenge for cause to be considered, it must affirmatively appear that the challenging party was forced to accept disqualified jurors or exhausted all its peremptory challenges in attempting to get rid of them. Blackman v. Edsall, 17 Colo. App. 429, 68 P. 790 (1902); Rio Grande S. R. R. v. Nichols, 52 Colo. 300, 123 P. 318 (1912).

Where no bias in favor of the plaintiff nor enmity toward the defendants was shown, a challenge for cause is properly overruled. Bonfils v. Hayes, 70 Colo. 336, 201 P. 677 (1921); Stock Yards Nat'l Bank v. Neugebauer, 97 Colo. 246, 48 P.2d 813 (1935).

The trial court properly denied defendant's challenge for cause to a Colorado state senator who had participated in enacting the statute under which defendant was charged where the juror's voir dire responses as a whole neither showed any fixed predisposition against the defendant, nor indicated an inability to render an impartial verdict based on the evidence presented and the court's instructions. People v. Greenwell, 830 P.2d 1116 (Colo. App. 1992).

Decision to deny challenge for cause will not be disturbed on review absent a manifest abuse of discretion. Freedman v. Kaiser Found. Health Plan, 849 P.2d 811 (Colo. App. 1992); Day v. Johnson, 232 P.3d 175 (Colo. App. 2009), aff'd on other grounds, 255 P.3d 1064 (Colo. 2011).

A trial court is correct in denying plaintiff's request to dismiss prospective jurors for cause after establishing only that they were policyholders with the same insurance company as the defendant, because the fact that they were policyholders in and of itself would not necessarily affect their judgment in the case. Oglesby v. Conger, 31 Colo. App. 504, 507 P.2d 883 (1972).

A court does err in refusing to allow further inquiry of these policyholders, because such inquiry is necessary to enable counsel to determine if there is a basis for a challenge for cause and to aid counsel in later making an intelligent exercise of his peremptory challenges. Oglesby v. Conger, 31 Colo. App. 504, 507 P.2d 883 (1972).

Fact that juror and party are stockholders in same company not alone grounds for sustaining challenge. Where a juror is a stockholder in a company and the plaintiff is also a stockholder in the same company, but it does not appear that the juror is otherwise connected with the plaintiff or with the defendant, such a showing as this furnishes no grounds for sustaining the defendant's challenge of this juror for cause. Tabor v. Sullivan, 12 Colo. 136, 20 P. 437 (1889).

The interest of a juror as a member or citizen of a municipality which is a party to the proceeding does not disqualify him. Warner v. Gunnison, 2 Colo. App. 430, 31 P. 238 (1892).

Mere possibility of a potential juror's future contact with a litigant is insufficient to disqualify the juror under section (e)(5) of this rule. Where juror's interest in the event of the action was uncertain and speculative, trial court did not abuse its discretion by denying plaintiffs' challenge of the juror for cause. Day v. Johnson, 232 P.3d 175 (Colo. App. 2009), aff'd on other grounds, 255 P.3d 1064 (Colo. 2011).

This rule does not make the forming or expressing of an opinion a decisive test as to the juror's competency, unless the opinion be unqualified as to the merits of the action. Collins v. Burns, 16 Colo. 7, 26 P. 145 (1891).

The law contemplates that the minds of jurors shall be free from such impressions of the merits as amount to a conviction or prejudgment of the case. The rule is a plain and necessary one, but its application is often exceedingly difficult; this is owing to a variety of circumstances which arise in practice. Denver, S. P. & P. R. R. v. Moynahan, 8 Colo. 56, 5 P. 811 (1884).

This rule relates more to the quality of the opinion than to the evidence upon which it is based, for the real question is whether the juror stands indifferent between the parties. The general rule that he who has heard rumors and reports only is competent, and he who has had a full relation of the facts from witnesses, or parties, is disqualified is intended as a guide to general results and is not without exceptions.

Union Gold Mining Co. v. Rocky Mt. Nat'l Bank, 2 Colo. 565 (1875), aff'd, 96 U.S. 640, 24 L. Ed. 648 (1877).

An opinion founded upon rumor of uncertain report, which has not taken firm hold of the mind, shall not disqualify. Union Gold Mining Co. v. Rocky Mt. Nat'l Bank, 2 Colo. 565 (1875), aff'd, 96 U.S. 640, 24 L. Ed. 648 (1877).

Inability on the part of persons called to serve as jurors, to speak the English language and to understand it when spoken does not necessarily disqualify them from serving as jurors under the statutes of Colorado. Trinidad v. Simpson, 5 Colo. 65 (1879); In re Allison, 13 Colo. 525, 22 P. 820 (1889).

Court has discretion to exclude them. There are many serious objections to the interposition of interpreters in judicial proceedings and while a court holds it within its power to appoint an interpreter where a juror does not understand the English language, it is also within its discretion to exclude such jurors. Trinidad v. Simpson, 5 Colo. 65 (1879).

Whenever it is practicable to secure a full panel of English speaking jurors, a wise discretion would excuse from jury duty persons ignorant of that language. Trinidad v. Simpson, 5 Colo. 65 (1879).

Juror's religious reservation on judging another cannot be ground for challenge under section (e)(1). Action Realty v. Brethouwer, 633 P.2d 522 (Colo. App. 1981).

Failure to sustain challenge was reversible error. The failure of the trial judge to sustain the plaintiff's challenge for cause, after the juror was determined to be within the class of persons designated in section (e)(3) of this rule, was reversible error. Safeway Stores, Inc. v. Langdon, 187 Colo. 425, 532 P.2d 337 (1975).

Test for disqualification because of religious conviction pursuant to section (e)(7) is the impartial fact-finder test. Action Realty v. Brethouwer, 633 P.2d 522 (Colo. App. 1981).

Law enforcement agency employee not challengeable for cause. The rules of civil procedure, unlike the rules of criminal procedure, do not explicitly define as grounds for a challenge for cause the juror's employment by a law enforcement agency. People in Interest of R.A.D., 196 Colo. 430, 586 P.2d 46 (1978).

No challenge for cause for being attorney. Trial court committed reversible error by granting a challenge for cause on the grounds that a prospective juror was an attorney, because this was not a ground set forth in the statute governing challenge for cause in civil actions and resulted in giving the defendant what amounted to an extra peremptory challenge. Faucett v. Hamill, 815 P.2d 989 (Colo. App. 1991).

No challenge for cause for juror with specific knowledge of damages caps under Health Care Availability Act notwithstanding requirement in § 13-64-302 (1) that prevents disclosure of such damage limitations to the jury. Trial court did not err in rejecting defendant's challenge for cause for prospective juror with special knowledge of the caps because this is not a ground set forth in section (e) of this rule for dismissal of a potential juror. Dupont v. Preston, 9 P.3d 1193 (Colo. App. 2000), aff'd on other grounds, 35 P.3d 433 (Colo. 2001).

Juror's debtor-creditor relation with party insufficient for challenge for cause. In a civil case, a juror's standing in a debtor-creditor relation with a party, without more, is insufficient grounds for a challenge for cause. Kaltenbach v. Julesburg Sch. Dist. RE-1, 43 Colo. App. 150, 603 P.2d 955 (1979).

Denial of challenge not abuse of discretion if juror decides case impartially. Denial of challenge for cause of juror who stated that he could, and would, put his feelings to one side and decide the case fairly and impartially based on the evidence presented was not an abuse of discretion. Kaltenbach v. Julesburg Sch. Dist. RE-1, 43 Colo. App. 150, 603 P.2d 955 (1979).

A juror who expresses an ability to set aside any biases need not be disqualified from jury service. Trial court did not abuse its discretion by denying plaintiffs' challenge for cause of juror who, despite expressing sympathy for defendant, stated she could evaluate the case fairly. Day v. Johnson, 232 P.3d 175 (Colo. App. 2009), aff'd on other grounds, 255 P.3d 1064 (Colo. 2011).

V. ORDER AND DETERMINATION OF CHALLENGES FOR CAUSE.

Annotator's note. Since section (f) of this rule is similar to § 202 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant case construing that section have been included in the annotations to this rule.

The method and order of procedure in ascertaining the qualifications of veniremen and disposing of challenges for cause are commonly in the discretion of the court, but the discretion is not an arbitrary one. Denver City Tramway Co. v. Carson, 21 Colo. App. 604, 123 P. 680 (1912).

The rule which requires the challenge of any particular juror for cause to be made at the very time when the ground for challenge becomes apparent from his examination before passing to the examination of another juror is doubtful, and the argument in favor of such a rule is not convincing. Denver City Tramway Co. v. Carson, 21 Colo. App. 604, 123 P. 680 (1912).

VI. ORDER OF SELECTING JURY.

Annotator's note. Since section (g) of this rule is similar to § 203 of the former Code of

Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

The forming of a jury to try an issue of fact rests largely in the discretion of the trial court. Rio Grande S. R. R. v. Nichols, 52 Colo. 300, 123 P. 318 (1912).

For an assignment of error to be considered, it must affirmatively appear from the record that the challenging party exhausted all its peremptory challenges. Rio Grande S. R. R. v. Nichols, 52 Colo. 300, 123 P. 318 (1912).

VII. PEREMPTORY CHALLENGES.

Law reviews. For comment, "Batson v. Kentucky: Peremptory Challenges Redefined", see 64 Den. U. L. Rev. 579 (1988).

Annotator's note. Since section (h) of this rule is similar to § 199 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

A peremptory challenge was not granted by the common law, and the right exists, if at all, by virtue of statute. Butler v. Hands, 43 Colo. 541, 95 P. 920 (1908).

Unless this rule regulating the manner of challenges is peremptory that the right cannot be exercised, the court must hold that the right exists. Butler v. Hands, 43 Colo. 541, 95 P. 920 (1908).

Guardian ad litem for child who was subject of paternity action should not have been granted preemptory challenges but such preemptory challenges may not be challenged on appeal by putative father who urged the granting of such challenges at trial. Morgan County DSS v. J.A.C., 791 P.2d 1157 (Colo. App. 1989).

A juror possessing statutory qualifications is still subject to such challenge. Trinidad v. Simpson, 5 Colo. 65 (1879).

Trial court may place reasonable restrictions on the questioning of jurors if the voir dire process facilitates an intelligent exercise of a party's preemptory challenges and challenges for cause. People v. Greenwell, 830 P.2d 1116 (Colo. App. 1992).

Multiple litigants are entitled to only one set of peremptory challenges, regardless of whether their interests are essentially common or generally antagonistic. Blades v. DaFoe, 704 P.2d 317 (Colo. 1985); Koustas Realty v. Regency Square P'ship, 724 P.2d 97 (Colo. App. 1986).

It is reversible error if the trial court grants peremptory challenges in excess of the number prescribed by this rule. Blades v. DaFoe, 704 P.2d 317 (Colo. 1985); Fieger v. East Nat. Bank, 710 P.2d 1134 (Colo. App. 1985); Koustas Realty v. Regency Square P'ship, 724 P.2d 97 (Colo. App. 1986).

VIII. OATH OF JURORS.

The juror's oath prescribes his duty; by the obligation thus imposed, he is to well and truly try the issues joined and a true verdict render, according to the law and the evidence. Demato v. People, 49 Colo. 147, 111 P. 703 (1910) (decided under § 198 of the former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941).

Absent any showing of prejudice by the defendant, the administration of the oath to the panel of jurors accepted for cause before the exercise of peremptory challenges does not constitute reversible error. People v. Smith, 848 P.2d 365 (Colo. 1993).

IX. WHEN JUROR DISCHARGED.

Annotator's note. Since section (j) of this rule is similar to § 189 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

This rule gives the court power to discharge a jury under certain circumstances. Swink v. Bohn, 6 Colo. App. 517, 41 P. 838 (1895).

The existence of this authority as a common-law right is recognized. Swink v. Bohn, 6 Colo. App. 517, 41 P. 838 (1895).

The court does not have arbitrary power to discharge a jury after it has been impaneled and sworn; the parties are entitled to have their case heard by the jury which has been selected, and they cannot be deprived of that right unless some sufficient reason exists for the exercise of the court's power in the premises. Swink v. Bohn, 6 Colo. App. 517, 41 P. 838 (1895).

X. EXAMINATION OF PREMISES BY JURY.

Annotator's note. Since section (k) of this rule is similar to § 206 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

The provisions of section (k) are clear. Kistler v. Northern Colo. Water Conservancy Dist., 126 Colo. 11, 246 P.2d 616 (1952).

An inspection of the premises by the jury is a matter entirely within the discretion of the trial court. Saint v. Guerrerio, 17 Colo. 448, 30 P. 335 (1892); Nogote-Northeastern Consol. Ditch Co. v. Gallegos, 70 Colo. 550, 203 P. 668 (1921).

Where the jury is permitted by the court to view the premises involved in the litigation, the jurymen are expected to look at everything upon the viewed premises and are not confined to the matters and things mentioned in the testimony given in the court room. Bijou Irrigation Dist. v. Cateran Land & Live Stock Co., 73 Colo. 93, 213 P. 999 (1923).

Applied in Kistler v. Northern Colo. Water Conservancy Dist., 126 Colo. 11, 246 P.2d 616 (1952).

XI. DELIBERATION OF JURY.

Law reviews. For article, "Limitations of the Power of Courts in Instructing Juries", see 6 Dicta 23 (March 1929).

Jury shall not separate during deliberation. Upon the close of the cause a jury shall retire for deliberation, and during such deliberation, shall not separate, although it might be in the discretion of the court to permit the jury to separate under certain circumstances. Dozenback v. Raymer, 13 Colo. 451, 22 P. 787 (1889).

The mere separation of a jury will not be "per se" sufficient ground for setting aside the verdict and granting a new trial; something else must appear — that is, that there was a strong probability that the jury had been tampered with or influenced to return the verdict which is sought to be set aside. Dozenback v. Raymer, 13 Colo. 451, 22 P. 787 (1889); Beals v. Cone, 27 Colo. 473, 62 P. 948 (1900).

The practice of calling the jury into the court room after they have deliberated longer than usual without agreeing upon a verdict and impressing upon them the importance of agreeing if possible is approved of; ordinarily a trial judge is within his rightful province when he urges agreement upon a jury at loggerheads with itself, but this process has its limits. Peterson v. Rawalt, 95 Colo. 368, 36 P.2d 465 (1934).

Reading of testimony is discretionary. The overwhelming weight of authority in this country is that the reading of all or part of the testimony of one or more of the witnesses at trial, criminal or civil, at the specific request of the jury during their deliberations is discretionary with the trial court. Settle v. People, 180 Colo. 262, 504 P.2d 680 (1972).

Where trial testimony is read to the jury at their request during their deliberations, it is essential that the court observe caution that evidence is not so selected, nor used in such a manner, that there is a likelihood of it being given undue weight or emphasis by the jury, for this would be prejudicial abuse of discretion and constitute grounds for reversal. Settle v. People, 180 Colo. 262, 504 P.2d 680 (1972).

Where the only portion of the record designated on review is the testimony which the trial court permitted to be read to the jury during deliberation, there is nothing upon which the court can make a determination of abuse of discretion, and it must therefore presume the trial court acted properly and without error. Settle v. People, 180 Colo. 262, 504 P.2d 680 (1972).

A trial court has discretion to grant the equitable relief of specific performance while the jury concurrently deliberates on the award of damages in cases where the damages are in no way contingent upon the trial court's equity decision. Soneff v. Harlan, 712 P.2d 1084 (Colo. App. 1985).

XII. PAPERS TAKEN BY JURY.

Annotator's note. Since section (m) of this rule is similar to § 211 of the former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Amendment to section (m) that allows all exhibits admitted into evidence to be taken into the jury room undercuts previous rule of law that jury could not have unrestricted and unsupervised access to evidence. Thus, the basis no longer exists for prohibiting juror access during deliberations to videotapes, audiotapes, or written documents. People v. McKinney, 80 P.3d 823 (Colo. App. 2003), rev'd on other grounds, 99 P.3d 1038 (Colo. 2004).

The pleadings should not be sent out with the jury. Spaulding v. Saltiel, 18 Colo. 86, 31 P. 486 (1892).

It is not a good practice to allow the jury to take the declaration to their room when they retire to consider their verdict. Good v. Martin, 1 Colo. 165 (1869), aff'd, 95 U.S. 90, 24 L. Ed. 341 (1877).

Jury may take pleadings with them unless objected or excepted to. Where it is assigned for error that the court permitted the jury to take the pleadings with them when they retired, but there is no record of an objection or an exception, an appellate court cannot review alleged irregularities that were apparently waived or consented to. King v. Rea, 13 Colo. 69, 21 P. 1084 (1889).

A transcript of the defendant's voluntary confession may be taken into the jury room during deliberations if it passed the tests of admissibility and was admitted into evidence. People v. Miller, 829 P.2d 443 (Colo. App. 1991).

No error in permitting jury unfettered access to properly admitted transcripts. People v. Al-Yousif, 206 P.3d 824 (Colo. App. 2006).

No error in permitting jury to view videotapes introduced at trial in jury room without defendant present. People v. Al-Yousif, 206 P.3d 824 (Colo. App. 2006).

The concern about the unsupervised review of materials indicated by the prohibition in this section of depositions in the jury room also applies to the videotape of the interrogation of a witness. As a result, the review of such a videotape by the jurors in this case should have been allowed only under circumstances which would assure that statements made in the videotape were not given undue weight or emphasis. People v. Montoya, 773 P.2d 623 (Colo. App. 1989), cert. denied, 781 P.2d 647 (Colo. 1989).

The amendment to section (m) effective January 1, 1999, undercuts the rationale of People v. Montoya and, under the amended rule, written statements that are trial exhibits may be taken into the jury room. People v. McKinney, 80 P.3d 823 (Colo. App. 2003), rev'd on other grounds, 99 P.3d 1038 (Colo. 2004).

The amendment to section (m) effective in 1999 made the analysis in People v. Montoya no longer applicable. Trial court, therefore, did not err when it permitted jurors to take victim's written statement into the jury room for deliberations. People v. Pahlavan, 83 P.3d 1138 (Colo. App. 2003).

Submission of deposition transcripts to the jury which are not read or otherwise used by the jurors, does not necessitate a new trial. Montrose Valley Funeral Home, Inc. v. Crippin, 835 P.2d 596 (Colo. App. 1992).

Applied in Billings v. People, 171 Colo. 236, 466 P.2d 474 (1970).

XIII. ADDITIONAL INSTRUCTIONS.

Annotator's note. Since section (n) of this rule is similar to § 212 of the former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

No error will be presumed in denying request for further instructions. Where a jury after retiring for deliberation returns into court and requests further instructions, which request is denied by the court, and the abstract of record contains neither the instructions given nor the request for further instructions, it will be presumed that no error was committed in denying the request. Buzanes v. Frost, 19 Colo. App. 388, 75 P. 594 (1904).

Sections (l) and (n) of this rule are not violated by written reply that matter is already covered. Where a jury in the course of its deliberations sends a note to the judge requesting advice on a question, and the judge replies in writing that "this matter is covered in your instructions", sections (l) and (n) of this rule are not violated. Kath v. Brodie, 132 Colo. 338, 287 P.2d 957 (1955); Reimer v. Walker, 170 Colo. 149, 459 P.2d 274 (1969).

Trial courts of necessity possess a large discretion in recalling juries and submitting amended or additional legal propositions by way of instructions. Hayes v. Williams, 17 Colo. 465, 30 P. 352 (1892).

Unless it fairly appears that some legal right of the party complaining has under proper objection been invaded and that the invasion may have resulted in injury, a reversal will not take place upon this ground. Hayes v. Williams, 17 Colo. 465, 30 P. 352 (1892).

Communication should take place in open court in counsel's presence. There ought to be no communication between the judge and jury after the latter have been charged and have retired to consider their verdict unless the communication takes place in open court, and, if practicable, in the presence of counsel on the respective sides. Colo. Cent. Consol. Mining Co. v. Turck, 50 F. 888 (8th Cir. 1892).

Where the communication complained of evidently took place in open court, but the record does not show the cause of counsel's absence, whether they were absent due to their own fault, or as to whether any efforts were made to secure their presence, every presumption in favor of the regularity and propriety of the court's action must be indulged. Colo. Cent. Consol. Mining Co. v. Turck, 50 F. 888 (8th Cir. 1892).

This rule must be given a reasonable construction. Tilley v. Montelius Piano Co., 15 Colo. App. 204, 61 P. 483 (1900).

This rule is intended simply to apply to such instructions or communications from the court to the jury as might bear upon the issues of the case and influence it in its determination for the one party or the other. Tilley v. Montelius Piano Co., 15 Colo. App. 204, 61 P. 483 (1900).

This rule is not intended to reach, or embrace, such communications as could not be construed to be instruction as to the law in the case and which are manifestly harmless in their character. Tilley v. Montelius Piano Co., 15 Colo. App. 204, 61 P. 483 (1900); People in Interest of E.S., 681 P.2d 528 (Colo. App. 1984).

An inquiry as to admissibility of verdict is not error. Where the jury after retiring send to the court by the bailiff, in the absence of counsel on both sides, a communication wherein they inquire whether a certain verdict would be admissible, to which communication the court returns by the bailiff a verbal answer "no", it is not reversible error as in violation of this rule. Tilley v. Montelius Piano Co., 15 Colo. App. 204, 61 P. 483 (1900).

An agreement may be called for. This rule has no application to a communication of the judge to jury, not as to the law of the case, but an exhortation to endeavor to harmonize their

differences and come to an agreement. Hutchins v. Haffner, 63 Colo. 365, 167 P. 966 (1917).

Instruction that jury "must" return verdict is error. When the jury indicates that it is in disagreement and an oral instruction precludes any possibility of a hung jury and goes far beyond the usual written third-degree instruction, which should be used with caution, then, where almost immediately after receiving this oral communication the jury returns its verdict, it can be reasonably assumed that any honest debate among the jurors is further precluded by the blunt instruction that they must return one verdict or the other with the implication that they cannot report a disagreement, so as to be prejudicial error. Reimer v. Walker, 170 Colo. 149, 459 P.2d 274 (1969).

A communication not in any way indicating the opinion of the court as to the merits of the controversy and not tending in any degree to coercion upon the jury is entirely proper and praiseworthy, though made in the absence of counsel and without their knowledge. Hutchins v. Haffner, 63 Colo. 365, 167 P. 966 (1917).

XIV. NEW TRIAL IF NO VERDICT.

When the trial court learns that the jury verdict was not unanimous and chooses to discharge the jury, the trial court had no choice but to order a new trial. Neil v. Espinoza, 747 P.2d 1257 (Colo. 1987).

XV. SEALED VERDICT.

Annotator's note. Since section (p) of this rule is similar to § 214 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Jurors may, by order of court, if they arrive at a verdict during recess, reduce it to writing, seal it, and separate. Kohn v. Kennedy, 6 Colo. App. 388, 41 P. 510 (1895).

The verdict must be retained by the jury or by some member thereof and be delivered to the court. Kohn v. Kennedy, 6 Colo. App. 388, 41 P. 510 (1895).

Although a jury may be allowed to separate after having sealed a verdict, they must be called at the opening of court and asked whether they have agreed upon their verdict. Kohn v. Kennedy, 6 Colo. App. 388, 41 P. 510 (1895).

Irregularity in the reception of a verdict is not waived by a failure to object at the time it was so received. Kohn v. Kennedy, 6 Colo. App. 388, 41 P. 510 (1895).

Where one seeks reversal on the ground of irregularity in the failure of the trial judge to be present when the verdict was received, then, if he was not substantially prejudiced by the trial court's procedure, he has no right to complain of the action of the trial court in entering its judgment on the verdict. Sowder v. Inhelder, 119 Colo. 196, 201 P.2d 533 (1948).

XVI. DECLARATION OF VERDICT.

Annotator's note. Since section (q) of this rule is similar to § 215 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Whether there shall be a poll of the jury rests in the sound discretion of the trial judge. Hindrey v. Williams, 9 Colo. 371, 12 P. 436 (1886); Morgan v. Gore, 96 Colo. 508, 44 P.2d 918 (1935).

If there should be any good reason, a request by either party to test the unanimity of the jury by a poll should be allowed. Hindrey v. Williams, 9 Colo. 371, 12 P. 436 (1886).

As a matter of practice, when a demand for a poll is made, it should be granted. Ryan v. People, 50 Colo. 99, 114 P. 306 (1911).

Rule does not require polling of jury unless a party so requests. Kading v. Kading, 683 P.2d 373 (Colo. App. 1984).

XVII. CORRECTION OF VERDICT.

Annotator's note. Since section (r) of this rule is similar to § 216 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Objections to the form of a verdict must be made in the court and before the jury is discharged. Cowell v. Colo. Springs Co., 3 Colo. 82 (1876), aff'd, 100 U.S. 55, 25 L. Ed. 547 (1879).

An objection to the form of a verdict cannot be raised on appeal for the first time. Cowell v. Colo. Springs Co., 3 Colo. 82 (1876), aff'd, 100 U.S. 55, 25 L. Ed. 547 (1879).

Where verdict is for plaintiff, it is the duty of the plaintiff and not the defendant to see that the verdict is corrected at the proper time. Dorsett v. Crew, 1 Colo. 18 (1864).

When mistakes in the form of the verdict are brought to the notice of the court, it becomes the duty of the court to send the jury back for the purpose of returning a correct verdict. Dorsett v. Crew, 1 Colo. 18 (1864).

If the amount of indemnity awarded by the jury is incorrect and the correct amount has already been determined and is not disputed, the court may amend the verdict in order to award the determined amount. Cole v.

Angerman, 31 Colo. App. 279, 501 P.2d 136 (1972).

Trial court may increase amount in verdict. Where the amount in question is undisputed or liquidated and the jury has failed to follow the instructions and returned a verdict for a lesser sum, the trial court has the power to increase the verdict to the higher figure. Cole v. Angerman, 31 Colo. App. 279, 501 P.2d 136 (1972).

Trial court may reduce amount in verdict. The action of the trial court, after receiving the verdict of the jury and remarking to them that they were discharged, in causing them to amend their verdict by reducing it to the amount claimed by the plaintiff, is not reversible error inasmuch as the same action might have been taken without the jury. Patrick Red Sandstone Co. v. Skoman, 1 Colo. App. 323, 29 P. 21 (1892).

Error by clerk is amendable. Any error or defect in a record which occurs through the act or omission of the clerk of the court in entering, or failing to enter of record, its judgment or proceedings is not an error in the express judgments pronounced by the court in the exercise of its judicial discretion, but is a clerical error and amendable. Hittson v. Davenport, 4 Colo. 169 (1878).

Word "defendant" in verdict presumed to include both defendants. Where two persons are sued as defendants and, although answering separately, make the same defense, a verdict for "the defendant" is not void for uncertainty, but must be presumed to include both defendants. Waddingham v. Dickson, 17 Colo. 223, 29 P. 177 (1892).

Nonpertinent matter may be disregarded. Where a verdict is irregular, the court may direct the jury to make necessary corrections, but it is not limited to that procedure, as it may properly disregard nonpertinent matter. Morgan v. Gore, 96 Colo. 508, 44 P.2d 918 (1935).

Any irregularity of form in verdict should be disregarded if it fairly appears that the jury intended a given verdict. Tyler v. District Court, 200 Colo. 254, 613 P.2d 899 (1980).

Court may not look beyond face of record to examine thought processes of jurors, and, if their intent is clear from the record, the verdict shall be given effect. Tyler v. District Court, 200 Colo. 254, 613 P.2d 899 (1980).

An incorrect method of expressing an intended verdict amounts to a mistake in the verdict that may properly be corrected under this rule. Kading v. Kading, 683 P.2d 373 (Colo. App. 1984).

A trial court may amend a verdict in matters of form, but not of substance. A change of substance is a change affecting the jury's underlying decision, but a change in form is one which merely corrects a technical error made by the jury. If amending a verdict to resolve an ambiguity would change the jury's underlying intent, the change is one of substance and cannot be done without a new trial. Dysert Assoc. Architecture v. Hoeltgen, 728 P.2d 756 (Colo. App. 1986).

A trial court may not set aside or amend, by way of remittitur, a jury's award for damages, so long as the verdict is consistent with the court's instruction and supported by evidence and the amount awarded is not so excessive or inadequate as to indicate bias, passion, or prejudice. Belfor USA Group v. Rocky Mtn. Caulking & Waterproofing, 159 P.3d 672 (Colo. App. 2006).

Where inconsistent verdicts indicate that the jury was misled by its instructions concerning the awarding of damages, the trial court may not resolve the inconsistency by amending the verdict, and the appropriate remedy is a new trial on the issue of damages. Hugh v. Washington Indus. Bank, 757 P.2d 1154 (Colo. App. 1988).

XVIII. VERDICT RECORDED.

Annotator's note. Since section (s) of this rule is similar to § 217 of the former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

If the answer is in the affirmative, the sealed verdict may be delivered to the court and, if in form, the jury may be discharged from the case. Kohn v. Kennedy, 6 Colo. App. 388, 41 P. 510 (1895).

When juror was questioned about whether the verdict in favor of defendant as reported by a written special verdict was her verdict and juror responded "no", judge should have declared a mistrial or directed the jurors to deliberate further; by engaging in extended questioning as to why the juror had said the verdict was not hers, the court and counsel improperly delved into the deliberations and mental processes of the jurors and risked unduly influencing the juror to conform to the signed verdict. Simpson v. Stjernholm, 985 P.2d 31 (Colo. App. 1998).

Until the jury is discharged, the jurors are not relieved their duties pertaining to the case. Kohn v. Kennedy, 6 Colo. App. 388, 41 P. 510 (1895).

Rule 48. Number of Jurors

The jury shall consist of six persons, unless the parties agree to a smaller number, not less than three. The parties may stipulate at any time before the verdict is returned that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.

Cross references: For number of jurors, see § 13-71-103, C.R.S.

ANNOTATION

Law reviews. For article, "Trials: Rules 38-53", see 23 Rocky Mt. L. Rev. 571 (1951).

Annotator's note. Since this rule is similar to § 197 of the former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Where a party objects to a jury of three, the objection should be sustained and a jury of six impaneled to try the cause. Branch v. Branch, 30 Colo. 499, 71 P. 632 (1903).

Unless the parties consent thereto, a jury of three cannot lawfully try a suit. Branch v. Branch, 30 Colo. 499, 71 P. 632 (1903).

Attorney appointed in default cannot consent. In case of default where an attorney has been appointed by the court to represent the absent defendant, the attorney so appointed cannot consent for the defendant to have the cause tried by a jury of three. Branch v. Branch, 30 Colo. 499, 71 P. 632 (1903).

Applied in People v. Peek, 199 Colo. 3, 604 P.2d 23 (1979); People v. Boos, 199 Colo. 15, 604 P.2d 272 (1979).

Rule 49. Special Verdicts and Interrogatories

(a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made upon the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact, the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other or one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

Cross references: For waiver of trial by jury, see C.R.C.P. 38(e); for entry of judgment, see C.R.C.P. 58.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, "Trials: Rules 38-53", see 23 Rocky Mt. L. Rev. 571 (1951). For article, "One Year Review of Civil Procedure and Appeals", see 39 Dicta 133 (1962).

II. SPECIAL VERDICTS.

Where plaintiffs fail to establish their allegations that defendants are guilty of gross negligence or of willful or wanton misconduct, but there is sufficient evidence of simple negligence, it requires submission of the case to the jury. Hurst v. Crowtero Boating Club, Inc., 31 Colo. App. 9, 496 P.2d 1054 (1972).

It is not error, in a will contest, for the court to submit the case to the jury on special interrogatories. In re Piercen's Estate, 118 Colo. 264, 195 P.2d 725 (1948).

Where no protest is made to the submission to the jury of a question any objections thereto are waived. Westing v. Marlatt, 124 Colo. 355, 238 P.2d 193 (1951).

Trial court's rejection of party's proposed jury instructions is not in error so long as the jury instructions submitted by the trial court sufficiently and properly cover the subjects contained in the proposed instructions. Staley v. Sagel, 841 P.2d 379 (Colo. App. 1992).

Appellate court has duty to attempt to reconcile jury's answers to special verdicts if it is at all possible, and where there is a view of the case that makes the jury's answers consistent, they must be resolved that way. City of Aurora v. Loveless, 639 P.2d 1061 (Colo. 1981); Williamson v. Sch. District No. 2, 695 P.2d 1173 (Colo. App. 1984).

III. GENERAL VERDICT.

The refusal to submit the interrogatories to the jury is not an abuse of discretion by the court. Lambrecht v. Archibald, 119 Colo. 356, 203 P.2d 897 (1949).

Under this rule the submission of interrogatories is discretionary and not mandatory. Lambrecht v. Archibald, 119 Colo. 356, 203 P.2d 897 (1949).

Use of special verdicts and interrogatories is discretionary. The use of special verdicts or interrogatories accompanying general verdicts, unless specifically required, is discretionary with the trial court. Felder v. Union Pac. R.R., 660 P.2d 911 (Colo. App. 1982).

Jury verdicts will not be reversed for inconsistency if the record discloses any evidentiary basis to support the verdicts. Alzado v. Blinder, Robinson & Co., Inc., 752 P.2d 544 (Colo. 1988).

Rule 50. Motion for Directed Verdict

A party may move for a directed verdict at the close of the evidence offered by an opponent or at the close of all the evidence. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, "Trials: Rules 38-53", see 23 Rocky Mt. L. Rev. 571 (1951). For article, "One Year Review of Civil Procedure", see 34 Dicta 69 (1957). For article, "One Year Review of Civil Procedure and Appeals", see 37 Dicta 21 (1960). For article, "One Year Review of Civil Procedure and Appeals", see 39 Dicta 133 (1962). For article, "The One Percent Solution", see 11 Colo. Law. 86 (1982). For article, "Federal Practice and Procedure", which discusses a recent Tenth Circuit decision dealing with a motion for directed verdict, see 62 Den. U. L. Rev. 230 (1985).

This rule is substantially the same as F.R.C.P. 50. Singer v. Chitwood, 126 Colo. 173, 247 P.2d 905 (1952).

This rule follows the rule and practice in federal courts. Klipp v. Grusing, 119 Colo. 111, 200 P.2d 917 (1948).

This rule governing the direction of a verdict is identical to the former rule controlling a motion for nonsuit in effect prior to the adoption of the rules of civil procedure. Singer v. Chitwood, 126 Colo. 173, 247 P.2d 905 (1952).

Motions for directed verdict present a question of law, not of discretion. Gossard v. Watson, 122 Colo. 271, 221 P.2d 353 (1950).

Motion of both sides for a directed verdict no longer amounts to a waiver of jury trial. Am. Nat'l Ins. Co. v. Gregg, 123 Colo. 476, 231 P.2d 467 (1951).

This rule specifically provides that "a motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts". Klipp v. Grusing, 119 Colo. 111, 200 P.2d 917 (1948).

It becomes the duty of the trial court to direct a verdict in favor of defendant and grant a dismissal of the action when a review of all the evidence establishes that there is not basis upon which a verdict in favor of plaintiff may be supported as a matter of law. Montes v. Hyland Hills Park, 849 P.2d 852 (Colo. 1992).

Granting a directed verdict is a final and legal determination of the controversy. Burenheide v. Wall, 131 Colo. 371, 281 P.2d 1000 (1955).

Direction of verdict by trial court is presumed regular and valid. Where the trial court in directing a verdict exercises sound judicial discretion, its action is entitled to the same presumption of regularity and validity as is accorded to any other type of judgment; that error may have been committed by the trial court is never presumed, but must affirmatively be made to appear. French v. Haarhues, 132 Colo. 261, 287 P.2d 278 (1955).

A jury's subsequent verdict to the contrary cannot stand if a trial court appropriately directs a verdict on an issue. Pinell v. McCrary, 849 P.2d 848 (Colo. App. 1992).

"Motion for directed verdict" is actually motion to dismiss. When the court is the trier of fact, a motion denominated a "motion for directed verdict" is actually a motion to dismiss pursuant to C.R.C.P. 41(b). Campbell v. Commercial Credit Plan, Inc., 670 P.2d 813 (Colo. App. 1983); Frontier Exploration v. Am. Nat., 849 P.2d 887 (Colo. App. 1992).

There are standards for directed verdict versus motion for new trial. The standards for directing a verdict and setting one aside for new trial are widely different and should not be controlled by the same conditions and circumstances. The entry of a judgment notwithstanding the verdict involves a legal standard, while the authority to grant a new trial rests in the discretion of the trial court. Whitlock v. Univ. of Denver, 712 P.2d 1072 (Colo. App. 1985), rev'd on other grounds, 744 P.2d 54 (Colo. 1987).

The result of setting aside a verdict and the event of directing one are entirely different and are not controlled by the same conditions or circumstances; the matter of a retrial of the issue rests, within limitations, in the discretion of the trial court, while the matter of a directed verdict rests upon legal right. Gossard v. Watson, 122 Colo. 271, 221 P.2d 353 (1950); Singer v. Chitwood, 126 Colo. 173, 247 P.2d 905 (1952); Burenheide v. Wall, 131 Colo. 371, 281 P.2d 1000 (1955).

There is a difference between the legal discretion of the court to set aside a verdict as against the weight of evidence and the obligation which the court has to withdraw a case from the jury, or direct a verdict, for insufficiency of evidence; in the latter case it must be so insufficient in fact as to be insufficient in law, while in the former case it is merely insufficient in fact. Gossard v. Watson, 122 Colo. 271, 221 P.2d 353 (1950); Singer v. Chitwood, 126 Colo. 173, 247 P.2d 905 (1952).

Applied in Simon v. Williams, 123 Colo. 505, 232 P.2d 181 (1951); Durango Sch. Dist. No. 9-R v. Thorpe, 200 Colo. 268, 614 P.2d 880 (1980); In re Van Camp, 632 P.2d 1062 (Colo. App. 1981); Marks v. District Court, 643 P.2d 741 (Colo. 1982); Conrad v. City & County of Denver, 656 P.2d 662 (Colo. 1982); Mucci v. Falcon Sch. Dist. No. 49, 655 P.2d 422 (Colo. App. 1982); Safeway Stores, Inc. v. Smith, 658 P.2d 255 (Colo. 1983); Yoder v. Hooper, 695 P.2d 1182 (Colo. App. 1984); Daly v. Observatory Corp., 759 P.2d 777 (Colo. App. 1988), rev'd on other grounds, 780 P.2d 462 (Colo. 1989).

II. EVIDENCE.

In passing upon a motion for a directed verdict, the trial court must view the evidence in the light most favorable to the party against whom the motion is directed. Gossard v. Watson, 122 Colo. 271, 221 P.2d 353 (1950); Singer v. Chitwood, 126 Colo. 173, 247 P.2d 905 (1952); Bradley Realty Inv. Co. v. Shwartz, 145 Colo. 65, 357 P.2d 638 (1960); Nettrour v. J. C. Penney Co., 146 Colo. 150, 360 P.2d 964 (1961); Gonzales v. Safeway Stores, Inc., 147 Colo. 358, 363 P.2d 667 (1961); Hildyard v. Western Fasteners, Inc., 33 Colo. App. 396, 522 P.2d 596 (1974); Safeway Stores, Inc. v. Langdon, 187 Colo. 425, 532 P.2d 337 (1975); Scognamillo v. Olsen, 795 P.2d 1357 (Colo. App. 1990); Lorenz v. Martin Marietta Corp., Inc., 802 P.2d 1146 (Colo. App. 1990), aff'd Martin Marietta Corp. v. Lorenz, 823 P.2d 100 (Colo. 1992); Herrera v. Gene's Towing, 827 P.2d 619 (Colo. App. 1992).

Every reasonable inference to be drawn from the evidence presented is to be considered in the light most favorable to such party. Singer v. Chitwood, 126 Colo. 173, 247 P.2d 905 (1952); Bradley Realty Inv. Co. v. Shwartz, 145 Colo. 65, 357 P.2d 638 (1960); Nettrour v. J. C. Penney Co., 146 Colo. 150, 360 P.2d 964 (1961); Gonzales v. Safeway Stores, Inc., 147 Colo. 358, 363 P.2d 667 (1961).

Reasonable inference may be drawn from circumstantial evidence. Kopeikin v. Merchants Mortg. & Trust Corp., 679 P.2d 599 (Colo. 1984).

A motion for a directed verdict admits the truth of the adversary's evidence and of every favorable inference of fact which may legitimately be drawn from it. Western-Realco Ltd. v. Harrison, 791 P.2d 1139 (Colo. App. 1989). Co., 806 P.2d 388 (Colo. App. 1990).

Every factual dispute supported by credible evidence must be resolved in his favor, and the strongest inferences reasonably deducible from the most favorable evidence must be indulged in his favor. Gossard v. Watson, 122 Colo. 271, 221 P.2d 353 (1950).

In ruling on whether an activity is inherently dangerous as a matter of law, if the state of the evidence is such that when viewed in a light most favorable to the plaintiff, the court is convinced that a jury could not find that all the following elements have been proven by a preponderance of the evidence, then it should direct a verdict against the plaintiff and in favor of the employer: (1) that the activity in question presented a special or peculiar danger to others inherent in the nature of the activity or the particular circumstances under which the activity was to be performed; (2) that the danger was different in kind from the ordinary risks that commonly confront persons in the community; (3) that the employer knew or should have known that the special danger was inherent in the nature of the activity or in the particular circumstances under which the activity was to be performed; and (4) that the injury to the plaintiff was not the result of the collateral negligence of the defendant's independent contractor. Huddleston v. Union Rural Elec. Ass'n, 841 P.2d 282 (Colo. 1992).

Where defendant moves for directed verdict, the court views the evidence in the light most favorable to plaintiff. Jasko v. F. W. Woolworth Co., 177 Colo. 418, 494 P.2d 839 (1972); Klein v. Sowa, 759 P.2d 857 (Colo. App. 1988).

Motion for directed verdict in a jury trial admits the truth of the adversary's evidence and of every favorable inference of fact which may legitimately be drawn therefrom. Comtrol, Inc. v. Mountain States Tel. & Tel. Co., 32 Colo. App. 384, 513 P.2d 1082 (1973); Salstrom v. Starke, 670 P.2d 809 (Colo. App. 1983).

In passing upon a motion to direct a verdict, a judge cannot properly undertake to weigh the evidence. Gossard v. Watson, 122 Colo. 271, 221 P.2d 353 (1950); Singer v. Chitwood, 126 Colo. 173, 247 P.2d 905 (1952); Roberts v. Bucher, 41 Colo. App. 138, 584 P.2d 97 (1978), rev'd on other grounds, 198 Colo. 1, 595 P.2d 239 (1979); Fagerberg v. Webb, 678 P.2d 544 (Colo. App. 1983); Christie v. San Miguel Cty. Sch. Dist., 759 P.2d 779 (Colo. App. 1988).

Party seeking to reopen evidence after party has rested and after motion for directed verdict has been made must make an offer proof as to what specific evidence the party would present and demonstrate that the evidence would cure any deficiencies in party's case. Failure to offer such proof and make such demonstration waives the right of the party to present future evidence. Justi v. RHO Condo. Ass'n, __ P.3d __ (Colo. App. 2011).

Court should not judge credibility of witnesses. On a motion for directed verdict at the close of a party's case, it is not for the court to judge as to the weight of the evidence or the credibility of witnesses. Bradley Realty Inv. Co. v. Shwartz, 145 Colo. 65, 357 P.2d 638 (1960).

The judge's duty is to take that view of the evidence most favorable to the party against whom it is moved to direct a verdict and from that evidence, and the inferences reasonably and justifiably to be drawn therefrom, determine whether or not under the law a verdict might be found for the party having the onus. Gossard v. Watson, 122 Colo. 271, 221 P.2d 353 (1950); Singer v. Chitwood, 126 Colo. 173, 247 P.2d 905 (1952).

When a plaintiff makes out a prima facie case, even though the facts are in dispute, it is for the jury, and not the judge, to resolve the conflict under this section. Herrera v. Gene's Towing, 827 P.2d 619 (Colo. App. 1992).

A motion for directed verdict should be granted only in the clearest of cases when the evidence is undisputed and it is plain no reasonable person could decide the issue against the moving party. Evans v. Webster, 832 P.2d 951 (Colo. App. 1991).

Whether new trial would be granted is not a proper test. It is not a proper test of whether the court should direct a verdict that the court, on "weighing" the evidence, would grant a new trial, upon motion. Gossard v. Watson, 122 Colo. 271, 221 P.2d 353 (1950); Singer v. Chitwood, 126 Colo. 173, 247 P.2d 905 (1952).

III. GRANT OF MOTION.

Directed verdict is proper only where there are no factual disputes. Williamson v. Sch. District No. 2, 695 P.2d 1173 (Colo. App. 1984).

A directed verdict may be granted only when, disregarding conflicting evidence and giving to nonmovant's evidence all the value to

which it is legally entitled by indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality and materiality to support a verdict in favor of the nonmovant if such a verdict were given. Gossard v. Watson, 122 Colo. 271, 221 P.2d 353 (1950).

It becomes the court's duty as a matter of law to direct a verdict. Where a trial court, from a review of all the evidence adduced, is convinced that there is no basis upon which a verdict in favor of a party may be supported and that even though a jury should return a verdict in his favor it could not be permitted to stand, it becomes the duty of the trial court, as a matter of law, to direct a verdict in favor of the other party. French v. Haarhues, 132 Colo. 261, 287 P.2d 278 (1955).

A motion for directed verdict can only be granted where the evidence, when considered, compels the conclusion that the minds of reasonable men could not be in disagreement and that no evidence, or legitimate inference arising therefrom, has been received or shown upon which a jury's verdict against the moving party could be sustained. Nettrour v. J. C. Penney Co., 146 Colo. 150, 360 P.2d 964 (1961); Gonzales v. Safeway Stores, Inc., 147 Colo. 358, 363 P.2d 667 (1961); Safeway Stores, Inc. v. Langdon, 187 Colo. 425, 532 P.2d 337 (1975); Western-Realco Ltd. v. Harrison, 791 P.2d 1139 (Colo. App. 1989); Pierce v. Capitol Life Ins. Co., 806 P.2d 388 (Colo. App. 1990); Burgess v. Mid-Century Ins. Co., 841 P.2d 325 (Colo. App. 1992).

A motion for a directed verdict should not be granted unless the evidence compels the conclusion that reasonable men could not disagree and that no evidence or inference had been received at trial upon which a verdict against the moving party could be sustained. Comtrol, Inc. v. Mountain States Tel. & Tel. Co., 32 Colo. App. 384, 513 P.2d 1082 (1973).

A verdict should be directed only when the evidence has such quality and weight as to point strongly and overwhelmingly to the fact that reasonable men could not arrive at a contrary verdict. Safeway Stores, Inc. v. Langdon, 187 Colo. 425, 532 P.2d 337 (1975).

A motion for directed verdict should not be granted unless the evidence compels the conclusion that reasonable jurors could not disagree and that no evidence or inference has been received at trial upon which a verdict against the movant could be sustained. Salstrom v. Starke, 670 P.2d 809 (Colo. App. 1983); Mahoney Marketing Corp. v. Sentry Builders, 697 P.2d 1139 (Colo. App. 1985); Smith v. Denver, 726 P.2d 1125 (Colo. 1986); United Bank v. One Center Joint Venture, 773 P.2d 637 (Colo. App. 1989).

Trial court's grant of motion for directed verdict on the theory of strict liability was proper since evidence was offered by plaintiff to prove that the product of defendants was unreasonably dangerous and carried no warning to that effect. Fenton v. Fibreboard Corp., 827 P.2d 564 (Colo. App. 1991).

Trial judge may only direct verdict in clearest cases. A trial judge may only invade the fact-finding province of the jury to grant a directed verdict in the clearest cases. Romero v. Denver & R. G. W. Ry., 183 Colo. 32, 514 P.2d 262 (1973).

Court is justified in usurping function of jury. Where the evidence is undisputed and where reasonable men could reach but one conclusion from that evidence, the court is justified in usurping the function of the jury and directing a verdict for either party. Pioneer Constr. Co. v. Richardson, 176 Colo. 254, 490 P.2d 71 (1971).

If the evidence is of such a character as to establish willful and wanton conduct as a matter of law, the court should direct a verdict and should not submit the matter to the jury. Rennels v. Marble Prods., Inc., 175 Colo. 229, 486 P.2d 1058 (1971).

Where there is evidence of the occurrence of an accident accompanied by "prima facie" evidence of defendant's negligence, and there is no evidence of facts absolving the defendant of negligence or of facts showing negligence on the part of the plaintiff, a directed verdict in favor of the plaintiff is proper. Moore v. Fischer, 31 Colo. App. 425, 505 P.2d 383 (1972), aff'd, 183 Colo. 392, 517 P.2d 458 (1973).

Where no evidence of damages has been introduced, a trial court properly directs a verdict against plaintiffs on their claim. Greenleaf, Inc. v. Manco Chem. Co., 30 Colo. App. 367, 492 P.2d 889 (1971).

Where the court errs in submitting case to the jury, then, since it should have granted a motion for a directed verdict, it should sustain a motion for judgment under this rule. First Nat'l Bank v. Henning, 112 Colo. 523, 150 P.2d 790 (1944).

IV. WHEN GRANT OF MOTION IMPROPER.

Where there is substantial evidence tending to establish cause of action, it is error to direct a verdict in favor of defendant at the close of plaintiff's case. Bradley Realty Inv. Co. v. Shwartz, 145 Colo. 65, 357 P.2d 638 (1960).

When a plaintiff makes out a "prima facie" case, even though the facts are in dispute, it is for the jury, and not the judge, to resolve the conflict, and a direction of a verdict is error. Romero v. Denver & R. G. W. Ry., 183 Colo. 32, 514 P.2d 626 (1973).

Directed verdict held reversible error where plaintiff established "prima facie" case. Kennedy v. City & County of Denver, 31 Colo. App. 564, 506 P.2d 764 (1972).

If conduct does not, as a matter of law, establish that it was willful and wanton, the matter necessarily has to be submitted to the jury. Rennels v. Marble Prods., Inc., 175 Colo. 229, 486 P.2d 1058 (1971).

Where a factual dispute exists, although both sides have moved for a directed verdict, the trial court has no alternative but to submit the matter to the jury. Rennels v. Marble Prods., Inc., 175 Colo. 229, 486 P.2d 1058 (1971).

Where there is conflicting testimony and reasonable men might draw different conclusions from the testimony, the question of proximate cause is properly one for the jury. Pioneer Constr. Co. v. Richardson, 176 Colo. 254, 490 P.2d 71 (1971).

When the evidence concerning a material fact is such that reasonable minds could differ with reference thereto, it should be submitted to the jury for its determination, and a trial court's refusal to submit the matter to the jury is error calling for reversal. Gonzales v. Safeway Stores, Inc., 147 Colo. 358, 363 P.2d 667 (1961).

Where a doctor in a malpractice suit presents evidence that his failure to inform plaintiff of all the risks attendant to an operation was consistent with community medical standards, the determination of the adequacy of his disclosures then becomes one for the jury, and a directed verdict in favor of plaintiff would not be warranted. Stauffer v. Karabin, 30 Colo. App. 357, 492 P.2d 862 (1971).

Directed verdict on issue on contributory negligence held error. Where, under conflicting evidence, a factual issue was presented as to whether plaintiff was contributorily negligent by virtue of a sudden and abrupt stopping of his vehicle in an unexpected location, the trial court erred in directing a verdict on the issue of plaintiff's contributory negligence. Hildyard v. Western Fasteners, Inc., 33 Colo. App. 396, 522 P.2d 596 (1974).

Whether assault and battery occurred are jury questions. Issues of whether officer or arrestee initiated force, whether officer's force was unreasonable, and whether arrestee used reasonable force in self-defense in resisting arrest should have been submitted to jury. Valdez v. City and County of Denver, 764 P.2d 393 (Colo. App. 1988).

Where the evidence presented raised disputed issues of fact, the trial court's refusal to grant a directed verdict was correct. Horton v. Mondragon, 705 P.2d 977 (Colo. App. 1984).

V. REVIEW OF MOTION.

In reviewing a motion for directed verdict, the court must consider the evidence in a light most favorable to the party against whom the motion is directed. Sanchez v. Staats, 34 Colo. App. 243, 526 P.2d 672 (1974), aff'd, 189 Colo. 228, 539 P.2d 1233 (1975); Evans v. Webster, 832 P.2d 951 (Colo. App. 1991).

The reviewing court does so by considering all evidence in the light most favorable to the party against whom the motion is directed and by indulging every reasonable inference that can be legitimately drawn from the evidence in that party's favor. Evans v. Webster, 832 P.2d 951 (Colo. App. 1991); Gast v. City of Fountain, 870 P.2d 506 (Colo. App. 1993).

If there is no conflicting evidence with respect to the particular issue raised by the motion for directed verdict and the only concern is the legal significance of undisputed facts, then the appellate court may make an independent determination of the issue. Evans v. Webster, 832 P.2d 951 (Colo. App. 1991).

Appellate court will not consider denial of motion for directed verdict when grounds are not stated by movant. Sharoff v. Iacino, 123 Colo. 456, 231 P.2d 959 (1951).

Where the evidence does not warrant the direction of a verdict for either party, but the trial court directs a verdict for one of the parties, the judgment must be reversed and a new trial granted, notwithstanding a motion by both sides for a directed verdict. Klipp v. Grusing, 119 Colo. 111, 200 P.2d 917 (1948).

Rule 51. Instructions to Jury

The parties shall tender jury instructions pursuant to C.R.C.P. 16(g). All instructions shall be submitted to the parties, who shall make all objections thereto before they are given to the jury. Only the grounds so specified shall be considered on motion for a new trial or on appeal or certiorari. Before argument, the court shall read its instructions to the jury but shall not comment upon the evidence. Such instructions shall be taken by the jury when it retires. All instructions offered by the parties, or given by the court, shall be filed with the clerk and, with the endorsement thereon indicating the action of the court, shall be taken as part of the record of the cause.

Source: Entire rule amended and adopted April 14, 1994, effective January 1, 1995, for all cases filed on or after that date; entire rule amended and effective September 10, 2009.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, "Limitations of the Power of Courts in Instructing Juries", see 6 Dicta 23 (March 1929). For article, "Shall Colorado Procedure Conform with the Proposed Federal Rules of Civil Procedure?", see 15 Dicta 5 (1938). For article, "Colorado Criminal Procedure — Does It Meet Minimum Standards?", see 28 Dicta 14 (1951). For article, "Trials: Rules 38-53", see 23 Rocky Mt. L. Rev. 571 (1951). For article, "One Year Review of Civil Procedure", see 34 Dicta 69 (1957). For article, "Jury Nullification and the Rule of Law", see 17 Colo. Law. 2151 (1988).

Annotator's note. Since this rule is similar to § 205 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

The giving of an instruction for special findings by a jury is discretionary with the court. Brown v. Maier, 96 Colo. 1, 38 P.2d 905 (1934).

Where there was no statute or rule to support the presumption created by a jury instruction, the presumption could only be properly given if it was supported by common law rules governing the admissibility and evidentiary effect of defendant electrical utility's compliance with industry standards. Yampa Valley Elec. v. Telecky, 862 P.2d 252 (Colo. 1993).

In the absence of a showing of abuse of discretion, no error can be predicated on the refusal to give such an instruction. Brown v. Maier, 96 Colo. 1, 38 P.2d 905 (1934).

A judgment of the trial court refusing to give requested instruction will not be reversed unless the refusal results in substantial, prejudicial error. Armentrout v. FMC Corp., 842 P.2d 175 (Colo. 1992).

The purpose of jury instructions is to provide the jury with the applicable law so that its attention will be directed to the specific issues that are to be determined. Rio Grande S. R.R. Co. v. Campbell, 44 Colo. 1, 96 P. 986 (1908); Yampa Valley Elec. v. Telecky, 862 P.2d 252 (Colo. 1993).

The trial court may exercise sound discretion as to the form and style in which instructions shall be given. Montgomery Ward & Co. v. Kerns, 172 Colo. 59, 470 P.2d 34 (1970).

The duty imposed upon the trial court necessarily involves a large discretion as to the form and style in which instructions to the jury shall be given. Moffat v. Tenney, 17 Colo. 189, 30 P. 348 (1892).

Court should state all issues and both parties' cases. A clear statement of the issues to the jury is eminently proper, but the court should be careful to state all the issues and put the case not only as it is laid by the plaintiff, but also as it is controverted by the defendant; he is entitled to have his defense and case stated. Kindel v. Hall, 8 Colo. App. 63, 44 P. 781 (1896).

A party is entitled to an instruction on his theory of the case when it is supported by competent evidence. Davis v. Cline, 177 Colo. 204, 493 P.2d 362 (1972).

A party is entitled to a jury instruction only when it is supported by the evidence and is consistent with existing law. Sufficient competent evidence, rather a mere scintilla of evidence, is required to support an instruction. Melton by and through Melton v. Larrabee, 832 P.2d 1069 (Colo. App. 1992).

Jury instruction that the highest degree of care was owed by the defendant gas service company in the distribution of propane gas was proper in action for negligence for gas explosion that destroyed home of insurance company's client, as was instruction on the doctrine of res ipsa loquitur; record showed that explosion would not have occurred but for negligence. U.S. Fidelity and Guarantee Co. v. Salida Gas Serv. Co., 793 P.2d 602 (Colo. App. 1989).

It is error for the court to instruct a jury on questions not presented by the pleadings, or with reference to matters irrelevant to the evidence. Bijou Irrigation Dist. v. Cateran Land & Live Stock Co., 73 Colo. 93, 213 P. 999 (1923); McCaffrey v. Mitchell, 98 Colo. 467, 56 P.2d 926, 57 P.2d 900 (1936).

Trial court's failure to instruct jury on loss of future earning capacity was error. Evidence was presented that the plaintiff had previously worked as a nurse aide at a specified rate of compensation, and testimony was such that a reasonable inference could be made that a return to work would be problematic. Plaintiff was not required to introduce evidence of an intention to return to work in the future. Martinez v. Shapland, 833 P.2d 837 (Colo. App. 1992).

Trial court has discretion to issue or refuse to issue instruction on loss of future earning capacity, but the court's decision must be based on the evidence and be premised on the presence or absence of evidence regarding earnings. When there is evidence in the record the court has an obligation to present proper instruction to the jury in support of a party's theory of recovery. Martinez v. Shapland, 833 P.2d 837 (Colo. App. 1992).

A trial court cannot in its instructions to the jury withdraw from its consideration a proper defense and, by an erroneous construction of the law, reenact a statute, disregarding its plain provisions, so as to fit the case under consideration. Potts v. Bird, 93 Colo. 547, 27 P.2d 745 (1933).

The charge of the court is to be taken as a whole. Coors v. Brock, 22 Colo. App. 470, 125 P. 599 (1912).

Instructions are to be read together and considered as a unified whole. Kendall v. Lively, 94 Colo. 483, 31 P.2d 343 (1934).

In construing a charge, each instruction is to be considered in connection with the entire charge. Dozenback v. Raymer, 13 Colo. 451, 22 P. 787 (1889).

Court's instruction to the jury at the close of evidence outweighs any previous instruction. In determining an award for damages, the jury was justified in considering evidence previously barred by an order in limine because the court's final instructions effectively negated that order. Belfor USA Group v. Rocky Mtn. Caulking & Waterproofing, 159 P.3d 672 (Colo. App. 2006).

Tendered instruction on "inherently dangerous activity" was properly refused, where record did not indicate that installation of heat tape was an activity analogous to other inherently dangerous activities. Melton by and through Melton v. Larrabee, 832 P.2d 1069 (Colo. App. 1992).

All instructions should be considered in determining whether the necessary law has been correctly stated. All of the trial court's instructions to the jury are to be read and considered as a whole in determining whether all the necessary law has been correctly stated to the jury. Montgomery Ward & Co. v. Kerns, 172 Colo. 59, 470 P.2d 34 (1970).

Instructions to the jury are to be read and considered together in determining whether it has been adequately and correctly advised of the law. Martin v. Bralliar, 36 Colo. App. 254, 540 P.2d 1118 (1975).

If, when so read and considered, they constitute a fair, full, and reasonably accurate statement of the law, the fact that some isolated portions may seem to be incomplete or incorrect is immaterial. Kendall v. Lively, 94 Colo. 483, 31 P.2d 343 (1934).

Regardless of the fact that some instructions were not in the form suggested by the Colorado Jury Instructions, and that there was some overlapping, when read as a whole, they adequately and correctly informed the jury as to the law applicable to the case, which is the test as to whether the instructions constituted reversible error. Hotchkiss v. Preble, 33 Colo. App. 431, 521 P.2d 1278 (1974).

If, in considering the charge as a whole, an appellate court is satisfied that the jury was not improperly advised as to any material point in the case, the judgment will not be reversed on account of an erroneous instruction. Dozenback v. Raymer, 13 Colo. 451, 22 P. 787 (1889).

An instruction, which by itself might be erroneous, may be qualified by what appears in another part of the charge. Coors v. Brock, 22 Colo. App. 470, 125 P. 599 (1912).

Jury instructions were so erroneous or so confusing or misleading as probably to lead the jury into error of such proportion as to require a new trial, where the jury was not instructed to consider separately any of the elements of the inherently dangerous activity exception and the jury was given no instruction at all on the issue of whether the accident was caused by the collateral negligence of the defendant. Huddleston v. Union Rural Elec. Ass'n, 841 P.2d 282 (Colo. 1992).

An instruction may be cured. An instruction which is merely defective, incomplete, or ambiguous or which leaves room for improper inferences may be cured by another point in the charge. Nelson v. Nelson, 27 Colo. App. 104, 146 P. 1079 (1915); Block v. Balajty, 31 Colo. App. 237, 502 P.2d 1117 (1972).

The refusal to give requested instructions does not constitute error where the instructions given by the court are sufficiently comprehensive to advise the jury fully upon the questions presented for its determination. Weicker Transf. & Storage Co. v. Bedwell, 95 Colo. 280, 35 P.2d 1022 (1934).

Where a legal principle is adequately covered in other instructions given, it is not error for the court to refuse a requested specific instruction. Mohler v. Park County Sch. Dist. Re-2, 32 Colo. App. 388, 515 P.2d 112 (1973).

Where correct instructions are given covering all the points of a case, the refusal of others, though correct in themselves, is not ground of error. Dozenback v. Raymer, 13 Colo. 451, 22 P. 787 (1889).

When a tendered instruction is no more than a restatement of the court's instruction, it is not error to refuse the tendered instruction. Lockwood v. Travelers Ins. Co., 179 Colo. 103, 498 P.2d 947 (1972).

Jury instruction which was merely a statement of the parties' pleadings and contained the trial court's admonition that the contentions of the parties in the pleadings were not to be considered by the jury as evidence was not improper or prejudicial. Schafer v. Nat'l Teal Co., 32 Colo. App. 372, 511 P.2d 949 (1973).

A requested instruction which contains unwarranted assumptions is properly refused. Alamosa v. Johnson, 99 Colo. 134, 60 P.2d 1087 (1936).

An instruction should not be given which creates issue of fact not supported by evidence or which tends to mislead or divert minds

of jury from real factual issues. Dolan v. Mitchell, 179 Colo. 359, 502 P.2d 72 (1972).

An instruction which states that the defendant has to prove a matter by a preponderance of the evidence is incorrect, because such an instruction shifts the entire burden of proof rather than shifting only the burden of going forward with the evidence to rebut the presumption and plaintiff's "prima facie" case. Lockwood v. Travelers Ins. Co., 179 Colo. 103, 498 P.2d 947 (1972).

Where it is necessary that the jury be properly and fully instructed on a measure and counsel fails to tender suitable instructions thereon, it is the duty of the court to so instruct on its own motion. Kendall v. Hargrave, 142 Colo. 120, 349 P.2d 993 (1960).

In instructing on its own motion, an appellate court may execute its discretion in noticing error appearing on the face of the record even though not raised by the parties. Kendall v. Hargrave, 142 Colo. 120, 349 P.2d 993 (1960).

Tendered instruction on negligence properly refused. It was not error for the trial court to refuse defendants tendered instruction where the instruction would have been proper as to only two of plaintiff's three theories of negligence and the defendants did not attempt to limit the instructions' applicability to those two theories. Kerby v. Flamingo Club, Inc., 35 Colo. App. 127, 532 P.2d 975 (1974).

Rule restricts parties not court. This rule serves only as a restriction on parties to an action both by requiring assistance in the orderly administration of justice and by preventing a miscarriage of justice: it is not a bar to the court where the trial judge is attempting to secure substantial justice. First Nat'l Bank v. Campbell, 198 Colo. 344, 599 P.2d 915 (1979).

The court's action in giving an example of the application of a comparative negligence instruction is not reversible error where the evidence supports the amount of the verdict, the court gave the summary closing instruction, and the defendant did not make any contemporaneous objection to the remarks. Bravo v. Wareham, 43 Colo. App. 1, 605 P.2d 58 (1979).

Where the trial court refused to make plaintiff's tendered instruction part of the record but defendant admits that the instruction was tendered and refused, this rule will not act as a technical or procedural bar on the right of the plaintiff to protest the failure to instruct on the issue raised in the tendered instruction. Martinez v. Atlas Bolt & Screw Co., 636 P.2d 1287 (Colo. App. 1981).

Trial court's improper refusal to grant defendant's tendered instruction was harmless where the instruction given by the court contained the essence of his claimed defense. People v. Berry, 703 P.2d 613 (Colo. App. 1985).

Electrical utility was not entitled to a jury instruction creating a rebuttable presumption that adherence to industry standards presumes compliance with "accepted good engineering practice in the electric industry", since whether the utility complied with accepted good engineering practices, or whether it exercised due care is best determined by the jury after it has examined the relevant evidence and been properly instructed concerning the effect of the utility's compliance with the industry's minimum standards. Yampa Valley Elec. v. Telecky, 862 P.2d 252 (Colo. 1993).

Trial court committed reversible error in giving jury instruction, because there was no statutory or common law justification to support the rebuttable presumption contained in the instruction. Yampa Valley Elec. v. Telecky, 862 P.2d 252 (Colo. 1993).

Failure to instruct jury on standard of care required of a practitioner with a sub-specialty or special training constituted prejudicial error. Short v. Kinkade, 685 P.2d 210 (Colo. App. 1983).

Trial court erred in refusing to instruct jury on the doctrine of res ipsa locquitur. The trial court should consider all legitimate inferences from the evidence in light most favorable to plaintiffs and submit the issue of res ipsa locquitur if the evidence reasonably permits the conclusion that negligence is the more probable explanation. Gambrell by and through Eddy v. Ravin, 764 P.2d 362 (Colo. App. 1988).

Evidence raising issue whether physician held himself out as specialist required jury instructions. Physician in medical malpractice case who advertised in the "Yellow Pages" under "Family Practice, Obstetrics and Pediatrics" and who held himself out as a family practitioner who delivered babies required jury instructions on the standard of care applicable to specialists and the standard of care applicable to general practitioners and on the jury's duty to apply the appropriate standard of care based upon its determination on the issue of whether the physician was a specialist. Gambrell by and through Eddy v. Ravin, 764 P.2d 362 (Colo. App. 1988), aff'd 788 P.2d 817 (Colo. App. 1992).

Where a requested jury instruction was legally correct and clearly applicable to a material question of fact in controversy, failure to give such instruction constituted reversible error. Horton v. Mondragon, 705 P.2d 977 (Colo. App. 1984).

Tendered instruction on affirmative defense neither pled nor raised at trial by defendant properly refused. Where assumption of risk is neither pled nor raised at trial by defendant, cautionary instruction that it was not a defense to plaintiff's claim was properly excluded. Cruz v. Union Pacific R. Co., 707 P.2d 360 (Colo. App. 1985).

Failure to request instructions conforming to evidence of legal theory, or to take other

steps at trial to permit the jury to consider the theory, precludes plaintiff from introducing such theory on appeal. Alzado v. Blinder, Robinson & Co., 752 P.2d 544 (Colo. 1988).

Public policy supports disclosing to juries the effect that their deliberative decisions will have; thus, there was no error in instructing a jury that the effect of its findings regarding a statute of limitations could bar plaintiff's claim where the jury was also instructed that it should not be influenced by sympathy and the defendant failed to provide any evidence that the jury ignored this instruction. Salazar v. Am. Sterlizer Co., 5 P.3d 357 (Colo. App. 2000).

Applied in Roblek v. Horst, 147 Colo. 55, 362 P.2d 869 (1961); Jones v. Jefferson County Sch. Dist. No. R-1, 154 Colo. 590, 392 P.2d 165 (1964); Nunn v. Car-Skaden, 163 Colo. 328, 430 P.2d 615 (1967); Wales v. Howard, 164 Colo. 167, 433 P.2d 493 (1967); Norden v. Henry, 167 Colo. 274, 447 P.2d 212 (1968); Downing v. Don Ward & Co., 28 Colo. App. 75, 470 P.2d 868 (1970); First Nat'l Bank v. Campbell, 41 Colo. App. 406, 589 P.2d 501 (1978); Mobell v. City & County of Denver, 671 P.2d 433 (Colo. App. 1983).

II. NUMBERED.

Good practice requires that instructions be numbered. Kansas Pac. Ry. v. Ward, 4 Colo. 30 (1877).

Formerly, it was held that the omission to number instructions was not a fatal defect. Gibbs v. Wall, 10 Colo. 153, 14 P. 216 (1887).

A party cannot complain because instructions are irregularly numbered where no possible prejudice results to him, nor can such alleged error be reviewed when raised for the first time on appeal. Austin v. Austin, 42 Colo. 130, 94 P. 309 (1908).

III. IN WRITING.

Instructions to the jury should be written. Dorsett v. Crew, 1 Colo. 18 (1864).

The court should not orally qualify or modify jury instructions. Dorsett v. Crew, 1 Colo. 18 (1864); Gile v. People, 1 Colo. 60 (1867); Montelius v. Atherton, 6 Colo. 224 (1882); Lee v. Stahl, 9 Colo. 208, 11 P. 77 (1886).

By express consent of counsel, charge to jury may be given orally. Keith v. Wells, 14 Colo. 321, 23 P. 991 (1890).

An error is not cured by the extension of the instructions by the stenographer and the signature of the judge. Brown v. Crawford, 2 Colo. App. 235, 29 P. 1137 (1873), aff'd, 21 Colo. 272, 40 P. 692 (1895).

Where the trial court orally answers the question of a juror concerning the interpretation of a given instruction, it does not commit error where the answer is correct. Schlesinger v. Miller, 97 Colo. 583, 52 P.2d 402 (1935).

An admonition orally addressed by the presiding judge to the jury to the effect that they must be controlled by the evidence, not substituting their own judgment or impressions, is not error. Denver City Tramway Co. v. Armstrong, 21 Colo. App. 640, 123 P. 136 (1912).

IV. OBJECTIONS.

Law reviews. For article, "Necessity for Exceptions to Instructions in Colorado", see 1 Rocky Mt. L. Rev. 102 (1929).

This rule provides that parties must make objections to any proposed instructions before they are submitted to the jury and that only the grounds so specified shall be considered on appeal. Ross v. Colo. Nat'l Bank, 170 Colo. 436, 463 P.2d 882 (1969); Am. Family Mut. Ins. Co. v. Bowser, 779 P.2d 1376 (Colo. App. 1989).

Parties cannot prevail upon the ground of error in an instruction to which they made no objection upon the trial. Phillips v. Komornic, 159 Colo. 335, 411 P.2d 238 (1966).

Plaintiff's failure to object to jury instructions constituted a waiver of any claim of error to the instruction. Martin v. Minnard, 862 P.2d 1014 (Colo. App. 1993); Gorsich v. Double B Trading Co., Inc., 893 P.2d 1357 (Colo. App. 1994); Voller v. Gertz, 107 P.3d 1129 (Colo. App. 2004).

An appellate court will not ordinarily consider objections to instructions when those objections were not made during the course of the trial. Montgomery Ward & Co. v. Kerns, 172 Colo. 59, 470 P.2d 34 (1970).

Court may, in its discretion, notice error of record. This rule, providing that only grounds specified in objections to instructions will be considered on appeal, is modified by C.A.R. 1(d), permitting an appellate court at its discretion to notice any error of record whether raised by counsel or not. Warner v. Barnard, 134 Colo. 337, 304 P.2d 898 (1956).

Discretion will be exercised by the court when necessary to do justice. Warner v. Barnard, 134 Colo. 337, 304 P.2d 898 (1956); Blueflame Gas, Inc. v. Van Hoose, 679 P.2d 579 (Colo. 1984).

The supreme court does not hold that it would not make an exception to the rule concerning objections to instructions where its enforcement would result in a miscarriage of justice. Mansfield v. Harris, 79 Colo. 164, 244 P. 474 (1926).

The contemporaneous objection rule has a salutary purpose in the orderly administration of justice; its principle is to enable trial judges to clarify or correct misleading or erroneous instructions before they are given to a jury, and

thereby prevent costly retrials necessitated by obvious and prejudicial error. Scheer v. Cromwell, 158 Colo. 427, 407 P.2d 344 (1965); Ross v. Colo. Nat'l Bank, 170 Colo. 436, 463 P.2d 882 (1969); First Nat'l Bank v. Campbell, 198 Colo. 344, 599 P.2d 915 (1979); Baum v. S.S. Kresge Co., 646 P.2d 400 (Colo. App. 1982).

Objections should be timely. Objections to instructions should be made in such time and manner as to give the trial court an opportunity to correct the same, if found erroneous. Jacobs v. Mitchell, 2 Colo. App. 456, 31 P. 235 (1892); Colo. Utils. Corp. v. Casady, 89 Colo. 168, 300 P. 606 (1931).

When instructions are about to be given to the jury, counsel may not sit idly by and allow improper instructions to be given without proper and specific objections thereto in time for the court to correct the instructions before giving them to the jury since it is not in furtherance of justice to permit them to lie in wait and catch the court in error for the purpose of obtaining a reversal. Blanchard v. People, 74 Colo. 431, 222 P. 649 (1924).

Agreement for making objections in new trial motion is ineffectual. An agreement between the parties' attorneys approved by the court, that objections made to plaintiff's instructions for the first time in defendant's motion for a new trial should be considered as having been made before the instructions were given to the jury, is ineffectual. Thompson v. Davis, 117 Colo. 82, 184 P.2d 133 (1947).

Objections to instructions on a former trial do not eliminate the necessity of a renewal of the objections in a new trial if the party wishes to avail himself of such objections, for except by stipulation or proper order to the contrary, every judgment depends upon its own record only. Everett v. Cole, 86 Colo. 414, 282 P. 253 (1929).

Error based on instructions will not be considered where the abstract of record contains no exceptions to the giving of such instructions. Mullen v. Griffin, 60 Colo. 464, 154 P. 90 (1916); Wertz v. Lawrence, 69 Colo. 540, 195 P. 647 (1921).

To entitle a party to a consideration of an assignment of error based upon the refusal of the trial court to give requested instructions, the abstract must set out the instructions given by the court. Rollman v. Stenger, 84 Colo. 507, 271 P. 625 (1928).

Where neither the requested instructions nor those given are set out in the abstract, plaintiff in error is not entitled to a ruling on assignments of error based thereon. Federal Life Ins. Co. v. Lorton, 97 Colo. 545, 51 P.2d 693 (1935).

Failure to object waives error. It is the duty of counsel to examine or listen to the reading of instructions when given, and, if objections or errors are not called to the attention of the court at the time, they must ordinarily be deemed waived. Gilligan v. Blakesley, 93 Colo. 370, 26 P.2d 808 (1933); Scheer v. Cromwell, 158 Colo. 427, 407 P.2d 344 (1965); Ross v. Colo. Nat'l Bank, 170 Colo. 436, 463 P.2d 882 (1969); Bear Valley Church of Christ v. DeBose, 928 P.2d 1315 (Colo. 1996).

A party is required to make specific objections to an instruction in the trial court, to entitle him to assign error thereon on review. Schwalbe v. Postle, 80 Colo. 1, 249 P. 495 (1926); Sandner v. Temmer, 81 Colo. 57, 253 P. 400 (1927); Koontz v. People, 82 Colo. 589, 263 P. 19 (1927); Colo. Nat'l Bank v. Ashcraft, 83 Colo. 136, 263 P. 23 (1927); Small v. Clark, 83 Colo. 211, 263 P. 933 (1928); Rains v. Rains, 97 Colo. 19, 46 P.2d 740 (1935).

If objections not made in lower court, they will not be considered on review. Objections to instructions not specifically made in the lower court before they are given will not be considered on review. Baldwin v. Scott, 65 Colo. 53, 173 P. 716 (1918); Krohn v. Colo. Springs Interurban Ry., 70 Colo. 243, 199 P. 88 (1921); Bijou Irrigation Dist. v. Cateran Land & Live Stock Co., 73 Colo. 93, 213 P. 999 (1923); Blanchard v. People, 74 Colo. 431, 222 P. 649 (1925); Galligan v. Bua, 77 Colo. 386, 236 P. 1016 (1925); Clark v. Giacomini, 85 Colo. 530, 277 P. 306 (1929); Colo. Utils. Corp. v. Casady, 89 Colo. 156, 300 P. 601 (1931); Boynton v. Fox Denver Theaters, Inc., 121 Colo. 227, 214 P.2d 793, 24 A.L.R.2d 235 (1950); Sharoff v. Iacino, 123 Colo. 456, 231 P.2d 959 (1951); Kennedy-Fudge v. Fink, 644 P.2d 91 (Colo. App. 1982).

A general objection to the whole of an instruction will not prevail where such instruction contains distinct propositions, one of which is sound in law. Atchison, T. & S. F. Ry. v. Gumaer, 22 Colo. App. 495, 125 P. 589 (1912).

General exceptions to instructions "in each and every part thereof" are insufficient. Jacobs v. Mitchell, 2 Colo. App. 456, 31 P. 235 (1892).

Single objection to error appearing in other instructions is sufficient. Where the attention of the trial court was sufficiently directed to objectionable words in an instruction, then the point is saved for consideration on appeal, although specific objections are not made to other instructions in which the error is repeated. Lewis v. La Nier, 84 Colo. 376, 270 P. 656 (1928).

Where one argues that instructions could have been differently arranged, he must complain of the arrangement at the time that the instructions are submitted by the parties and before they are given to the jury. Mallett v. Pirkey, 171 Colo. 271, 466 P.2d 466 (1970).

Contemporaneous objection requirement inapplicable to sua sponte grant of new trial. This rule does not apply to the trial court when it sua sponte grants a new trial; the purposes of the contemporaneous objection requirement of this rule are not violated when the trial court acts on its own initiative to order a new trial under C.R.C.P. 59(d) (now 59(c)(1)). First Nat'l Bank v. Campbell, 198 Colo. 344, 599 P.2d 915 (1979).

Where an objection sufficiently directs the court's attention to the asserted error, the purpose of this rule, to enable the trial judge to correct instructions before they are given to the jury, is satisfied. Blueflame Gas, Inc. v. Van Hoose, 679 P.2d 579 (Colo. 1984).

"Plain error" rule should be applied sparingly where there is a full and uninhibited opportunity to object to a charge. In re Massey v. Riebold, 3 Bankr. 110 (Bankr. D. Colo. 1980).

V. READ TO JURY.

This rule provides that the instructions shall be read to the jury before argument. Ress v. Rediess, 130 Colo. 572, 278 P.2d 183 (1954).

It is error to instruct a jury orally. Home Pub. Mkt. v. Newrock, 111 Colo. 428, 142 P.2d 272 (1943).

This rule clearly prohibits comment on the evidence by the trial court. Angelopoulos v. Wise, 133 Colo. 133, 293 P.2d 294 (1956).

Instructions should be on law applicable to facts. It is the duty of the court, before the argument is begun, to give the jury such instructions upon the law applicable to the facts as may be necessary for their guidance. Pickett v. Handy, 5 Colo. App. 295, 38 P. 606 (1884); Dozenback v. Raymer, 13 Colo. 451, 22 P. 787 (1889).

The existence of facts proper for the consideration of the jury must not be assumed in the instructions of the court. Kinney v. Williams, 1 Colo. 191 (1870).

Instructions to the jury should be confined to the law of the case, leaving the facts to be determined by the jury. Sopris v. Truax, 1 Colo. 89 (1868).

Faulty instruction involves fatal error. An instruction which announces as the law what is not the law, or which assumes as proven what is not supported by the evidence, or which withdraws from the jury an issue of fact exclusively within its province involves fatal error. King Solomon Tunnel & Dev. Co. v. Mary Verna Mining Co., 22 Colo. App. 528, 127 P. 129 (1912).

It is clearly error for a court to assume in an instruction that any disputed fact in a suit is true or has been established. Foster v. Feder, 135 Colo. 585, 316 P.2d 576 (1957).

It is not required that every instruction should by express words require the jury to find "from the evidence". Sholine v. Harris, 22 Colo. App. 63, 123 P. 330 (1912).

Rule 51.1. Colorado Jury Instructions

(1) In instructing the jury in a civil case, the court shall use such instructions as are contained in Colorado Jury Instruction (CJI) as are applicable to the evidence and the prevailing law.

(2) In cases in which there are no CJI instructions on the subject, or in which the factual situation or changes in the law warrant a departure from the CJI instructions, the court shall instruct the jury as to the prevailing law applicable to the evidence in a manner which is clear, unambiguous, impartial and free from argument, using CJI instructions as models as to the form so far as possible.

Editor's note: The Colorado Jury Instructions are contained in a book prepared by the Colorado Supreme Court Committee on Civil Jury Instructions.

ANNOTATION

Intent of the Colorado supreme court in promulgating these instructions was to provide clear and impartial forms for use by the trial court in preparing instructions for juries. These forms are to be used with discrimination, keeping in mind that they are not law in themselves and, in order to continually provide accurate assistance to juries, must be refined and modified in accord with changes in statutes and the body of appellate decisions. Gallegos v. Graff, 32 Colo. App. 213, 508 P.2d 798 (1973).

In promulgating the Colorado jury instructions, it was not the purpose of the Colorado supreme court to compile a restatement or an encyclopedia of prevailing law. Gallegos v. Graff, 32 Colo. App. 213, 508 P.2d 798 (1973).

Trial court did not err in refusing to give instruction in personal injury action which

provided that, if the jury should find in favor of the plaintiff, it "should not add any sum for income taxes as such an award is not taxable under federal and state tax laws", because the subject matter of this instruction is not covered in the Colorado jury instructions as one to be given. Davis v. Fortino & Jackson Chevrolet Co., 32 Colo. App. 222, 510 P.2d 1376 (1973).

Trial court committed harmless error by instructing jury in personal injury action not to adjust amount of damages awarded in order to compensate for income taxes since damages are not taxable. Rego Co. v. McKown-Katy, 801 P.2d 536 (Colo. 1990).

Court did not abuse its discretion in providing respondeat superior doctrine to jury in its jury instructions. Where medical negligence cases involve acts or omissions during surgery, the jury should be instructed that a surgeon is vicariously liable for the negligence of subordinate hospital employees. Ochoa v. Vered, 212 P.3d 963 (Colo. App. 2009).

Jury instruction stating that "[a]n exercise of judgment that results in an unsuccessful outcome does not, by itself, mean that a physician was negligent" accurately reflects the law. The instruction does not impose a subjective standard of care on a physician whose exercise of judgment results in an unsuccessful outcome. Rather, it informs juries that a bad outcome that results from a physician's exercise of judgment does not by itself constitute negligence. Day v. Johnson, 232 P.3d 175 (Colo. App. 2009), aff'd, 255 P.3d 1064 (Colo. 2011).

Jury award of zero damages indicated that the jury failed to follow court instructions as the evidence was undisputed with respect to the existence and nature of the injuries sustained. Martinez v. Shapland, 833 P.2d 837 (Colo. App. 1992).

The instructions found in the Colorado jury instructions are not to be used if they do not reflect the prevailing law. Federal Ins. Co. v. Pub. Serv. Co., 194 Colo. 107, 570 P.2d 239 (1977).

The trial court has the duty to examine the prevailing law to determine whether a Colorado jury instruction is applicable to the facts of the particular case and states the prevailing law. Federal Ins. Co. v. Pub. Serv. Co., 194 Colo. 107, 570 P.2d 239 (1977).

Where there was no statute or rule to support the presumption created by a jury instruction, the presumption could only be properly given if it was supported by common law rules governing the admissibility and evidentiary effect of defendant electrical utility's compliance with industry standards. Yampa Valley Elec. v. Telecky, 862 P.2d 252 (Colo. 1993).

Applied in Sherwood v. Graco, Inc., 427 F. Supp. 155 (D. Colo. 1977); Price v. Sommermeyer, 41 Colo. App. 147, 584 P.2d 1220 (1978); Mailloux v. Bradley, 643 P.2d 797 (Colo. App. 1982); Peterson v. Tadolini, 97 P.3d 359 (Colo. App. 2004).

Rule 52. Findings by the Court

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Neither requests for findings nor objections to findings rendered are necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41(b).

Cross references: For motions for judgment on the pleading and for separate or more definite statement and for motion to strike, see C.R.C.P. 12; for involuntary dismissal, see C.R.C.P. 41(b); for acceptance by court of master's findings unless clearly erroneous, see C.R.C.P. 53(e)(2); for summary judgment, see C.R.C.P. 56; for entry of judgment, see C.R.C.P. 58; for motions for post-trial relief, see C.R.C.P. 59.

ANNOTATION

I. General Consideration.
II. Effect.
III. Amendment.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Notes on Proposed Amendments to Colorado Rules of Civil Procedure", see 27 Dicta 165 (1950). For article, "Amendments to the Colorado Rules of Civil Procedure", see 28 Dicta 242 (1951). For article, "Trials: Rules 38-53", see 23 Rocky Mt. L. Rev. 571 (1951). For article, "The Applicability of the Rules of Evidence in Non-Jury Trials", see 24 Rocky Mt. L. Rev. 480 (1952). For article, "One Year Review of Civil Procedure and Appeals", see 37 Dicta 21 (1960). For article, "One Year Review of Civil Procedure and Appeals", see 39 Dicta 133 (1962). For article, "Post-Trial Motions in the Civil Case: An Appellate Perspective", see 32 Colo. Law. 71 (November 2003).

This rule is applicable to judgments in custody proceedings. In Jaramillo, 37 Colo. App. 171, 543 P.2d 1281 (1975).

Finding that "cost-plus" contract had been made is necessarily against the claim that contract was for a fixed sum less the cost of materials. Johnson v. Neel, 123 Colo. 377, 229 P.2d 939 (1951).

No findings of fact and conclusions of law were required where motion for costs and damages was not a motion pursuant to C.R.C.P. 41(b). City & County of Denver v. Ameritrust, 832 P.2d 1054 (Colo. App. 1992).

Applied in People in Interest of G.A.T., 183 Colo. 111, 515 P.2d 104 (1973); Deas v. Cronin, 190 Colo. 177, 544 P.2d 991 (1976); Poor v. District Court, 190 Colo. 433, 549 P.2d 756 (1976); People in Interest of A.A.T., 191 Colo. 494, 554 P.2d 302 (1976); In re Wolfert, 42 Colo. App. 433, 598 P.2d 524 (1979); People ex rel. MacFarlane v. Delaware Corp., 626 P.2d 1144 (Colo. App. 1980); In re Van Camp, 632 P.2d 1062 (Colo. App. 1981); Hawkins v. Powers, 635 P.2d 915 (Colo. App. 1981); Esecson v. Bushnell, 663 P.2d 258 (Colo. App. 1983); ITT Diversified Credit Corp. v. Couch, 669 P.2d 1355 (Colo. 1983); Metro Nat'l Bank v. Roe, 675 P.2d 331 (Colo. App. 1983).

II. EFFECT.

The purpose of this rule is to enable an appellate court to determine the basis of a trial court's decision. Twin Lakes Reservoir & Canal Co. v. Bond, 156 Colo. 433, 399 P.2d 793 (1965); Am. Nat'l Bank v. Quad Constr., Inc., 31 Colo. App. 373, 504 P.2d 1113 (1972); Gitlitz v. Bellock, 171 P.3d 1274 (Colo. App. 2007).

The purpose of this rule is to apprise prospective appellate courts of the basis of the trial court's decision. Westland Nursing Home, Inc. v. Benson, 33 Colo. App. 245, 517 P.2d 862 (1974).

In order for the appellate court to determine the ground on which it reached its decision, the lower court must state on the record its reasons for a ruling. People v. Abbott, 638 P.2d 781 (Colo. 1981).

The purpose of the requirement of specific findings of fact and conclusions of law is to give the appellate court a clear understanding of the grounds for the trial court's decision. Financial Management Task Force, Inc. v. Altberger, 807 P.2d 1230 (Colo. App. 1990); City & County of Denver v. Ameritrust, 832 P.2d 1054, (Colo. App. 1992).

This rule uses mandatory words that the court "shall" find the facts. Mowry v. Jackson, 140 Colo. 197, 343 P.2d 833 (1959).

It is the duty of a trial court to see that a final judgment supported by findings of fact and conclusions of law is entered in each case heard and decided by it, so that on appeal, an appellate court can be fully advised as to the complete results of the trial. Ray v. City of Brush, 152 Colo. 428, 383 P.2d 478 (1963).

Parties need not request findings. The provisions of this rule, that requests for findings are not necessary for purposes of review, relieve the parties of the need to request findings but do not relieve a judge of the duty to make them. Mowry v. Jackson, 140 Colo. 197, 343 P.2d 833 (1959).

Factual findings on the record required. Before a trial court can make legal findings or conclusions, and to make such conclusions reviewable by an appellate court, the trial court must make factual findings on the record. Pasbrig v. Walton, 651 P.2d 459 (Colo. App. 1982).

Court has duty to make separate findings of fact and conclusions of law. When a matter is tried to the court without a jury, the court is under a duty to make findings of fact and to state conclusions of law separately, and even though a court has made findings, they must be sufficiently clear to indicate on appeal the basis of the court's decision. In re Estate of Lewin v. First Nat'l Bank, 42 Colo. App. 129, 595 P.2d 1055 (1979).

Trial court's order must contain findings of fact and conclusions of law sufficiently explicit to give an appellate court a clear understanding of the basis of its order and to enable the appellate court to determine the grounds upon which the trial court reached its decision. In re Van Inwegen, 757 P.2d 1118 (Colo. App. 1988).

Decisionmaker must state reasons for determination. Although written findings are not

required, where significant rights are at issue, the decisionmaker must state the reasons for his determination. Mau v. E.P.H. Corp., 638 P.2d 777 (Colo. 1981).

Failure to comply literally with this rule is not necessarily fatally defective. Thiele v. City & County of Denver, 135 Colo. 442, 312 P.2d 786 (1957).

Brief findings and conclusions sufficient compliance with rule. Even though the findings of fact and conclusions of law are brief and sparse in detail, there is sufficient compliance with the rule if the ultimate facts have been determined and conclusions of law are entered thereon. Manor Vail Condominium Ass'n v. Town of Vail, 199 Colo. 62, 604 P.2d 1168 (1980); M Life Ins. Co. v. Sapers & Wallack Ins. Agency, Inc., 40 P.3d 6 (Colo. App. 2001).

The court expressly resolved the ultimate questions of fact before it, and therefore there was sufficient compliance with the rule. Johnson v. Benson, 725 P.2d 21 (Colo. App. 1986).

This rule provides that findings of fact and conclusions of law are unnecessary on decisions of motions. Garrow v. Garrow, 152 Colo. 480, 382 P.2d 809 (1963); Leidy's Inc. v. H2O Eng'g, Inc., 811 P.2d 38 (Colo. 1991).

Where order is a decision based on post-decree motions, the trial court is under no obligation to attach findings of fact or conclusions of law. City of Boulder v. Sherrelwood, Inc., 42 Colo. App. 522, 604 P.2d 686 (1979).

Where an action is on a motion for modification of support and visitation orders, a trial court is under no duty to make written findings of fact and conclusions of law. Garrow v. Garrow, 152 Colo. 480, 382 P.2d 809 (1963).

A trial judge is not required to assert in detail the negative of every rejected proposition as well as the affirmative of those which he finds to be correct. Uptime Corp. v. Colo. Research Corp., 161 Colo. 87, 420 P.2d 232 (1966); Westland Nursing Home, Inc. v. Benson, 33 Colo. App. 245, 517 P.2d 862 (1974).

Court's findings made in detail upon all major issues are in full compliance with section (a) of this rule. Johnson v. Neel, 123 Colo. 377, 229 P.2d 939 (1951).

It is sufficient compliance with this rule if a court makes findings on the material and ultimate facts. Lininger v. Lininger, 138 Colo. 338, 333 P.2d 625 (1958); Rubens v. Pember, 170 Colo. 182, 460 P.2d 803 (1969).

This rule is complied with if the trial court makes findings on the material and ultimate facts. Epcon Co. v. Bar B Que Baron Int'l, Inc., 32 Colo. App. 393, 512 P.2d 646 (1973).

Though it is necessary for trial courts to expressly label their findings of fact in cases involving disputed evidence, it is better practice to do it in all instances. Thiele v. City & County of Denver, 135 Colo. 442, 312 P.2d 786 (1957).

Oral findings may be sufficient to support judgment. Where a trial court makes no written detailed findings of fact or conclusions of law, but makes oral findings then when there are no disputed facts in the case, the oral findings of the court are sufficient to support the judgment. Massachusetts Bonding & Ins. Co. v. Central Fin. Corp., 124 Colo. 379, 237 P.2d 1079 (1951).

Written findings of fact and conclusions of law are not imposed by section (a) of this rule and C.A.R. 10(a). Dunbar v. County Court, 131 Colo. 483, 283 P.2d 182 (1955).

If a court makes oral findings and written ones are desired by either party, then they should make such a request in writing. Mowry v. Jackson, 140 Colo. 197, 343 P.2d 833 (1959).

The findings of the trial court may be either oral or written at the discretion of the trial court. Mowry v. Jackson, 140 Colo. 197, 343 P.2d 833 (1959); Murray v. Rock, 147 Colo. 561, 364 P.2d 393 (1961); Hipps v. Hennig, 167 Colo. 358, 447 P.2d 700 (1968).

The court has a duty to make either oral or written findings. Mowry v. Jackson, 140 Colo. 197, 343 P.2d 833 (1959); Murray v. Rock, 147 Colo. 561, 364 P.2d 393 (1961); Hipps v. Hennig, 167 Colo. 358, 447 P.2d 700 (1968).

If made orally, the statements must be transcribed in full. Mowry v. Jackson, 140 Colo. 197, 343 P.2d 833 (1959); Murray v. Rock, 147 Colo. 561, 364 P.2d 393 (1961); Hipps v. Hennig, 167 Colo. 358, 447 P.2d 700 (1968).

Where all of the findings of fact and conclusions of law entered orally have been reported in the transcript, then, if they are sufficiently comprehensive to provide a basis for a review, the requirements of this rule have been satisfied. Hipps v. Hennig, 167 Colo. 358, 447 P.2d 700 (1968).

The court's findings must be so explicit as to give an appellate court a clear understanding of the basis of the trial court's decision and to enable it to determine the ground on which it reached its decision. Mowry v. Jackson, 140 Colo. 197, 343 P.2d 833 (1959); Murray v. Rock, 147 Colo. 561, 364 P.2d 393 (1961); Hipps v. Hennig, 167 Colo. 358, 447 P.2d 700 (1968); People v. Abbott, 638 P.2d 781 (Colo. 1981).

Findings of fact by a trial court sitting without a jury must be made so explicit as to give a reviewing court an opportunity to determine on what ground the trial court reached its decision, and whether that decision was supported by competent evidence. Westland Nursing Home, Inc. v. Benson, 33 Colo. App. 245, 517 P.2d 862 (1974).

Court's ruling that the issue of paternity could not be raised in the child support proceeding because it had been previously litigated

was based on undisputed facts, and was tantamount to a partial judgment on the pleadings or a partial summary judgment. As such, no findings of fact and conclusions of law were required. McNeece v. McNeece, 39 Colo. App. 160, 562 P.2d 767 (1977).

Defendant's motion to reopen the divorce decree was not a motion pursuant to C.R.C.P. 41(b), and therefore no findings of fact and conclusions of law were required to accompany the ruling on this motion. McNeece v. McNeece, 39 Colo. App. 160, 562 P.2d 767 (1977).

The ultimate test as to the propriety of findings is whether they are sufficiently comprehensive to provide a basis for decision and are supported by the evidence. Mowry v. Jackson, 140 Colo. 197, 343 P.2d 833 (1959); Johnson v. Benson, 725 P.2d 21 (Colo. App. 1986).

Where record would not support that trial court made findings about probable cause or the absence thereof, or that the trial court made factual findings of exigent circumstances or the absence thereof, the trial court's findings presented an inadequate basis upon which to resolve these issues, requiring the trial court's order to be vacated and the case to be remanded for further findings as to these issues. People v. Mendoza-Balderama, 981 P.2d 168 (Colo. 1999).

Standard for determining harmless error. The standard for determining harmless error is whether the error, defect, irregularity, or variance affected substantial rights of the defendant. People v. Vialpando, 804 P.2d 219 (Colo. App. 1990).

It is only when the findings themselves are inadequate and do not indicate the basis for the trial court's decision that the judgment will be reversed. Uptime Corp. v. Colo. Research Corp., 161 Colo. 87, 420 P.2d 232 (1966).

It is not error for a trial court to adopt advisory verdicts in its findings of fact, and the adoption of such a verdict by the court is equivalent to its findings on the questions thereby determined. McKelvy v. Cooper, 165 Colo. 102, 437 P.2d 346 (1968).

When a trial judge signs the findings, the responsibility for their correctness becomes his, and the findings, if otherwise sufficient, are not weakened or discredited because given in the form submitted by counsel. Uptime Corp. v. Colo. Research Corp., 161 Colo. 87, 420 P.2d 232 (1966).

The supreme court does not approve the practice of uncritical adoption of findings prepared by litigants; but if, after careful study, a trial judge concludes that the findings prepared by a party correctly state both the law and the facts, then there is no good reason why he may not adopt them as his own. Uptime Corp. v. Colo. Research Corp., 161 Colo. 87, 420 P.2d 232 (1966).

Where the findings of a trial court are verbatim those submitted by the successful litigant, an appellate court will scrutinize them more critically and give them less weight than if they were the work product of the judge himself, or, at least bear evidence that he has given them careful study and revision. Uptime Corp. v. Colo. Research Corp., 161 Colo. 87, 420 P.2d 232 (1966).

Any court finding that complaint is "true" is sufficient. Any finding by a court that the evidence supports the allegations of the complaint, that the allegations of the complaint are true, or which recites verbatim the pleading of an ultimate fact in the complaint is sufficient to comply with this rule. Lininger v. Lininger, 138 Colo. 338, 333 P.2d 625 (1958); Bulow v. Ward Terry & Co., 155 Colo. 560, 396 P.2d 232 (1964).

Where a court sets forth the allegations of a complaint and then finds that plaintiff failed to prove them, a finding of no evidence to support a specific allegation complies with this rule. McCray v. City of Boulder, 165 Colo. 383, 439 P.2d 350 (1968).

Comments of trial court at close of trial, although not formally labeled "findings of fact", are sufficient to constitute such where the facts recited and conclusions announced are amply supported by the evidence. Nemer v. Anderson, 151 Colo. 411, 378 P.2d 841 (1963).

Where the record shows no compliance with this rule, remarks and rulings of the court do not constitute a judgment under the rule. Ray v. City of Brush, 152 Colo. 428, 383 P.2d 478 (1963).

Entering a judgment is not sufficient setting forth of conclusion of law to properly inform an appellate court of a trial court's reasons. Mowry v. Jackson, 140 Colo. 197, 343 P.2d 833 (1959).

It is no finding of fact at all to merely state that the facts are in the record. Mowry v. Jackson, 140 Colo. 197, 343 P.2d 833 (1959).

Where the necessary findings of fact are lacking when a party seeks relief in an appellate court, the correct procedure is not to dismiss a writ but rather to vacate the judgment and remand the case to a trial court for appropriate findings of fact; if this cannot be done, then the judgment is reversed and remanded for a new trial. Mowry v. Jackson, 140 Colo. 197, 343 P.2d 833 (1959); Murray v. Rock, 147 Colo. 561, 364 P.2d 393 (1961); Commercial Claims, Ltd. v. Clement Bros., 709 P.2d 88 (Colo. App. 1985).

Trial court's failure to make specific factual findings, so that appellate court is unable to determine the grounds on which decision was based, is error and cause may be remanded.

Estate of Hickle v. Carney, 748 P.2d 360 (Colo. App. 1987).

Where custodial orders of a trial court are silent on the question of character and fitness of either parent to have custody of the children, the trial court should have made findings of fact thereon, and lacking such findings the supreme court is without compass to ascertain whether the trial court acted properly, so that the judgment will be reversed with directions that findings of fact be made. Songster v. Songster, 150 Colo. 466, 374 P.2d 197 (1962).

Findings of fact shall not be set aside upon review unless clearly erroneous. Broncucia v. McGee, 173 Colo. 22, 475 P.2d 336 (1970); Trinidad Sch. Dist. No. 1 v. Lopez, 963 P.2d 1095 (Colo. 1998); In re Estate of Elliott, 993 P.2d 474 (Colo. 2000).

The credibility of the witnesses, the sufficiency, probative effect, and weight of all the evidence, and the inferences and conclusions to be drawn therefrom are all within the province of the trial court whose conclusions will not be disturbed on review unless so clearly erroneous as to find no support in the record. Am. Nat'l Bank v. Quad Constr., Inc., 31 Colo. App. 373, 504 P.2d 1113 (1972).

It is the responsibility of the trier of fact to determine the credibility of the witnesses and the weight, probative effect and sufficiency of the evidence. Hence, the factual findings of the trial court will be accepted on review unless they are clearly erroneous and not supported by the record. Wright Farms, Inc. v. Weninger, 669 P.2d 1054 (Colo. App. 1983); Wulf v. Tibaldo, 680 P.2d 1348 (Colo. App. 1984).

Failure to give a jury instruction on the credibility of a child's testimony at the time child's hearsay statement is admitted is not plain error in a prosecution for aggravated incest and sexual assault on a child, so long as such instruction was given as a jury instruction at the conclusion of the evidence. People v. Flysaway, 807 P.2d 1179 (Colo. App. 1990).

An appellate court's conclusion from the evidence might differ from that of the trial court. In a trial to the court, the sufficiency, probative effect, and weight of all the evidence and the inferences and conclusions to be drawn therefrom are conclusions for the trial court; although an appellate court's conclusions from the evidence might differ, the trial court's determination will not be disturbed on review unless so clearly erroneous as to find no support in the record. Warren v. Farmers Alliance Mut. Ins. Co., 31 Colo. App. 292, 501 P.2d 135 (1972).

An appellate court is not allowed to substitute its conclusions. There being sufficient evidence to support the fact findings of the trial court and the evidence being conflicting, an appellate court is not allowed to substitute its conclusions on the facts for those of the lower court. Retail Hdwe. Mut. Fire Ins. Co. v. Securities Corp., 97 Colo. 487, 51 P.2d 598 (1935).

Where the evidence in the record is conflicting, but there is sufficient evidence to support the trial court's finding, in that case, an appellate court will not substitute its opinion for that of the trial court. Famularo v. Bd. of County Comm'rs, 180 Colo. 333, 505 P.2d 958 (1973).

An appellate court may not impress its contrary finding upon a trial court where the record contains evidence to support the trial court's finding which is also in accord with law. Leo Payne Pontiac, Inc. v. Ratliff, 178 Colo. 361, 497 P.2d 997 (1972).

Where the evidence is conflicting, it is the sole responsibility of the trier of the fact to resolve the factual issues. Broncucia v. McGee, 173 Colo. 22, 475 P.2d 336 (1970).

Findings of fact by a court should respond to and be within the issues, and a finding outside the issues cannot be supported and cannot be used to formulate a judgment. Credit Inv. & Loan Co. v. Guaranty Bank & Trust Co., 166 Colo. 471, 444 P.2d 633 (1968).

Neither this section nor § 13-21-102.5 (3)(a) require the trial court to make specific findings of clear and convincing evidence for not reducing the award of noneconomic damages. Herrera v. Gene's Towing, 827 P.2d 619 (Colo. App. 1992).

Defendant's motion for costs and damages was not a motion pursuant to C.R.C.P. 41(b), and therefore, no findings of law were required. City & County of Denver v. Ameritrust, 832 P.2d 1054 (Colo. App. 1992).

Facts are to be determined by the court from the evidence, and not settled by conclusions of witnesses. Royal Tiger Mines Co. v. Ahearn, 97 Colo. 116, 47 P.2d 692 (1935).

Finding based on choice of plausible views is not erroneous. A court's finding based upon a choice between two plausible views of the weight of the evidence, or upon a choice between conflicting inferences from the evidence, is not clearly erroneous. Am. Nat'l Bank v. Quad Constr., Inc., 31 Colo. App. 373, 504 P.2d 1113 (1972).

Court findings which are inadequate as a matter of law cannot be upheld on review. Redman & Scripp, Inc. v. Douglas, 170 Colo. 208, 460 P.2d 231 (1969).

C.R.C.P. 53(e)(2), binds a court to accept the findings of a master just as effectively as section (a) of this rule binds an appellate court to accept findings of a trial court. Hutchinson v. Elder, 140 Colo. 379, 344 P.2d 1090 (1959).

Trial court's findings held supported by the evidence. Howard v. White, 144 Colo. 391, 356 P.2d 484 (1960); Rowe v. Bowers, 160 Colo. 379, 417 P.2d 503 (1966); Pastor v. San Juan Sch. Dist. No. 1, 699 P.2d 418 (Colo. App.

1985); Martinez v. Continental Enterprises, 730 P.2d 308 (Colo. 1986).

Findings and conclusions held insufficient under section (a). H.M.O. Sys. v. Choicecare Health Servs., Inc., 665 P.2d 635 (Colo. App. 1983).

Applied in Light v. Rogers, 125 Colo. 209, 242 P.2d 234 (1952); Shoenberg Farms, Inc. v. People ex rel. Swisher, 166 Colo. 199, 444 P.2d 277 (1968); Estate of Barnhart v. Burkhardt, 38 Colo. App. 544, 563 P.2d 972 (1977); Matter of Estate of Van Winkle, 757 P.2d 1134 (Colo. App. 1988); Trinidad Sch. Dist. No. 1 v. Lopez, 963 P.2d 1095 (Colo. 1998); In re Estate of Elliott, 993 P.2d 474 (Colo. 2000); Vento v. Colo. Nat'l Bank, 985 P.2d 48 (Colo. App. 1999).

III. AMENDMENT.

Either party may make motion. Section (b) of this rule, providing for amendment of findings or additional findings upon motion, allows either party to make such a motion. Noice v. Jorgensen, 151 Colo. 459, 378 P.2d 834 (1963).

The trial judge may decline to adopt any of the proposed changes by simply denying the motion. Eitel v. Alford, 127 Colo. 341, 257 P.2d 955 (1953).

If he believes that his findings and conclusions, already announced, are proper and sufficient, his denial of the motion without explanation is not error. Eitel v. Alford, 127 Colo. 341, 257 P.2d 955 (1953).

This rule does not require the trial court to act singly upon each of the proposed changes, additions, or modifications, nor to state any reason for its ruling thereon. Eitel v. Alford, 127 Colo. 341, 257 P.2d 955 (1953).

The purpose of section (b) of this rule is to clarify matters for the appellate court's better understanding of the basis of the decision of the trial court. Noice v. Jorgensen, 151 Colo. 459, 378 P.2d 834 (1963).

This rule merely provides a method for amplifying and expanding the findings of fact. Noice v. Jorgensen, 151 Colo. 459, 378 P.2d 834 (1963).

This rule does not provide a method for reversal of the judgment or a finding of contrary facts. Noice v. Jorgensen, 151 Colo. 459, 378 P.2d 834 (1963).

This rule is not intended as a vehicle for securing a rehearing on the merits. Noice v. Jorgensen, 151 Colo. 459, 378 P.2d 834 (1963).

There is nothing in section (b) of this rule that obviates filing motion for new trial. There is nothing in section (b) of this rule to indicate that even a motion to amend findings, let alone mere objections thereto, obviates the necessity for filing a motion for new trial under C.R.C.P. 59. Denver Feed Co. v. Winters, 152 Colo. 103, 380 P.2d 678 (1963); Noice v. Jorgensen, 151 Colo. 459, 378 P.2d 834 (1963); Austin v. Coll./Univ. Ins. Co. of Am., 30 Colo. App. 502, 495 P.2d 1162 (1972).

This rule should be regarded similarly to motion for new trial. Section (b) of this rule, authorizing the filing of a motion to amend or make additional findings, should be regarded similarly to a motion for a new trial. Eitel v. Alford, 127 Colo. 341, 257 P.2d 955 (1953).

This rule and C.R.C.P. 59 are not two separate rules on the same subject matter; rather each serves a distinctly different procedural purpose. Noice v. Jorgensen, 151 Colo. 459, 378 P.2d 834 (1963).

A motion under this rule may be joined with a motion for a new trial under C.R.C.P. 59. Noice v. Jorgensen, 151 Colo. 459, 378 P.2d 834 (1963).

Successful party may question finding on review without having objected. Where the judgment in the trial court is for a party, that party is not bound by the court's finding but may question it on review even though the record disclosed neither objection nor exception thereto in the lower court. C. I. T. Corp. v. K. & S. Fin. Co., 111 Colo. 378, 142 P.2d 1005 (1943).

This rule states that in a trial to the court without a jury objections to the court's findings are not necessary in order to preserve for appellate review the question of sufficiency of the evidence to support the findings. Noice v. Jorgensen, 151 Colo. 459, 378 P.2d 834 (1963); Denver Feed Co. v. Winters, 152 Colo. 103, 380 P.2d 678 (1963).

It is not essential to an appeal that there be any motion to amend. Denver Feed Co. v. Winters, 152 Colo. 103, 380 P.2d 678 (1963).

There was error in denying motion for additional findings. Calvin v. Fitzsimmons, 129 Colo. 420, 270 P.2d 748 (1954).

Applied in Green v. Hoffman, 126 Colo. 104, 251 P.2d 933 (1952); Greathouse v. Jones, 158 Colo. 516, 408 P.2d 439 (1965).

Rule 53. Masters

(a) Appointment and Compensation. The court in which any action is pending may appoint a master therein. As used in these rules the word "master" includes a referee, an auditor, and an examiner. The compensation to be allowed to a master shall be fixed by the court, and may be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain the master's report as security for the master's compen-

sation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

(b) Reference. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it.

(c) Powers. The order of reference to the master may specify or limit the master's powers and may direct the master to report only upon particular issues, or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before the master and to do all acts and take all measures necessary or proper for the efficient performance of the master's duties under the order. The master may require the production before the master of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. The master may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may himself (or herself) examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence received, offered, and excluded in the same manner and subject to the same limitations as a court sitting without a jury.

(d) Proceedings.

(1) **Meetings.** When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 21 days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make his or her report. If a party fails to appear at the time and place appointed, the master may proceed ex parte or, in the master's discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) **Witnesses.** The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, he may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 107.

(3) **Statement of Accounts.** When matters of accounting are in issue before the master, the master may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as the master directs.

(e) Report.

(1) **Contents and Filing.** The master shall prepare a report upon the matters submitted to the master by the order of reference and, if required to make findings of fact and conclusions of law, shall set them forth in the report. The master shall file the report with the clerk of the court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. Unless otherwise directed by the order of reference, the master shall serve a copy of the report on each party.

(2) **In Nonjury Actions.** In an action to be tried without a jury the court shall accept the master's finding of fact unless clearly erroneous. Within 14 days after being served with notice of the filing of the report any party may serve written objections thereto upon

the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion. The court, after hearing, may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(3) **In Jury Action.** In an action to be tried by a jury the master shall not be directed to report the evidence. The master's findings upon the issues submitted to the master are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

(4) **Stipulation as to Findings.** The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(5) **Draft Report.** Before filing the master's report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

Source: Entire rule amended October 8, 1992, effective January 1, 1993; (e)(1) amended and effective July 1, 1993; entire rule amended and effective April 14, 2005; (d)(1) and (e)(2) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Cross references: For appointment of referees in cases under the workers' compensation law, see § 8-43-208, C.R.S.; for when referee appointed in registration of land titles, see § 38-36-127, C.R.S.; for sanctions for failure to make discovery, see C.R.C.P. 37; for subpoenas for attendance of witnesses, see C.R.C.P. 45(a); for civil contempt, see C.R.C.P. 107; for interrogatories to parties, see C.R.C.P. 33; for time at which a written motion shall be served, see C.R.C.P. 6(d); for admissibility of evidence, see C.R.C.P. 43(a); for parties, see C.R.C.P. 17 to 25.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, "Trials: Rules 38-53", see 23 Rocky Mt. L. Rev. 571 (1951). For article, "One Year Review of Civil Procedure and Appeals", see 37 Dicta 21 (1960).

Annotator's note. Since this rule is similar to §§ 223 to 235 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing those sections have been included in the annotations to this rule.

This rule and the sections of the former Code of Civil Procedure it supersedes are substantially the same. Julius Hyman & Co. v. Velsicol Corp., 123 Colo. 563, 233 P.2d 977, cert. denied, 342 U.S. 870, 72 S. Ct. 113, 96 L. Ed. 654, reh'g denied, 342 U.S. 895, 72 S. Ct. 199, 96 L. Ed. 671 (1951).

The relationship between a master and the trial court is the same relationship as exists between a trier of fact and an appellate reviewing body. Sunshine v. Sunshine, 30 Colo. App. 67, 488 P.2d 1131 (1971).

Applied in United States v. City & County of Denver, 656 P.2d 1 (Colo. 1982); In re Westlake, 674 P.2d 1386 (Colo. App. 1983); In re Brantley, 674 P.2d 1388 (Colo. App. 1983).

II. APPOINTMENT AND COMPENSATION.

The appointment of a master is a discretionary matter, not a matter of right. Gypsum Aggregates Corp. v. Lionelle, 170 Colo. 282, 460 P.2d 780 (1969).

Master's fee of $2,500 held unjustified in circumstances of case. Carlson v. Carlson, 178 Colo. 283, 497 P.2d 1006 (1972).

III. REFERENCE.

This rule and federal rule identical. Because this rule, and F.R.C.P. 53(b) are identical, federal decisions are persuasive authority on procedural matters. Curtis, Inc. v. District Court, 182 Colo. 73, 511 P.2d 463 (1973).

Referral of a case to a master is declared to be the exception and not the rule. Gypsum Aggregates Corp. v. Lionelle, 170 Colo. 282, 460 P.2d 780 (1969).

Masters should not be appointed as a routine matter in cases where the issues are not

complex and the facts are not complicated. Carlson v. Carlson, 178 Colo. 283, 497 P.2d 1006 (1972).

Circumstances in divorce action insufficient to warrant reference to master. Gelfond v. District Court, 180 Colo. 95, 504 P.2d 673 (1972).

The showing of an exceptional condition requiring the reference of a case to a master is not necessary under section (b) of this rule where, subsequent to the appointment of a master, the parties make a voluntary stipulation that the master should act as arbitrator, and he continues in the case as arbitrator rather than as master. Zelinger v. Mellwin Constr. Co., 123 Colo. 149, 225 P.2d 844 (1950).

A reference may be ordered when the trial of an issue of fact requires the examination of any long account on either side. Wilson v. Union Distilling Co., 16 Colo. App. 429, 66 P. 170 (1901).

Possibly, conditions might exist which would render a refusal to order a reference an abuse of judicial discretion and therefore erroneous. Wilson v. Union Distilling Co., 16 Colo. App. 429, 66 P. 170 (1901).

Denial of belated request for referral held not error. Gypsum Aggregates Corp. v. Lionelle, 170 Colo. 282, 460 P.2d 780 (1969).

Order for reference properly entered in action for accounting. In an action for accounting where defendant objected to the appointment of a referee unless and until the plaintiff had rendered an account to it, the court properly exercised its right in overruling the objection and entering an order for reference on the pleadings; no substantial prejudice resulting therefrom, error based upon the claim of premature reference could not be successfully urged on review. Lallier Const. & Eng'r Co. v. Morrison, 93 Colo. 305, 25 P.2d 729 (1933).

The mere fact that an accounting may be necessary is not sufficient in itself to justify a reference to a master if it appears that the matter is simple and would not consume an undue amount of the court's time. Gelfond v. District Court, 180 Colo. 95, 504 P.2d 673 (1972).

Even where an accounting possesses the requisite complexity and difficulty, there is no license in this rule to refer all the issues presented in a case to a master. Gelfond v. District Court, 180 Colo. 95, 504 P.2d 673 (1972).

The issuance of a writ to mandate the vacation of a reference order to a master is necessary where the court is proceeding in excess of its power, for to await the final judgment based on the master's report would be too late and any appeal at that point a futile act, as the expenditure of both time and money would already have occurred, and there would then be no way to undo what had already been erroneously done. Gelfond v. District Court, 180 Colo. 95, 504 P.2d 673 (1972).

In a civil action which involved disclosure of trade secrets and confidential information concerning plaintiff's record keeping and information systems, the plaintiff is entitled to have the judge hear the evidence initially and not through a report from a referee. Curtis, Inc. v. District Court, 182 Colo. 73, 511 P.2d 463 (1973).

IV. POWERS.

Where the order of reference is general and the master is given authority to determine issues of law and of fact, his powers are coextensive with those of the court. Belmont Mining & Milling Co. v. Costigan, 21 Colo. 471, 42 P. 647 (1895).

Delegation of decision making is abdication of constitutional responsibilities. Where the trial court's order appointing the master in effect delegates the decision making as well as the fact finding function to the master, the judge abdicates his constitutional responsibilities and duties. Gelfond v. District Court, 180 Colo. 95, 504 P.2d 673 (1972).

Reference of all the issues presented may be sanctioned only under the most compelling circumstance. Gelfond v. District Court, 180 Colo. 95, 504 P.2d 673 (1972).

Where the order of reference is limited, the cause being referred with authority to take the testimony and report the same with findings of fact thereon at the next term of court, the order further fixing the time during which the parties should present their evidence, then the master has no power to grant a continuance nor has he authority to pass upon a question as to the sufficiency of the complaint. Belmont Mining & Milling Co. v. Costigan, 21 Colo. 471, 42 P. 647 (1895).

Where a court orders a certified public accountant to audit and file a report, but the record lacks any order of reference as contemplated by this rule which would set forth the scope of the auditor's authority, it is assumed that the auditor or master is to perform the limited function of auditing the "reserve account", as provided in section (b) pertaining to matters of account in actions tried without a jury. Credit Inv. & Loan Co. v. Guaranty Bank & Trust Co., 166 Colo. 471, 444 P.2d 633 (1968).

Trial court was correct in dismissing a report of the master which was not requested by the trial court because production of such report was outside the master's powers as set forth in the order of appointment. CNA Ins. Co. v. Berndt, 839 P.2d 492 (Colo. App. 1992).

This rule provides that a master may rule upon the admissibility of evidence unless otherwise directed by the order of reference. Oswald v. Dawn, 143 Colo. 487, 354 P.2d 505 (1960).

V. PROCEEDINGS.

This rule contemplates that a hearing rather than an "ex parte" investigation shall be held. Oswald v. Dawn, 143 Colo. 487, 354 P.2d 505 (1960).

Witnesses may be examined at evidentiary hearings. When a master is appointed, this rule contemplates that the master will conduct evidentiary hearings at which witnesses may be examined and cross-examined. Sunshine v. Sunshine, 30 Colo. App. 67, 488 P.2d 1131 (1971).

The word "hearing" contemplates not only the privilege to be present when the matter is being considered, but also the right to present one's contention and support the same by proof and argument. Brown v. Brown, 161 Colo. 409, 422 P.2d 634 (1967).

The master occupies the position of finder of fact. Sunshine v. Sunshine, 30 Colo. App. 67, 488 P.2d 1131 (1971).

In case of death of the master before findings are made, it is necessary that his successor begin the proceedings anew or that the trial court hold hearings on its own before making findings. Sunshine v. Sunshine, 30 Colo. App. 67, 488 P.2d 1131 (1971).

A successor master who fails to conduct a hearing "de novo" lacks jurisdiction to enter any findings or conclusions. Sunshine v. Sunshine, 30 Colo. App. 67, 488 P.2d 1131 (1971).

Mutual consent cannot confer jurisdiction where it is absent. Sunshine v. Sunshine, 30 Colo. App. 67, 488 P.2d 1131 (1971).

It is error for the court to appoint one to succeed another as master with the admonition to make findings and recommendations based upon the transcript of the hearings held before the first master, inasmuch as the newly appointed master has to conduct his own hearings and in general conduct a hearing "do novo" on the matters in controversy before he can properly make findings and recommendations to the court. Sunshine v. Sunshine, 30 Colo. App. 67, 488 P.2d 1131 (1971).

VI. REPORT.

A. Contents and Filing.

Master's duty to report findings. It is a master's duty to conduct hearings, receive evidence, listen to the testimony on the issues involved, and then report his findings of fact and conclusions to the trial court. Sunshine v. Sunshine, 30 Colo. App. 67, 488 P.2d 1131 (1971).

Bald conclusions are not sufficient. Where the master's report does not contain findings of fact relating to many of the issues that would be significant and is replete with conclusions, the bald conclusions are not sufficient to support a recommendation or a court order based upon the recommendations. Carlson v. Carlson, 178 Colo. 283, 497 P.2d 1006 (1972).

Referee's report is recommendation, not order. The report of the referee is not an order; it is a recommendation. The referee has no power to enter orders or decrees. In re Debreceni, 663 P.2d 1062 (Colo. App. 1983); In re Petroff, 666 P.2d 1131 (Colo. App. 1983).

Until the report is acted on by the court, no legal consequence may be attached to it. In re Debreceni, 663 P.2d 1062 (Colo. App. 1983).

Without further court action, the referee's decision is not a judgment, much less a final judgment. In re Petroff, 666 P.2d 1131 (Colo. App. 1983).

Court may receive further evidence. Following the filing of a master's report, the court may receive further evidence, and it may also recommit the report to the master with instructions. When an item has been omitted from the master's accounting, evidence concerning that item may be properly admitted. Rasheed v. Mubarak, 695 P.2d 754 (Colo. App. 1984).

Notice must be given of filing of orders. Handwritten orders which served to notify party of what permanent orders included did not fulfill notice requirement since they did not serve to notify party that referee's report was final and had been turned over to court for final consideration. Barron v. District Court, 683 P.2d 353 (Colo. 1984).

This rule requires the trial court to hold a hearing on all motions or objections to a master's report before taking any action on such report. But, where the trial court had heard defendant's objections to the report and had consistently held the master to his original grant of authority, the trial court did not err in refusing to hold a hearing on defendant's objections to the report. CNA Ins. Co. v. Berndt, 839 P.2d 492 (Colo. App. 1992).

B. Nonjury Actions.

Section (e)(2) of this rule, binds a trial court to accept the findings of a master just as effectively as C.R.C.P. 52(a), binds an appellate court to accept findings of a trial court. Hutchinson v. Elder, 140 Colo. 379, 344 P.2d 1090 (1959); Brown v. Brown, 161 Colo. 409, 422 P.2d 634 (1967); In re Smith, 641 P.2d 301 (Colo. App. 1981).

Section (e)(2) of this rule prohibits the trial court from rejecting the master's report without a hearing to determine whether the master's findings were clearly erroneous, and then ordering a jury trial over the objection of the parties. Dobler v. District Court, 806 P.2d 944 (Colo. 1991).

Master's findings accepted unless clearly erroneous. Once a court has referred the determination of permanent orders to a master, the court is bound to accept the master's findings of

fact unless clearly erroneous. Carlson v. Carlson, 178 Colo. 283, 497 P.2d 1006 (1972); Dobler v. District Court, 806 P.2d 944 (Colo. 1991); In re Schelp, 194 P.3d 450 (Colo. App. 2008), rev'd on other grounds, 228 P.3d 151 (Colo. 2010).

Appellate courts should accept master's findings. Under customary practice and this rule of procedure an appellate court should accept a master's findings unless clearly erroneous. People ex rel. Kent v. Denious, 118 Colo. 342, 196 P.2d 257 (1948).

References of all the issues presented reduce the function of the judge to that of a reviewing court. Gelfond v. District Court, 180 Colo. 95, 504 P.2d 673 (1972).

Where the order appointing a master gives him no specific power to make findings of fact, but in his report he reports the evidence taken by him together with his findings of fact, his findings are not conclusive either upon the trial court or an appellate court. Michael v. Tracy, 15 Colo. App. 312, 62 P. 1048 (1900).

Only if clearly erroneous, that is, only if clearly unsupported by the evidence in the record, may such findings be disturbed by the trial court. Sunshine v. Sunshine, 30 Colo. App. 67, 488 P.2d 1131 (1971); Dobler v. District Court, 806 P.2d 944 (Colo. 1991).

Even if the trial court disagrees with the conclusions reached, it is not free to tamper with the findings of a master if, based upon the evidence, a reasonable man might have reached the same conclusions as did the master. Sunshine v. Sunshine, 30 Colo. App. 67, 488 P.2d 1131 (1971).

Where a master has been appointed, his findings should not be disturbed merely because the trial court is of a different opinion or is dissatisfied with the master's findings. Brown v. Brown, 161 Colo. 409, 422 P.2d 634 (1967); Dobler v. District Court, 806 P.2d 944, (Colo. 1991).

When there is any testimony consistent with the findings, it must be treated as unassailable except when "clearly erroneous". Brown v. Brown, 161 Colo. 409, 422 P.2d 634 (1967); In re Smith, 641 P.2d 301 (Colo. App. 1981).

The basis for the rule that the court must accept the master's report and conclusions unless the same are clearly not supported by the evidence is that the master is presumed to be the best judge of the credibility of witnesses and the weight to be given to their testimony. Sunshine v. Sunshine, 30 Colo. App. 67, 488 P.2d 1131 (1971).

A trial court's substitution of its conclusion for a master's is erroneous because on a question of fact, insofar as it depends upon conflicting testimony, credibility of witnesses, and demeanor of witnesses, the master is the only one who can reach a conclusion in this area. Brown v. Brown, 161 Colo. 409, 422 P.2d 634 (1967); In re Smith, 641 P.2d 301 (Colo. App. 1981).

When proper exceptions are filed, the findings of a master do not become the findings of a court unless approved by the court. Maniatis v. Stiny, 130 Colo. 261, 274 P.2d 975 (1954).

If the sufficiency of the evidence to sustain the findings of a master is challenged, a court cannot determine this question without an examination of the testimony taken and reported by the master. Maniatis v. Stiny, 130 Colo. 261, 274 P.2d 975 (1954).

The object of permitting exceptions to be filed is to give the party filing them an opportunity to point out to the court wherein the report of a master is erroneous. Maniatis v. Stiny, 130 Colo. 261, 274 P.2d 975 (1954).

The authority of a court thus invoked cannot be exercised capriciously. Maniatis v. Stiny, 130 Colo. 261, 274 P.2d 975 (1954).

The court cannot act intelligently without an examination of the questions raised by the exceptions. Maniatis v. Stiny, 130 Colo. 261, 274 P.2d 975 (1954).

When they challenge the sufficiency of the evidence to sustain the findings of a master, it is both the province and duty of a court to examine the testimony and review the conclusions. Maniatis v. Stiny, 130 Colo. 261, 274 P.2d 975 (1954).

Failing to examine the testimony and review the conclusions, over proper exceptions, the court has no authority to approve the report. Maniatis v. Stiny, 130 Colo. 261, 274 P.2d 975 (1954).

Amendment to timely filed objection permitted. There is no prohibition against filing an amendment to a timely filed objection to a master's report before a hearing on that objection has occurred. Rocky Mt. Power Co. v. Colo. River Water Conservation Dist., 646 P.2d 383 (Colo. 1982).

The court may reject report after hearing. Under section (e)(2) of this rule, the trial court is granted, among other alternatives, the authority to reject the master's report after hearing. Brown v. Brown, 161 Colo. 409, 422 P.2d 634 (1967); In re Smith, 641 P.2d 301 (Colo. App. 1981).

The court can make new findings after a new hearing. Under section (e)(2) of this rule, when the trial court rejects the master's report, it can only make new findings after it has conducted a hearing of its own. Sunshine v. Sunshine, 30 Colo. App. 67, 488 P.2d 1131 (1971).

This is a mandatory procedure in cases where the court rejects or modifies the master's report. Sunshine v. Sunshine, 30 Colo. App. 67, 488 P.2d 1131 (1971).

Approved findings bind appellate court just as jury verdict. Findings approved by a trial court are entitled to the same weight and

are just as binding on an appellate court as the verdict of a jury. Julius Hyman & Co. v. Velsicol Corp., 123 Colo. 563, 233 P.2d 977, cert. denied, 342 U.S. 870, 72 S. Ct. 113, 96 L. Ed. 654, reh'g denied, 342 U.S. 895, 72 S. Ct. 199, 96 L. Ed. 671 (1951).

The findings of a master, as to their conclusive effect in an appellate court, stand as a verdict of a jury or the findings of a court. Crater v. McCormick, 4 Colo. 196 (1878); Kimball v. Lyon, 19 Colo. 266, 35 P. 44 (1893); Groth v. Kersting, 4 Colo. App. 395, 36 P. 156 (1894).

Where a master hears evidence and makes findings of fact thereon and his findings are approved by the trial court, the findings are entitled to the same weight and are just as binding on an appellate court as the verdict of a jury or findings of the trial court made upon oral testimony. Noble v. Faull, 26 Colo. 467, 58 P. 681 (1899).

There being sufficient evidence to support the findings and judgment, an appellate court is bound by the findings and judgment in the court below. Peck v. Alexander, 40 Colo. 392, 91 P. 38 (1907).

Where findings are supported by the evidence and are not manifestly against the weight of the evidence, they will not be disturbed by an appellate court. Perdew v. Creditors of Coffin's Estate, 11 Colo. App. 157, 52 P. 747 (1898).

Findings accepted unless master or court was governed by bias or prejudice. Findings of a master, when based upon conflicting evidence, will not be interfered with upon appeal if there is legal evidence to sustain them, unless it appears that the master or the trial court was governed by bias or prejudice or influenced by passion. Noble v. Faull, 26 Colo. 467, 58 P. 681 (1899).

Section (e)(2) of this rule inapplicable in dependency proceeding. Section (e)(2) of this rule, which provides that in an action tried without a jury the court shall accept a master's or referee's findings of fact unless clearly erroneous, is inapplicable in a dependency proceeding because that is a statutory proceeding in which the statute supersedes the conflicting rule. People in Interest of S.S.T., 38 Colo. App. 110, 553 P.2d 82 (1976).

Applied in Thompson v. McCormick, 169 Colo. 151, 454 P.2d 934 (1969); P.F.P. Family Holdings v. Stan Lee Media, 252 P.3d 1 (Colo. App. 2010).

C. Stipulation.

Stipulation that master should act as arbitrator instead held all right. Zelinger v. Mellwin Constr. Co., 123 Colo. 149, 225 P.2d 844 (1950).

Even though use of a "master" pursuant to this rule conflicts with § 38-44-108 for resolving a disputed boundary, because the parties stipulated for the entry of judgment upon final approval of the surveyor's report by the trial court, the parties waived their rights to object to the trial court's determination of the disputed boundary. Durbin v. Bonanza Corp., 716 P.2d 1124 (Colo. App. 1986).

CHAPTER 6

Judgment

CHAPTER 6

JUDGMENT

Rule 54. Judgments; Costs

(a) Definition; Form. "Judgment" as used in these rules includes a decree and order to or from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims, or parties and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for Judgment. A judgment by default shall not be different in kind from that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

COMMITTEE COMMENT

The amendment to C.R.C.P. 54(c) is to eliminate what has been perceived as a possible conflict between that section and the recent change to C.R.C.P. 8(a) which prohibits statement of amount in that **ad damnum**. The amendment simply strikes the words "or exceed in amount" to make the section consistent with C.R.C.P. 8(a). Relief sought in the prayer is now described rather than stated as an amount. It is, therefore, not necessary to have an amount limitation in C.R.C.P. 54(c).

(d) Costs. Except when express provision therefor is made either in a statute of this state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the state of Colorado, its officers or agencies, shall be imposed only to the extent permitted by law.

(e) Against Partnership. Any judgment obtained against a partnership or unincorporated association shall bind only the joint property of the partners or associates, and the separate property of the parties personally served.

(f) After Death, How Payable. If a party dies after a verdict or decision upon any issue of fact, and before judgment, the court may, nevertheless, render judgment thereon. Such judgment shall not be a lien on the real property of the deceased party, but shall be paid as a claim against his estate.

(g) Against Unknown Defendants. The judgment in an action in rem shall apply to and conclude the unknown defendants whose interests are described in the complaint.

(h) Revival of Judgments. A judgment may be revived against any one or more judgment debtors whether they are jointly or severally liable under the judgment. To revive a judgment a motion shall be filed alleging the date of the judgment and the amount thereof which remains unsatisfied. Thereupon the clerk shall issue a notice requiring the judgment debtor to show cause within 14 days after service thereof why the judgment should not be

revived. The notice shall be served on the judgment debtor in conformity with Rule 4. If the judgment debtor answer, any issue so presented shall be tried and determined by the court. A revived judgment must be entered within twenty years after the entry of the judgment which it revives, and may be enforced and made a lien in the same manner and for like period as an original judgment. If a judgment is revived before the expiration of any lien created by the original judgment, the filing of the transcript of the entry of revivor in the register of actions with the clerk and recorder of the appropriate county before the expiration of such lien shall continue that lien for the same period from the entry of the revived judgment as is provided for original judgments. Revived judgments may themselves be revived in the manner herein provided.

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

Cross references: For effect of an order of dismissal, see C.R.C.P. 41(a) and (b); for pleadings, see C.R.C.P. 7(a); for masters' reports, see C.R.C.P. 53(e); for default judgments, see C.R.C.P. 55; for creditors' claims against estates, see part 8 of article 12 of title 15, C.R.S.; for service of process by publication, see C.R.C.P. 4(h); for provisions encompassing process, see C.R.C.P. 4.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, "Notes on Proposed Amendments to Colorado Rules of Civil Procedure", see 27 Dicta 165 (1950). For article, "Amendments to the Colorado Rules of Civil Procedure", see 28 Dicta 242 (1951). For article, "Judgment: Rules 54-63", see 23 Rocky Mt. L. Rev. 581 (1951). For article, "One Year Review of Civil Procedure and Appeals", see 36 Dicta 5 (1959). For article, "One Year Review of Civil Procedure and Appeals", see 39 Dicta 133 (1962). For article, "Certification Under Rule 54(b): Risky Efficiency", see 13 Colo. Law. 997 (1984). For article, "The Final Judgment Rule And Attorney Fees", see 17 Colo. Law. 2139 (1988).

Where the damages to which plaintiff is entitled can only be estimated at the pleading stage and the defendant is given notice of the various elements of the damages claim, then recovery is not to be limited to the amount listed in the complaint. DeCicco v. Trinidad Area Health Ass'n, 40 Colo. App. 63, 573 P.2d 559 (1977).

Rule inapplicable to C.R.C.P. 120 foreclosure sale. Because a statutory public trustee foreclosure does not involve foreclosure through the court, and because there is no appeal from the limited order of a C.R.C.P. 120, court on a motion authorizing the public trustee to conduct a foreclosure sale, this rule is inapplicable to such a foreclosure. Bakers Park Mining & Milling Co. v. District Court, 662 P.2d 483 (Colo. 1983).

Rule as basis for jurisdiction. See Bd. of County Comm'rs v. Anderson, 34 Colo. App. 37, 525 P.2d 478 (1974), aff'd, 534 P.2d 1201 (1975); Silverman v. Univ. of Colo., 36 Colo. App. 269, 541 P.2d 93 (1975); United Bank of Denver Nat'l Ass'n v. Shavlik, 189 Colo. 280, 541 P.2d 317 (1975); First Com. Corp. v. Geter, 37 Colo. App. 391, 547 P.2d 1291 (1976); City of Delta v. Thompson, 37 Colo. App. 205, 548 P.2d 1292 (1975); Chavez v. Zanghi, 42 Colo. App. 417, 598 P.2d 152 (1979); Styers v. Mara, 631 P.2d 1138 (Colo. App. 1981); Fort Collins Nat'l Bank v. Fort Collins Nat'l Bank Bldg., 662 P.2d 196 (Colo. App. 1983).

Applied in Vogt v. Hansen, 123 Colo. 105, 225 P.2d 1040 (1950); Corper v. City & County of Denver, 36 Colo. App. 118, 536 P.2d 874 (1975), modified, 191 Colo. 252, 552 P.2d 13 (1976); Shaw v. Aurora Mobile Homes & Real Estate, Inc., 36 Colo. App. 321, 539 P.2d 1366 (1975); Ginsberg v. Stanley Aviation Corp., 37 Colo. App. 240, 551 P.2d 1086 (1975); Page v. Clark, 40 Colo. App. 24, 572 P.2d 1214 (1977); Hait v. Miller, 38 Colo. App. 503, 559 P.2d 260 (1977); In re Heinzman, 40 Colo. App. 227, 579 P.2d 638 (1977); Mancillas v. Campbell, 42 Colo. App. 145, 595 P.2d 267 (1979); In re Heinzman, 198 Colo. 36, 596 P.2d 61 (1979); Tipton v. Zions First Nat'l Bank, 42 Colo. App. 534, 601 P.2d 352 (1979); Gray v. Reg'l Transp. Dist., 43 Colo. App. 107, 602 P.2d 879 (1979); Ellis v. Rocky Mt. Empire Sports, Inc., 43 Colo. App. 166, 602 P.2d 895 (1979); Haines v.

United Sec. Ins. Co., 43 Colo. App. 276, 602 P.2d 901 (1979); Einarsen v. City of Wheat Ridge, 43 Colo. App. 232, 604 P.2d 691 (1979); Naiman v. Warren A. Flickinger & Assocs., 43 Colo. App. 279, 605 P.2d 63 (1979); Ellerman v. Kite, 626 P.2d 696 (Colo. App. 1979); First Nat'l Bank v. Collins, 44 Colo. App. 228, 616 P.2d 154 (1980); Fuqua Homes, Inc. v. Western Sur. Co., 44 Colo. App. 257, 616 P.2d 163 (1980); Cibere v. Indus. Comm'n, 624 P.2d 920 (Colo. App. 1980); Rossmiller v. Romero, 625 P.2d 1029 (Colo. 1981); Campbell v. Home Ins. Co., 628 P.2d 96 (Colo. 1981); Broyles v. Fort Lyon Canal Co., 638 P.2d 244 (Colo. 1981); Judd Constr. Co. v. Evans Joint Venture, 642 P.2d 922 (Colo. 1982); City & County of Denver v. Eggert, 647 P.2d 216 (Colo. 1982); United States v. City & County of Denver, 656 P.2d 1 (Colo. 1982); People in Interest of W.M., 643 P.2d 794 (Colo. Ct. App. 1982); F.J. Kent Corp. v. Town of Dillon, 648 P.2d 669 (Colo. App. 1982); Aspen-Western Corp. v. Bd. of County Comm'rs, 650 P.2d 1326 (Colo. App. 1982); Am. Television & Commc'ns Corp. v. Manning, 651 P.2d 440 (Colo. App. 1982); Frank v. First Nat'l Bank, 653 P.2d 748 (Colo. App. 1982); Heinrichsdorff v. Raat, 655 P.2d 860 (Colo. App. 1982); Ortega v. Bd. of County Comm'rs, 657 P.2d 989 (Colo. App. 1982); City of Colo. Springs v. Berl, 658 P.2d 280 (Colo. App. 1982); Krause v. Columbia Sav. & Loan Ass'n, 661 P.2d 265 (Colo. 1983); Bd. of County Comm'rs v. Pennobscot, Inc., 662 P.2d 1091 (Colo. 1983); Wickham v. Wickham, 670 P.2d 452 (Colo. App. 1983); Slovek v. Bd. of County Comm'rs, 697 P.2d 781 (Colo. App. 1984); People v. Mountain States Tel. & Tel. Co., 739 P.2d 850 (Colo. 1987); People in Interest of B.J.F., 761 P.2d 297 (Colo. App. 1988).

II. DEFINITION; FORM.

Validity of a judgment depends on the court's jurisdiction of the person and the subject matter of the issue it decides. McLeod v. Provident Mut. Life Ins. Co., 186 Colo. 234, 526 P.2d 1318 (1974).

It is not approved practice for a trial court to make no independent conclusions of law, but rather make its conclusions by incorporating party's brief. Metro. Denver Sewage Disposal Dist. No. 1 v. Farmers Reservoir & Irrigation Co., 179 Colo. 36, 499 P.2d 1190 (1972).

Judgment rendered without jurisdiction is void and may be attacked directly or collaterally. McLeod v. Provident Mut. Life Ins. Co., 186 Colo. 234, 526 P.2d 1318 (1974).

III. MULTIPLE CLAIMS OR PARTIES.

Law reviews. For note, "Res Judicata — Should It Apply to a Judgment Which is Being Appealed?", see 33 Rocky Mt. L. Rev. 95 (1960). For article, "One Year Review of Civil Procedure and Appeals", see 38 Dicta 133 (1961).

Section (b) is identical to corresponding federal rule. Since section (b) of this rule is identical to the corresponding federal rule, the federal cases interpreting F.R.C.P. 54(b) are persuasive here. Moore & Co. v. Triangle Constr. & Dev. Co., 44 Colo. App. 499, 619 P.2d 80 (1980); Harding Glass Co. v. Jones, 640 P.2d 1123 (Colo. 1982); Forbes v. Goldenhersh, 899 P.2d 246 (Colo. App. 1994); State ex rel. Salazar v. Gen. Steel Domestic Sales, LLC, 129 P.3d 1047 (Colo. App. 2005).

The proper function of a reviewing court in section (b) cases is for the court to fully review whether the trial court completely resolved a single claim for relief; however, some deference should be given where the trial court has made its reasoning clear. State ex rel. Salazar v. Gen. Steel Domestic Sales, LLC, 129 P.3d 1047 (Colo. App. 2005).

Section (b) creates an exception to the requirement that an entire case must be resolved by a final judgment before an appeal is brought. Harding Glass Co. v. Jones, 640 P.2d 1123 (Colo. 1982); Nelson v. Elway, 971 P.2d 245 (Colo. App. 1998).

For the purposes of issue preclusion, a judgment that is still pending on appeal is not final. Rantz v. Kaufman, 109 P.3d 132 (Colo. 2005).

A judgment is not final for purposes of issue preclusion until certiorari has been resolved both in the Colorado supreme court and the United States supreme court. Certiorari can be resolved in any of three ways: (1) The parties fail to file a timely petition for certiorari; (2) the court denies the petition for certiorari; or (3) the court issues an opinion after granting certiorari. Barnett v. Elite Props. of Am., 252 P.3d 14 (Colo. App. 2010).

Jurisdiction to hear appeal depends on correctness of certification. An appellate court's jurisdiction to entertain an appeal of a trial court's section (b) certification depends upon the correctness of the certification itself. Alexander v. City of Colo. Springs, 655 P.2d 851 (Colo. App. 1982); Richmond Am. Homes of Colo., Inc. v. Steel Floors, LLC, 187 P.3d 1199 (Colo. App. 2008).

A premature notice of appeal does not render void for lack of jurisdiction acts of the trial court taken during the interval between the filing of the invalid notice of appeal and the dismissal of the appeal by the court of appeals. Woznicki v. Musick, 94 P.3d 1243 (Colo. App. 2004), aff'd, 136 P.3d 244 (Colo. 2006).

Where the trial court incorrectly entered a default judgment the certification of that judgment pursuant to section (b) was likewise improper. Although the court had jurisdiction to decide the legal sufficiency of the section

(b) certification, the court lacked jurisdiction to consider the issues raised by the appellant regarding the adequacy of service on him and the denial of his motion to set aside the default judgment. Salomon Smith Barney, Inc. v. Schroeder, 43 P.3d 715 (Colo. App. 2001).

Previously, a judgment disposing of less than the entire case could be final and subject to review only where it was a final determination of a distinct claim arising out of a different transaction or occurrence from the other claims involved. Brown v. Mountain States Tel. & Tel. Co., 121 Colo. 502, 218 P.2d 1063 (1950).

Rule grants trial courts the authority to certify a ruling as a final judgment on less than an entire case, without altering the requirements of finality of judgment as to any other claim. Steven A. Gall, P.C. v. District Court, 965 P.2d 1268 (Colo. 1998).

An order dismissing an action as to two of the defendants and directing that plaintiffs should have a stated time within which to "Prepare the record in order to apply to the supreme court for appeal" is a final judgment to review. Ruhter v. Steele, 120 Colo. 367, 209 P.2d 771 (1949).

Where several items alleged in a complaint all resulted from a single transaction or occurrence, these items of damage still constituted a single claim, and the determination of one of the several asserted legal rights was not a final judgment. Brown v. Mountain States Tel. & Tel. Co., 121 Colo. 502, 218 P.2d 1063 (1950).

In cases which have been consolidated for the purpose of trial, a judgment entered in one case only is not a final appealable judgment absent a specific certification that there is no just reason for delay by the court pursuant to section (b). Mission Viejo Co. v. Willows Water Dist., 818 P.2d 254 (Colo. 1991).

Section (b) of this rule prevents or imposes conditions on the entry of final judgment on less than all of the pending claims. Harvey v. Morris, 148 Colo. 489, 367 P.2d 352 (1961).

Trial court may direct entry of final judgment where more than one claim exists. Section (b) of this rule allows a trial court to direct entry of a final judgment upon one or more but less than all of the claims on certain conditions where more than one claim exists. Hamm v. Twin Lakes Reservoir & Canal Co., 150 Colo. 447, 373 P.2d 525 (1962).

Final adjudication of a particular claim in a case involving multiple claims or multiple parties may be certified as a final judgment. Levine v. Empire Sav. & Loan Ass'n, 34 Colo. App. 235, 527 P.2d 910 (1974), aff'd, 189 Colo. 64, 536 P.2d 1134 (1975).

This rule directs what must be done where multiple claims are involved and less than all of them decided. Fidelity & Deposit Co. v. May, 142 Colo. 195, 350 P.2d 343 (1960).

This rule specifically provides that where multiple claims are involved and less than all of them are decided, in order to effect a final judgment or final disposition of the matters decided, the trial court must expressly determine that there is no just reason for delay and must expressly direct the entry of a judgment with respect to those claims which are decided. Blackburn v. Skinner, 156 Colo. 41, 396 P.2d 968 (1964).

In order for a trial court to enter a final judgment on less than all of the claims pending before it pursuant to this rule, the order certified as final must dispose of an "entire claim". Thus, if only a single claim is asserted, but multiple remedies are sought based upon that single claim, an order denying one remedy, but not disposing of the requests for other remedies, cannot be made a final judgment by the entry of a certification pursuant to this rule. Virdanco, Inc. v. MTS Intern., 791 P.2d 1236 (Colo. App. 1990).

In order for a judgment to be "final" with respect to a whole, single claim, that order must fix all damages stemming from that claim. Thus, if the court's order purports to award some damages, but reserves the right to award additional damages at a later date, that order does not dispose of an entire claim and cannot be made a final judgment under this rule. Virdanco, Inc. v. MTS Intern., 791 P.2d 1236 (Colo. App. 1990).

Where the express language required by this rule does not appear in the order of judgment, an appeal must be dismissed. Blackburn v. Skinner, 156 Colo. 41, 396 P.2d 968 (1964).

If an order does not constitute final adjudication of a claim, certification of it as such does not operate to make it so. Levine v. Empire Sav. & Loan Ass'n, 34 Colo. App. 235, 527 P.2d 910 (1974), aff'd, 189 Colo. 64, 536 P.2d 1134 (1975).

Order awarding attorney fees as sanctions under C.R.C.P. 11 and § 13-17-102 held not to be a claim for relief; thus appeal of order was dismissed. State Farm Fire & Cas. Co. v. Bellino, 976 P.2d 342 (Colo. App. 1998); State ex rel. Suthers v. CB Servs. Corp., 252 P.3d 7 (Colo. App. 2010).

Colorado rules and decisions discourage the piecemeal review of a cause. Vandy's Inc. v. Nelson, 130 Colo. 51, 273 P.2d 633 (1954); Berry v. Westknit Originals, Inc., 145 Colo. 48, 357 P.2d 652 (1960); Hamm v. Twin Lakes Reservoir & Canal Co., 150 Colo. 447, 373 P.2d 525 (1962).

Purpose of requiring that an entire claim for relief be finally adjudicated before certification is proper is to avoid the dissipation of judicial resources through piecemeal appeals. Harding Glass Co. v. Jones, 640 P.2d 1123 (Colo. 1982).

Number of precautionary appeals cut. The change from the old version of the rule was made largely to reduce the number of precautionary appeals taken as a result of the difficulty of determining whether several claims arose from a single transaction or occurrence. Ireland v. Wynkoop, 36 Colo. App. 206, 539 P.2d 1349 (1975).

This rule expressly provides that in the absence of an express direction by a trial court for the entry of final judgment, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and an order or other form of decision is subject to revision at any time before entry of judgment adjudicating all of the claims. Broadway Roofing & Supply, Inc. v. District Court, 140 Colo. 154, 342 P.2d 1022 (1959); Forbes v. Goldenhersh, 899 P.2d 246 (Colo. App. 1994).

By its terms, C.R.C.P. 56(d) involves an adjudication of less than the entire action, and consequently, a disposition pursuant to that rule does not purport to be a final judgment. Instead, a trial court remains free to reconsider an earlier partial summary judgment ruling absent the entry of judgment under section (b) of this rule. Forbes v. Goldenhersh, 899 P.2d 246 (Colo. App. 1994).

Except as provided in section (b) of this rule, a final judgment is one which ends the particular action in which it is entered, leaving nothing further to be done in determining the rights of the parties involved in the action. Berry v. Westknit Originals, Inc., 145 Colo. 48, 357 P.2d 652 (1960); Harding Glass Co. v. Jones, 640 P.2d 1123 (Colo. 1982).

"Final judgment" defined. Only those orders which finally resolve a claim may be certified as final judgments pursuant to this section. Ball Corp. v. Loran, 42 Colo. App. 501, 596 P.2d 412 (1979).

A decision on the merits is a final judgment for appeal purposes despite any outstanding issue of attorney fees, and certification pursuant to this rule is not a prerequisite to appellate review of the merits of a case if a judgment has been entered and only the issue of attorney fees remains to be determined. Baldwin v. Bright Mortg. Co., 757 P.2d 1072 (Colo. 1988).

Determination of relief required for final judgment. A trial court's order determining that defendants are liable does not constitute the final resolution of a claim for purposes of this section unless and until the trial court determines what relief, if any, may be secured. Ball Corp. v. Loran, 42 Colo. App. 501, 596 P.2d 412 (1979).

A default judgment that completely disposes of petitioner's claim against defendant individually constitutes a final and appealable judgment for certification under this rule even though other plaintiffs' claims are unresolved. Kempter v. Hurd, 713 P.2d 1274 (Colo. 1986).

A judgment is not final which determines the action as to less than all of the defendants, except as provided in section (b) of this rule. Berry v. Westknit Originals, Inc., 145 Colo. 48, 357 P.2d 652 (1960).

When a summary judgment disposes of less than the entire action, the judgment is not final unless the trial court expressly determines that there is no just reason for delay and directs the entry of a final judgment. Manka v. Martin, 200 Colo. 260, 614 P.2d 875 (1980), cert. denied, 450 U.S. 913, 101 S. Ct. 1354, 67 L. Ed. 2d 338 (1981).

However, all defendants are potentially jointly and severally liable and subject to judgment as to which finality rule applies unless there has been a specification of only joint liability. Corporon v. Safeway Stores, Inc., 708 P.2d 1385 (Colo. App. 1985).

Before an appeal can be brought, all claims for relief in a case must be resolved by final judgment unless section (b) or another rule or statutory section is applicable. Alexander v. City of Colo. Springs, 655 P.2d 851 (Colo. App. 1982).

Denial of a motion for summary judgment is not a final appealable order. Town of Grand Lake v. Lanzi, 937 P.2d 785 (Colo. App. 1996).

A final judgment can only enter when the trial court has nothing further to do to determine the rights of the parties involved, unless the judgment meets the requirements of section (b) of this rule. Hamm v. Twin Lakes Reservoir & Canal Co., 150 Colo. 447, 373 P.2d 525 (1962).

Trial court erred in certifying summary judgment in third-party action as final since, at time of judgment, attorney fees, interest, and costs which were part of primary action had not yet been determined. Corinthian Hill Metro. Dist. v. Keen, 812 P.2d 721 (Colo. App. 1991).

This rule applies only to a final decision of one or more, but not all, claims for relief. Trans Cent. Airlines v. McBreen & Assocs., 31 Colo. App. 71, 497 P.2d 1033 (1972).

Because a certification pursuant to section (b) applies to a final decision of one or more but not all claims for relief, the trial court retains jurisdiction over those portions of the case not affected by the judgment certified as final for appeal. Nelson v. Elway, 971 P.2d 245 (Colo. App. 1998).

The effect of this rule is to permit the trial court to advance the time when such a final decision could be appealed. Trans Cent. Airlines v. McBreen & Assocs., 31 Colo. App. 71, 497 P.2d 1033 (1972).

Trial court makes determination of finality. Under this rule the trial court, not the parties or their counsel, may make the required determination of finality. Trans Cent. Airlines v.

McBreen & Assocs., 31 Colo. App. 71, 497 P.2d 1033 (1972).

A trial court may, by the exercise of its discretion in the interest of sound judicial administration, release for appeal final decisions upon one or more, but less than all, claims in multiple claims actions. Trans Cent. Airlines v. McBreen & Assocs., 31 Colo. App. 71, 497 P.2d 1033 (1972).

The trial court had discretion to certify its adjudication of two allegations, in spite of pending counterclaims. Ireland v. Wynkoop, 36 Colo. App. 206, 539 P.2d 1349 (1975).

The timing of such a release is vested by this rule in the discretion of the trial court as the one most likely to be familiar with the case and with any justifiable reasons for delay. Trans Cent. Airlines v. McBreen & Assocs., 31 Colo. App. 71, 497 P.2d 1033 (1972).

A substantial delay between the entry of a ruling and the filing of the section (b) motion caused by nonmovant's failure to prosecute the case does not prevent the court from certifying the ruling as final. LoPresti v. Brandenburg, 267 P.3d 1211 (Colo. 2011).

Certification of final judgment is appropriate only when more than one claim for relief is presented in an action, or when multiple parties are involved, and there are claims or counterclaims remaining to be resolved. San Miguel County Bd. of County Comm'rs v. Roberts, 159 P.3d 800 (Colo. App. 2006).

In deciding whether to issue a section (b) certification with respect to a decision which does not dispose of the entire case in a multiple claims action, a trial court must engage in a three-step process. First, it must determine that the decision to be certified is a ruling upon an entire "claim for relief". Next, it must conclude that the decision is final in the sense of an ultimate disposition of an individual claim. Finally, the trial court must determine whether there is just reason for delay in entry of a final judgment on the claim. Harding Glass Co. v. Jones, 640 P.2d 1123 (Colo. 1982); Troxel v. Town of Basalt, 682 P.2d 501 (Colo. App. 1984); Pub. Serv. Co. of Colo. v. Linnebur, 687 P.2d 506 (Colo. App. 1984), aff'd, 716 P.2d 1120 (Colo. 1986); Lytle v. Kite, 728 P.2d 305 (Colo. 1986); Keith v. Kinney, 961 P.2d 516 (Colo. App. 1997); Carothers v. Archuleta County Sheriff, 159 P.3d 647 (Colo. App. 2006); Richmond Am. Homes of Colo., Inc. v. Steel Floors, LLC, 187 P.3d 1199 (Colo. App. 2008).

Certification under section (b) of this rule is improper if the ruling sought to be appealed disposes of one or more claims against some, but not all, of the parties who may be jointly, but not severally, liable and there remains in the trial court a claim or claims against one or more of the remaining parties who, because of the certification, are not before the appellate court. Hall v. Bornschelgel, 740 P.2d 539 (Colo. App. 1987).

For certification under section (b) to be proper, a full adjudication of rights and liabilities regarding appealed claim is necessary. Corinthian Hill Metro. Dist. v. Keen, 812 P.2d 721 (Colo. App. 1991).

Certification under section (b) is not required before a judgment can be given preclusive effect for purposes of collateral estoppel. Carpenter v. Young, 773 P.2d 561 (Colo. 1989).

Absent certification by the trial court under this rule, a judgment that disposes of fewer than all of the claims in an action may not be appealed. Estate of Burford v. Burford, 935 P.2d 943 (Colo. 1997).

A decree of dissolution when entered by the district court is final to dissolve the marriage even when the district court refuses to certify the decree as a final judgment appealable under this rule. Estate of Burford v. Burford, 935 P.2d 943 (Colo. 1997).

The same rules of finality apply in probate cases as in other civil cases. An order of the probate court is final if it ends the particular action in which it is entered and leaves nothing further for the court pronouncing it to do in order to completely determine the rights of the parties as to that proceeding. In re Estate of Scott, 119 P.3d 511 (Colo. App. 2004), aff'd, 136 P.3d 892 (Colo. 2006).

Section (b) governs the interlocutory appeal of a probate court order. In re Estate of Scott, 119 P.3d 511 (Colo. App. 2004), aff'd, 136 P.3d 892 (Colo. 2006).

Court has discretion in determining "just reason for delay". The task of assessing whether there is just reason for delay is committed to the trial court's sound judicial discretion, and review of a trial court's ruling on that question is limited to an inquiry into whether that discretion has been abused. Hardin Glass Co. v. Jones, 640 P.2d 1123 (Colo. 1982); Georgian Health Center v. Colonial Paint, 738 P.2d 809 (Colo. App. 1987).

It is within the trial court's discretion to determine whether there is just reason for delay, and such determination will not be disturbed absent an abuse thereof. The trial court's assessment of equities will be disturbed only if its conclusion was clearly unreasonable. Messler v. Phillips, 867 P.2d 128 (Colo. App. 1993).

The discretion accorded the trial court under this rule is limited, and does not permit the court to declare that which is not final under the rules to be final. Trans Cent. Airlines v. McBreen & Assocs., 31 Colo. App. 71, 497 P.2d 1033 (1972).

A trial court's determinations that a claim for relief is the subject of the decision sought to be certified and that the decision is final are not truly discretionary as the correctness of these two determinations is fully reviewable by an

appellate court because the trial court cannot in the exercise of its discretion, treat as final that which is not final. Harding Glass Co. v. Jones, 640 P.2d 1123 (Colo. 1982); Kelly v. Mid-Century Ins. Co., 695 P.2d 752 (Colo. App. 1984); Lytle v. Kite, 728 P.2d 305 (Colo. 1986).

Court abused its discretion in refusing to reconsider and vacate partial summary judgment in favor of one of several defendants where, following defendant's belated production of a key document, an issue as to a material fact was seen to arise. Halter v. Waco Scaffolding & Equip. Co., 797 P.2d 790 (Colo. App. 1990).

Discretion must be exercised with extreme care. Trial court's decision in certifying one of its orders must be exercised with extreme care where a pending counterclaim is involved, and this is particularly true where the counterclaim arguably arises from the same transaction or occurrence as the adjudicated claim. Ireland v. Wynkoop, 36 Colo. App. 206, 539 P.2d 1349 (1975).

Order denying motion for summary judgment not final order. Since an order denying a motion for summary judgment is not a final order, a trial court is without power to declare it to be final and appealable. Trans Cent. Airlines v. McBreen & Assocs., 31 Colo. App. 71, 497 P.2d 1033 (1972).

Certification by a trial court is not binding upon the appellate courts. Trans Cent. Airlines v. McBreen & Assocs., 31 Colo. App. 71, 497 P.2d 1033 (1972).

Where a trial court issues a certificate, a reviewing court has no jurisdiction unless the trial court has power to do so, but the trial court's determination that it has such power is not binding upon the appellate court. Trans Cent. Airlines v. McBreen & Assocs., 31 Colo. App. 71, 497 P.2d 1033 (1972).

An appellate court thus will review de novo the legal sufficiency of a trial court's certification. Richmond Am. Homes of Colo., Inc. v. Steel Floors, LLC, 187 P.3d 1199 (Colo. App. 2008).

In order to effect a final judgment, thus rendering it reviewable, a trial court should (1) expressly determine that there is no just reason for delay and (2) expressly direct the entry of a judgment. Fidelity & Deposit Co. v. May, 142 Colo. 195, 350 P.2d 343 (1960).

Trial court properly concluded that there was no just reason for delay in entering final judgment for the defendant because it had granted summary judgment in favor of the defendant on all of plaintiffs' claims. The trial court made its order in favor of the defendant a final judgment for purposes of section (b). It was not necessary for the trial court to address the defendant's counterclaim once it had disposed of the plaintiffs' claims. Bickel v. City of Boulder, 885 P.2d 215 (Colo. 1994), cert. denied, 513 U.S. 1155, 115 S. Ct. 1112, 130 L. Ed. 2d 1076 (1995).

Finality under this rule contemplates more than the rendition of a judgment. Fidelity & Deposit Co. v. May, 142 Colo. 195, 350 P.2d 343 (1960).

A determination under this rule must be made in order to pave the way for the filing of an appeal. Allied Colo. Enters. Co. v. Grote, 156 Colo. 160, 397 P.2d 225 (1964).

Failure to procure an express finding by a trial court so that an appeal can be properly pursued is fatal. Smith v. City of Arvada, 163 Colo. 189, 429 P.2d 308 (1967).

Where, in granting a motion for summary judgment, a court expressly determines that there is no just reason for delay, directs that it be a final judgment, and dispenses with the necessity of filing a motion for new trial, there is created justifiable cause for review by an appellate court under section (b) of this rule. Hynes v. Donaldson, 155 Colo. 456, 395 P.2d 221 (1964).

Where appealed claims are factually distinct from the retained claims—i.e., they arise from different transactions or occurrences—multiple "claims for relief" are present, and the current rule may be applied just like the old rule. Ireland v. Wynkoop, 36 Colo. App. 206, 539 P.2d 1349 (1975).

Appealable unit is claim for relief. Under the present version of F.R.C.P. 54(b) and section (b) of this rule, the appealable judicial unit is a "claim for relief", and a "claim, counterclaim, cross-claim or third-party claim" may be a separate unit. Ireland v. Wynkoop, 36 Colo. App. 206, 539 P.2d 1349 (1975).

Where dismissed claims and a retained counterclaim are not so inherently inseparable or intertwined, certification of dismissal of the claims was not an abuse of discretion. Ireland v. Wynkoop, 36 Colo. App. 206, 539 P.2d 1349 (1975).

The trial court may not certify an order as a final judgment pursuant to this rule after the notice of appeal has been filed. Levine v. Empire Sav. & Loan Ass'n, 34 Colo. App. 235, 527 P.2d 910 (1974), aff'd, 189 Colo. 64, 536 P.2d 1134 (1975), overruled in Musick v. Woznicki, 136 P.3d 244 (Colo. 2006).

Trial court not authorized to enter judgment without assertion of claim for relief. This rule does not authorize the trial court to enter judgment against a party when no claim for relief has been asserted against that party by the party in whose favor the judgment is to be entered. A.R.A. Mfg. Co. v. Brady Auto Accessories, Inc., 622 P.2d 113 (Colo. App. 1980).

Order dismissing class action aspects of the case determined the legal insufficiency of the complaint as a class action, and therefore, in its legal effect, it is "tantamount to a dismissal of the action as to all members of the class other

than [petitioners]". Levine v. Empire Sav. & Loan Ass'n, 192 Colo. 188, 557 P.2d 386 (1976).

Trial court's order granting class action certification is not an ultimate disposition of an individual claim. Soto v. Progressive Mtn. Ins. Co., 181 P.3d 297 (Colo. App. 2007).

Trial court's C.R.C.P. 54(b) certification of its order granting class action certification as a final judgment was improper. Soto v. Progressive Mtn. Ins. Co., 181 P.3d 297 (Colo. App. 2007).

Decree of dissolution of marriage final. Section 14-10-105 provides that the Colorado rules of civil procedure apply to dissolution proceedings except as "otherwise specifically provided" in article 10 of title 14; and § 14-10-120 provides that a decree of dissolution of marriage is "final" when entered, subject to the right of appeal. The trial court is authorized to enter an order pursuant to section (b) of this rule, making the decree final for purposes of appeal. In re Baier, 39 Colo. App. 34, 561 P.2d 20 (1977).

Upon the entry of an order under section (b) of this rule, a decree of dissolution of marriage may be appealed prior to entry of permanent orders on the issues of child custody, support, and division of property. In re Baier, 39 Colo. App. 34, 561 P.2d 20 (1977).

Claims in a forcible entry and detainer action wherein damages as well as possession are sought are sufficiently severable that a final and appealable order may be issued as to possession while the claim for damages (rent owed) is reserved for future determination. Sun Valley Dev. Co. v. Paradise Valley Country Club, 663 P.2d 628 (Colo. App. 1983).

Complaint asserting single legal right states only single claim, even though multiple remedies may be sought for the alleged violation of that legal right. Harding Glass Co. v. Jones, 640 P.2d 1123 (Colo. 1982); Messenger v. Main, 697 P.2d 420 (Colo. App. 1985).

Where the plaintiff requests different remedies for relief, injunction, and damages, but the multiple remedies sought are to redress the violation of one legal right, only one claim is asserted, which, by virtue of its singularity, is not certifiable under section (b). Alexander v. City of Colo. Springs, 655 P.2d 851 (Colo. App. 1982).

For purposes of applying section (b), a "claim" is the aggregate of operative facts which give rise to a right enforceable in the courts, and the ultimate determination of multiplicity of claims rests on whether the underlying factual bases for recovery state a number of different claims which could have been separately enforced. Corporon v. Safeway Stores, Inc., 708 P.2d 1385 (Colo. App. 1985).

More pragmatically stated, claims for relief are "multiple claims" for purposes of section (b) when a claimant pleads claims for which his possible recoveries are more than one and when a judgment rendered on one of his claims would not bar a judgment on his other claims. Corporon v. Safeway Stores, Inc., 708 P.2d 1385 (Colo. App. 1985).

Disposition of only one of several elements of damages sought does not constitute an appealable ruling, even when purportedly certified as final under section (b). Harding Glass Co. v. Jones, 640 P.2d 1123 (Colo. 1982).

Order dismissing availability of treble damages under the Colorado Antitrust Act was not a final disposition and therefore not ripe for appeal where claims for misappropriation and unjust enrichment were undecided by the trial court. Smith v. TCI Commc'ns, Inc., 981 P.2d 690 (Colo. App. 1999).

Trial court's entry of certification under section (b) cannot transform an interlocutory decision into a final one absent dismissal of the arbitrable claims. Ferla v. Infinity Dev. Assocs., LLC, 107 P.3d 1006 (Colo. App. 2004).

Order preventing pursuit of claim for punitive damages is not final judgment. Partial summary judgment of the issue of punitive damages is an interlocutory rather than a final judgment for purposes of certification under section (b). Harding Glass Co. v. Jones, 640 P.2d 1123 (Colo. 1982).

Summary judgment for portion of claim cannot be made final under rule. If the trial court enters a summary judgment for only a portion of a claim or counterclaim or any other order that falls short of fully adjudicating at least one claim or counterclaim, the order cannot be made final under this rule, despite an "express determination" and an "express direction". Moore & Co. v. Triangle Constr. & Dev. Co., 44 Colo. App. 499, 619 P.2d 80 (1980).

Barring extraordinary circumstances, a judgment subject to C.R.C.P. 54(b) certification must be so certified in order to be considered final and sufficient to transfer jurisdiction to the court of appeals. Trial court retains jurisdiction to determine substantive matters when a party files a premature notice of appeal of a nonfinal judgment. Musick v. Woznicki, 136 P.3d 244 (Colo. 2006) (overruling Levine v. Empire Sav. & Loan Ass'n, 34 Colo. App. 235, 527 P.2d 910 (1974), aff'd, 189 Colo. 64, 536 P.2d 1134 (1975)).

Trial court's language held to sufficiently comply with the requirements of section (b). Chambliss/Jenkins Assocs. v. Forster, 650 P.2d 1315 (Colo. App. 1982).

Rule as basis for jurisdiction. Comstock v. Colo. Nat'l Bank, 37 Colo. App. 468, 552 P.2d 514 (1976), modified on other grounds, 194 Colo. 28, 568 P.2d 1164 (1977); Crownover v. Gleichman, 38 Colo. App. 96, 554 P.2d 313 (1976), aff'd, 194 Colo. 48, 574 P.2d 497 (1977), cert. denied, 435 U.S. 905, 98 S.Ct.

1450, 55 L. Ed. 2d 495 (1978); Silverstein v. Sisters of Charity, 38 Colo. App. 286, 559 P.2d 716 (1976); McIntire & Quiros of Colo., Inc. v. Westinghouse Credit Corp., 40 Colo. App. 398, 576 P.2d 1026 (1978).

Applied in Hudler v. New Red Top Valley Ditch Co., 121 Colo. 489, 217 P.2d 613 (1950); Hoff v. Armbruster, 125 Colo. 324, 244 P.2d 1069 (1952); McGlasson v. Hilton, 155 Colo. 237, 393 P.2d 733 (1964); Perlman v. Great States Life Ins. Co., 164 Colo. 493, 436 P.2d 124 (1968); Cyr v. District Court, 685 P.2d 769 (Colo. 1984); Floyd v. Coors Brewing Co., 952 P.2d 797 (Colo. App. 1997); Daly v. Aspen Ctr. for Women's Health, Inc., 134 P.3d 450 (Colo. App. 2005); State ex rel. Salazar v. Gen. Steel Domestic Sales, LLC, 129 P.3d 1047 (Colo. App. 2005); Yadon v. Lowry, 126 P.3d 332 (Colo. App. 2005); Gunnison County Bd. of County Comm'rs v. BDS Int'l, LLC., 159 P.3d 773 (Colo. App. 2006); Richmond Am. Homes of Colo., Inc. v. Steel Floors, LLC, 187 P.3d 1199 (Colo. App. 2008).

IV. DEMAND FOR JUDGMENT.

Annotator's note. Since section (c) of this rule is similar to § 187 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Section (c) is identical and modeled after F.C.R.P. 54(c). Dlug v. Wooldridge, 189 Colo. 164, 538 P.2d 883 (1975).

Under section (c) of this rule, a judgment by default may not be different in kind or exceed in amount that prayed for in the demand for judgment. Barnard v. Gaumer, 146 Colo. 409, 361 P.2d 778 (1961); Toplitsky v. Schilt, 146 Colo. 428, 361 P.2d 970 (1961); Burson v. Burson, 149 Colo. 566, 369 P.2d 979 (1962); Dept. of Welfare v. Schneider, 156 Colo. 189, 397 P.2d 752 (1964).

Section 5-12-102 contains no requirement that town request statutory interest in its pleadings for court to award interest pursuant to section (c). Town of Breckenridge v. Golforce, Inc., 851 P.2d 214 (Colo. App. 1992).

Both legal and equitable relief may be given in one action and in one judgment or decree. Foothills Holding Corp. v. Tulsa Rig, Reel & Mfg. Co., 155 Colo. 232, 393 P.2d 749 (1964).

Where a party has misconceived his remedy and is seeking relief to which he is not entitled under the law, this does not mean that his petition should be dismissed, for, if, under the allegations of the petition, he is entitled to any relief, a court upon a hearing may grant him the relief to which he is entitled regardless of the prayer in the petition. Regennitter v. Fowler, 132 Colo. 489, 290 P.2d 223 (1955).

The question, therefore, is not whether a party has asked for the proper remedy, but whether under his pleadings he is entitled to any remedy. Regennitter v. Fowler, 132 Colo. 489, 290 P.2d 223 (1955).

The rules of civil procedure were intended to deemphasize the theory of a "cause of action" and to place the emphasis upon the facts giving rise to the asserted claim. Hutchinson v. Hutchinson, 149 Colo. 38, 367 P.2d 594 (1961).

The substance of a claim rather than the appellation applied to the pleading by the litigant is what controls. Hutchinson v. Hutchinson, 149 Colo. 38, 367 P.2d 594 (1961).

If from the allegations of a complaint the plaintiff is entitled to relief under any "theory", it is sufficient to state a claim. Hutchinson v. Hutchinson, 149 Colo. 38, 367 P.2d 594 (1961).

Court will grant relief entitled. If a plaintiff has stated a cause of action for any relief, it is immaterial what he designates it or what he asked for in his prayer; the court will grant him the relief to which he is entitled under the facts pleaded. Berryman v. Berryman, 115 Colo. 281, 172 P.2d 446 (1946).

Court has duty to grant relief to which party entitled. Under this rule it is the duty of the court to grant relief to which a party is entitled, even though not specifically demanded in the prayer. Spears Free Clinic & Hosp. for Poor Children v. State Bd. of Health, 122 Colo. 147, 220 P.2d 872 (1950).

Should a court determine that the precise relief requested is not appropriate, other means may be formulated. Davidson v. Dill, 180 Colo. 123, 503 P.2d 157 (1972).

If a plaintiff declares his intention to seek a particular form of relief and to refuse all other relief, the legality or propriety of the relief sought might properly be determined on a motion to dismiss, though the complaint states facts entitling plaintiff to other relief than that he demands. Berryman v. Berryman, 115 Colo. 281, 172 P.2d 446 (1946).

Relief demanded as limiting relief granted. Snell v. Pub. Utils. Comm'n, 108 Colo. 162, 114 P.2d 563 (1941).

Equitable relief not precluded. Although the plaintiffs originally sought damages in an action at law, equitable relief was not precluded where a change in circumstances altered the posture of the case and rendered the original relief sought inappropriate. Rice v. Hilty, 38 Colo. App. 338, 559 P.2d 725 (1976); Booth v. Bd. of Educ., 950 P.2d 601 (Colo. App. 1997), aff'd in part and rev'd in part on other grounds, 984 P.2d 639 (Colo. 1999).

If the evidence justifies an award, the particular theory pleaded will not prevent the award. Johnson v. Bovee, 40 Colo. App. 317,

574 P.2d 513 (1978); Nix v. Clary, 640 P.2d 246 (Colo. App. 1981).

Recovery is not limited to the amount specified in the complaint, and final judgment should be in the amount to which plaintiff is entitled where amount of damages can only be estimated at the pleading stage and defendant is provided with notice of the elements of the damage claim. Worthen Bank & Trust v. Silvercool Serv. Co., 687 P.2d 464 (Colo. App. 1984).

Applied in Bridges v. Ingram, 122 Colo. 501, 223 P.2d 1051 (1950); Morrissey v. Achziger, 147 Colo. 510, 364 P.2d 187 (1961); Colo. Ranch Estates, Inc. v. Halvorson, 163 Colo. 146, 428 P.2d 917 (1967).

V. COSTS.

Law reviews. For article, "Obtaining Costs for Clients Part 1", see 14 Colo. Law. 1974 (1985).

Section (d) violates neither the due process nor equal protection guarantees contained in the federal and state constitutions. The classification between governmental and non-governmental entities is rationally related to the goal of protecting the public treasury. County of Broomfield v. Farmers Reservoir, 239 P.3d 1270 (Colo. 2010).

Consistency with the principle of discretion in the assessment of costs is preserved by section (d) of this rule. Greenwald v. Molloy, 114 Colo. 529, 166 P.2d 983 (1946).

Generally, when costs are necessarily incurred in preparing for trial and because of litigation, reasonable costs may be awarded to the prevailing party, and trial courts may exercise their discretion in awarding such costs under this rule. Bainbridge, Inc. v. Bd. of County Comm'rs, 55 P.3d 271 (Colo. App. 2002).

No discretionary authority in clerk to determine amounts allowable as expert witness fees or attorney fees. Discretionary authority is judicial function not properly delegable to the clerk of court. Davis v. Bruton, 797 P.2d 830 (Colo. App. 1990).

To omit an award of costs in a judgment is a proper form for a trial judge to use in "directing" that no costs be allowed a prevailing party. Grange Mut. Fire Ins. Co. v. Golden Gas Co., 133 Colo. 537, 298 P.2d 950 (1956).

Although the omission of an award of costs is a proper form for denial of costs, the court must direct the denial. Coldwell Banker Com. Group v. Hegge, 770 P.2d 1297 (Colo. App. 1988).

The specific limitation in the second sentence of § 13-16-113 (2) cannot reasonably be interpreted as a general prohibition extending to all motions for summary judgment brought under C.R.C.P. 56, and the defendant's entitlement to an award of costs was properly considered under section (d). Spencer v. United Mortg. Co., 857 P.2d 1342 (Colo. App. 1993).

An award of costs is not prohibited by this rule even if a party is not entitled to costs under § 13-16-104. Weeks v. City of Colo. Springs, 928 P.2d 1346 (Colo. App. 1996).

Because express provision for the award of costs was made in § 13-16-104, this rule is inapplicable to the extent it makes the awarding of costs discretionary. Nat'l Canada Corp. v. Dikeou, 868 P.2d 1131 (Colo. App. 1993).

There is no indication that the provision in § 13-64-402 creating a mechanism for insurers to assert their subrogation rights for medical benefits paid to a plaintiff is meant to supplant a prevailing party's right to recover costs. Mullins v. Kessler, 83 P.3d 1203 (Colo. App. 2003).

A prevailing party is one that has succeeded upon a significant issue presented by the litigation and has achieved some of the benefits sought in the lawsuit. Nat'l Canada Corp. v. Dikeou, 868 P.2d 1131 (Colo. App. 1993).

The party in whose favor the decision or verdict on liability is rendered is the prevailing party, even where plaintiff received no monetary or other benefit from the jury's verdict. Weeks v. City of Colo. Springs, 928 P.2d 1346 (Colo. App. 1996).

The test for determining a prevailing party in a contract case does not apply to a tort case. Pastrana v. Hudock, 140 P.3d 188 (Colo. App. 2006).

Where party prevails on some but not all of multiple claims, the trial court has broad discretion to determine which, if any, party was "the" prevailing party. Archer v. Farmer Bros. Co., 70 P.3d 495 (Colo. App. 2002), aff'd on other grounds, 90 P.3d 228 (Colo. 2004); Pastrana v. Hudock, 140 P.3d 188 (Colo. App. 2006).

"Prevailing party" may include a defendant who does not assert counterclaims and, under certain circumstances, may include a defendant who is found partly liable. Archer v. Farmer Bros. Co., 90 P.3d 228 (Colo. 2004).

A water court has the discretion to award costs to the prevailing party in a case to determine whether an application for water rights shall be granted. Once a case is before the water judge, it changes character. The application for water rights becomes litigation at the point it has moved from the jurisdiction of the water referee to the water court, and thus the water court is within its discretion to award costs. Fort Morgan v. GASP, 85 P.3d 536 (Colo. 2004).

"Prevailing party" status for award of costs must await the resolution of the claims pending in the water court. Matter of Application for Water Rights, 891 P.2d 981 (Colo. 1995).

Costs are not taxable against the sovereign unless the general assembly so directs. Shumate v. State Pers. Bd., 34 Colo. App. 393, 528 P.2d 404 (1974); McFarland v. Gunter, 829 P.2d 510 (Colo. App. 1992); Smith v. Furlong, 976 P.2d 889 (Colo. App. 1999).

Costs may not be awarded against state entities pursuant to section (d) in the absence of express legislative authority for such awards. Central Colo. Water v. Simpson, 877 P.2d 335 (Colo. 1994).

A water court has the discretion to award costs against a mutual ditch company because a mutual ditch company is not a subdivision of the state. County of Broomfield v. Farmers Reservoir, 239 P.3d 1270 (Colo. 2010).

School district is exempt from an award of costs. Trial court erred in awarding costs against school district, which is a political subdivision of the state, because there was no express provision allowing for the costs. Lombard v. Colo. Outdoor Ed. Center, Inc., 266 P.3d 412 (Colo. App. 2011).

Notwithstanding section (d) of this rule, § 13-16-111 allows a prevailing plaintiff in a C.R.C.P. 106(a)(4) action to recover costs against the state, its officers, or agencies. Branch v. Colo. Dept. of Corr., 89 P.3d 496 (Colo. App. 2003).

Section 24-4-106 (7) does not take precedence over this rule. While § 24-4-106 (7) permits the court "to afford such other relief as may be appropriate", this provision cannot be construed to authorize assessment of costs against the state so as to take precedence over section (d). Shumate v. State Pers. Bd., 34 Colo. App. 393, 528 P.2d 404 (1974).

In state's action to recover costs for treatment in state institutions, the trial court was without jurisdiction to assess court costs against the executive branch of the state, or its officers. State ex rel. Fort Logan Mental Health Ctr. v. Harwood, 34 Colo. App. 213, 524 P.2d 614 (1974).

An award of costs is proper against a municipal corporation. Kussman v. City & County of Denver, 671 P.2d 1000 (Colo. App. 1983).

Costs in challenge of driver's license revocation not recoverable. The trial court has no power to award costs to the plaintiff in a case challenging revocation of a driver's license under § 42-4-1202 (3)(b), because there is no specific statutory provision allowing for such an award. Lucero v. Charnes, 44 Colo. App. 73, 607 P.2d 405 (1980).

Trial courts may exercise discretion to award costs to prevailing party unless there is a statute or rule specifically prohibiting the award of costs. Rossmiller v. Romero, 625 P.2d 1029 (Colo. 1981).

Prevailing plaintiff properly charged with defendant's post-offer costs where jury awarded plaintiff less than the defendant's offer. Whitney v. Anderson, 784 P.2d 830 (Colo. App. 1989).

The prevailing party for the award of costs is the one in whose favor the decision or verdict on liability is rendered even if the other party also prevailed in part on some of the claims involved in the case. Mackall v. Jalisco Int'l, Inc., 28 P.3d 975 (Colo. App. 2001).

Even if each of the parties can arguably be viewed as having prevailed in part, the award of costs in such a situation is committed to the sole discretion of the trial court. Mackall v. Jalisco Int'l, Inc., 28 P.3d 975 (Colo. App. 2001).

When a party prevailed on only one fairly minor issue and lost on every other substantial issue, the trial court did not abuse its discretion in finding that the party was not a prevailing party. Farmers Reservoir & Irrigation Co. v. City of Golden, 113 P.3d 119 (Colo. 2005).

The discretion of the trial court to award costs to a prevailing party is not limited to specific claims upon which the party prevailed, thus even if the prevailing party's expert witness fees were incurred solely in connection with a claim that was dismissed by the court, the award of those fees is proper. Mackall v. Jalisco Int'l, Inc., 28 P.3d 975 (Colo. App. 2001).

Costs of third-party defendant properly divided between plaintiff and defendant when both had claims against third-party defendant since dismissal of the claims made third-party defendant the prevailing party against both. Cobai v. Young, 679 P.2d 121 (Colo. App. 1984); Poole v. Estate of Collins, 728 P.2d 741 (Colo. App. 1986).

Costs attributable to expert witness fees for expert witnesses that did not testify at trial were properly awarded. These costs were valuation expenses necessarily incurred by reason of the litigation and were necessary for the proper preparation for trial. Fowler Irrevocable Trust 1992-1 v. City of Boulder, 992 P.2d 1188 (Colo. App. 1999), aff'd in part and rev'd in part on other grounds, 17 P.3d 797 (Colo. 2001).

Costs may be awarded in tort action under the Governmental Immunity Act. Lee v. Colo. Dept. of Health, 718 P.2d 221 (Colo. 1986).

Trial court did not err in awarding plaintiff his costs pursuant to section (d) in his tort action under the Colorado Governmental Immunity Act. Nguyen v. Reg'l Transp. Dist., 987 P.2d 933 (Colo. App. 1999).

Trial court in a far better position to determine whether the challenged costs were reasonable and necessary. Trial court did not abuse its discretion in awarding costs for: (1) Discovery deposition fees; (2) copies of discov-

ery depositions; (3) copies of medical records for injuries not claimed at trial; (4) certain expert fees; (5) fees associated with photographs; and (6) non-itemized copy fees. Nguyen v. Reg'l Transp. Dist., 987 P.2d 933 (Colo. App. 1999).

Even if court of appeals were to agree with RTD that trial court erred in awarding $2.65 in costs on the basis of mathematical errors that originated in plaintiff's bill of costs, any error falls within the scope of the maxim de minimus non curat lex. Hence, court declines to expend judicial resources remanding for correction of this negligible error. Nguyen v. Reg'l Transp. Dist., 987 P.2d 933 (Colo. App. 1999).

Post-trial motion for the award of attorney fees is analagous to a request for taxing costs and should follow procedures established by section (d) of this rule and C.R.C.P 121, sec. 1-22. A trial court may address the issue of the award of attorney fees for services rendered in connection with the underlying litigation on a post-trial basis, whether or not counsel has previously sought to "reserve" the issue. Roa v. Miller, 784 P.2d 826 (Colo. App. 1989).

Attempt to have costs assessed pursuant to section (d) and C.R.C.P. 121, 1-22, was ineffective where court had previously reserved matter of costs for future hearing pursuant to C.R.C.P. 68. Seymour v. Travis, 755 P.2d 461 (Colo. App. 1988).

Costs may be assessed against the nonprevailing party where the purpose for imposing costs is to sanction counsel for improper conduct which led to a mistrial. Koehn v. R.D. Werner Co., Inc., 809 P.2d 1045 (Colo. App. 1990).

Section (d) of this rule and § 13-16-104 are modified by § 13-17-202 (1)(a)(II), which does not allow a party who rejects a settlement offer and recovers less at trial to recover his or her costs, even though that party is determined to be the prevailing party. Bennett v. Hickman, 992 P.2d 670 (Colo. App. 1999).

An offer of settlement as to "all claims" unambiguously includes attorney fees and costs if the only claim for attorney fees and costs appears in the complaint. The offer of settlement need not explicitly reference attorney fees and costs. Bumbal v. Smith, 165 P.3d 844 (Colo. App. 2007).

Court construed the Health Care Availability Act in harmony with § 13-16-105 and section (d) of this rule to allow a prevailing defendant to recover costs in a medical negligence action. Mullins v. Kessler, 83 P.3d 1203 (Colo. App. 2003).

Where a judgment has been successfully appealed, an award of costs previously entered on that judgment is no longer valid because, upon remand, that judgment no longer exists. Where a judgment has been successfully appealed, the identity of the prevailing party is still unknown, and only after the stage of the proceedings where a prevailing party can be identified will a court's order awarding costs be valid. Here, the judgment underlying the award of costs in the first action was reversed, and the case was remanded for further proceedings. As a result, the board of county commissioners was no longer the prevailing party, and the order awarding costs, which was dependent on and ancillary to that vacated judgment, was reversed. The parties returned to the same positions they were in before the filing of the first action. Bainbridge, Inc. v. Bd. of County Comm'rs, 55 P.3d 271 (Colo. App. 2002).

A trial court may award costs to a prevailing party for an expert witness who does not testify, but the court must find that such costs were reasonable. Because homebuilders concede that costs associated with two cost-accounting experts retained by board of county commissioners in the second action are reasonable, trial court's award of such costs is affirmed. Bainbridge, Inc. v. Bd. of County Comm'rs, 55 P.3d 271 (Colo. App. 2002).

In view of issue at trial of whether fees charged by board were reasonable in relation to direct and indirect costs of building department, and knowledge of board's uniform building code expert in this area, trial court's award of costs for this witness was reasonable. The expert witness offered advice that may have been relevant to the preparation for the second action, and the board limited the expert witness' involvement in this case. Bainbridge, Inc. v. Bd. of County Comm'rs, 55 P.3d 271 (Colo. App. 2002).

VI. AGAINST PARTNERSHIP.

Law reviews. For note, "Necessity of Resorting to Firm Assets Before Levying on the Assets of an Individual Partner", see 8 Rocky Mt. L. Rev. 134 (1936).

Annotator's note. Since section (e) of this rule is similar to § 14 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Judgment against a partnership binds the joint property of the associates and the separate property of members duly served with process. Denver Nat'l Bank v. Grimes, 97 Colo. 158, 47 P.2d 862 (1935).

A court has jurisdiction of partner who is served to proceed to final judgment against him. A judgment having been entered against a partnership and execution thereon having been returned unsatisfied, then, under the provisions of this rule a court has, and continues to have, jurisdiction of a partner who has been served with summons for the purpose of proceeding to

final judgment against him. Denver Nat'l Bank v. Grimes, 97 Colo. 158, 47 P.2d 862 (1935).

Any member being served with summons has notice that he may appear in the case and set up any defense to the partnership liability or to his liability as a partner. Denver Nat'l Bank v. Grimes, 97 Colo. 158, 47 P.2d 862 (1935).

No personal judgment can be obtained against the partners not served, for, as to them, the judgment rendered could bind only their interests in the partnership property. Peabody v. Oleson, 15 Colo. App. 346, 62 P. 234 (1900); Ellsberry v. Block, 28 Colo. 477, 65 P. 629 (1901); Blythe v. Cordingly, 20 Colo. App. 508, 80 P. 495 (1905); Womack v. Grandbush, 134 Colo. 1, 298 P.2d 735 (1956).

Section 13-50-105 is permissive and not mandatory, as partnership or a limited partnership may sue or be sued either in its common name or by naming its partners. Frazier v. Carlin, 42 Colo. App. 226, 591 P.2d 1348 (1979).

Section 13-50-105 and section (e) of this rule contain clear requirements that an individual partner must be named, personally served, and subjected to the jurisdiction of the court to seek recovery from the individual. Plaintiffs actually knew the identity of some of the individual partners but made a conscious decision not to name and serve them. The plaintiffs' judgment was enforceable only against the assets of the partnership. Gutrich v. Cogswell & Wehrle, 961 P.2d 1115 (Colo. 1998).

VII. REVIVAL OF JUDGMENTS.

Law reviews. For article, "Executions and Levies on Tangible Property", see 27 Dicta 143 (1950).

Revived judgments must be entered within 20 years after the entry of the judgment sought to be revived or the court will lose its jurisdiction to do so. Mark v. Mark, 697 P.2d 799 (Colo. App. 1984).

By its plain language section (h) requires notice to be served on the judgment debtor and provides the judgment debtor the opportunity to have issues tried and determined by the court. Hicks v. Joondeph, 232 P.3d 248 (Colo. App. 2009).

Where a judgment has been entered reducing child support arrears to a fixed sum, such judgment may be revived within 20 years after it was entered, regardless of the date that each child support payment became due. Santarelli v. Santarelli, 839 P.2d 525 (Colo. App. 1992).

Judgment lien, based on a domesticated out-of-state judgment, must be revived under Colorado procedural law for the lien to be extended. To extend a judgment lien beyond six years after the date of judgment, Colorado procedural law requires a judgment to be revived pursuant to section (h) and a transcript of the revival to be filed with the clerk and recorder. Wells Fargo Bank, N.A. v. Kopfman, 205 P.3d 437 (Colo. App. 2008), aff'd, 226 P.3d 1068 (Colo. 2010).

When a motion to revive a judgment is filed in sufficient time for the procedures of section (h) to be completed before the expiration of the original judgment, but court delays prevent a revived judgment from being entered before the judgment's expiration, then a revived judgment should be entered nunc pro tunc as of a date the motion could have been decided had there been no court delays. Robbins v. Goldberg, 185 P.3d 794 (Colo. 2008).

Rule 55. Default

(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

(b) Judgment. A party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, guardian ad litem, conservator, or such other representative who has appeared in the action. If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least 7 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper. However, before judgment is entered, the court shall be satisfied that the venue of the action is proper under Rule 98.

(c) Setting Aside Default. For good cause shown the court may set aside an entry of

default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

(d) Plaintiffs, Counterclaimants, Cross Claimants. The provisions of this Rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

(e) Judgment Against an Officer or Agency of the State of Colorado. No judgment by default shall be entered against an officer or agency of the State of Colorado unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

(f) Judgment on Substituted Service. In actions where the service of summons was by publication, mail, or personal service out of the state, the plaintiff, upon expiration of the time allowed for answer, may upon proof of service and of the failure to plead or otherwise defend, apply for judgment. The court shall thereupon require proof to be made of the claim and may render judgment subject to the limitations of Rule 54(c).

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

Cross references: For venue, see C.R.C.P. 98; for relief from judgment for mistakes, inadvertence, surprise, excusable neglect, fraud, etc., see C.R.C.P. 60(b); for demand for judgment, see C.R.C.P. 54(c); for evidence, see C.R.C.P. 43.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, "Judgment: Rules 54-63", see 23 Rocky Mt. L. Rev. 581 (1951). For article, "Standard Pleading Samples to Be Used in Quiet Title Litigation", see 30 Dicta 39 (1953). For article, "One Year Review of Civil Procedure and Appeals", see 37 Dicta 21 (1960). For article, "One Year Review of Civil Procedure and Appeals", see 38 Dicta 133 (1961). For article, "One Year Review of Civil Procedure and Appeals", see 39 Dicta 133 (1962). For article, "Motions for Default Judgments", see 24 Colo. Law. 1295 (1995).

Annotator's note. Since this rule is similar to § 186 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Not being present at trial is not an act of default as contemplated under this rule. Kielsmier v. Foster, 669 P.2d 630 (Colo. App. 1983).

Judgment entered pursuant to stipulation not default judgment. Where parties deal at arm's length and are represented by counsel who agree to the entry of judgment and there is no fraud on the attorney's part or any professional dereliction of duty inimical to the best interests of the parties, a judgment entered pursuant to their stipulation is not a default judgment, but is a stipulated judgment. In re George, 650 P.2d 1353 (Colo. App. 1982).

Allegations in a motion for default judgment under this rule are sufficient to assert a basis for relief for judgment on the basis of fraud. Salvo v. De Simone, 727 P.2d 879 (Colo. App. 1986).

Defaulting codebtor allowed to participate in verdict and judgment against bank on bank's counterclaim against debtors since bank failed to apply for an entry of judgment by default against debtor. Pierson v. United Bank of Durango, 754 P.2d 431 (Colo. App. 1988).

Motion for default judgment should have been denied where defendant's answer, though filed late, was filed before default had been entered and before the trial court had ruled on the motion for default judgment. Colo. Compensation Ins. Auth. v. Raycomm Transworld Indus., Inc., 940 P.2d 1000 (Colo. App. 1996).

Motion to strike answer tantamount to default judgement. When trial court struck defendants' answer brief, it effectively denied them the opportunity to litigate their claim, and such motion was unwarranted by defendants' actions. Pinkstaff v. Black & Decker (U.S.), Inc., 211 P.3d 698 (Colo. 2009).

Trial court lacks jurisdiction to enter default judgment against a defendant while an appeal is pending. Anstine v. Churchman, 74 P.3d 451 (Colo. App. 2003).

Applied in Petrini v. Sidwell, 38 Colo. App. 454, 558 P.2d 447 (1976); Johnston v. District Court, 196 Colo. 1, 580 P.2d 798 (1978); City of Trinidad v. District Court, 196 Colo. 106, 581 P.2d 304 (1978); Norsworthy v. Colo. Dept. of Rev., 197 Colo. 527, 594 P.2d 1055 (1979); Security State Bank v. Weingardt, 42 Colo. App. 219, 597 P.2d 1045 (1979); People in Interest of C.A.W., 660 P.2d 10 (Colo. App. 1982); O'Brien v. Eubanks, 701 P.2d 614 (Colo. App. 1984), cert. denied, 474 U.S. 904, 106 S. Ct. 272, 88 L. Ed. 2d 233 (1985); Denman v. Burlington Northern R. Co., 761 P.2d 244 (Colo. App. 1988).

II. ENTRY.

Clerk to enter default. Section (a) of this rule provides that the clerk of the court in which an action is pending shall enter default when a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend. Valdez v. Sams, 134 Colo. 488, 307 P.2d 189 (1957).

A trial court may not enter an order of default when a defendant answers and actively litigates but fails to appear for trial. Instead, a court may receive evidence in the defendant's absence and render judgment on the merits. Rombough v. Mitchell, 140 P.3d 202 (Colo. App. 2006).

III. JUDGMENT.

A. By the Clerk

This rule provides that "judgment by default" may be entered by the clerk in those circumstances specifically mentioned. Valdez v. Sams, 134 Colo. 488, 307 P.2d 189 (1957).

This rule is not in conflict with the constitution as an invasion of the province of the judiciary, the theory being that the judgment is the sentence which the law itself pronounces as the sequence of statutory conditions, and the judgment, though in fact entered by the clerk, is, in the consideration of the law, what it purports on its face to be, namely, the act and determination of the court itself. The courts of many of the states have acted under similar statutory provisions for many years past, and the validity of such judgment has been upheld by repeated decisions of the highest courts of these states. Phelan v. Ganebin, 5 Colo. 14 (1894).

This rule was never intended to deprive the court of its power to render a judgment, but only to give the clerk authority to enter it. Griffing v. Smith, 26 Colo. App. 220, 142 P. 202 (1914); Plaza del Lago Townhomes Ass'n v. Highwood Builders, 148 P.3d 367 (Colo. App. 2006).

B. By the Court

Default judgments are drastic. Default judgments — particularly in those actions where the defendant has answered and the case is at issue — are serious and drastic. Civil Serv. Comm'n v. Doyle, 162 Colo. 1, 424 P.2d 368 (1967).

The ramifications which may ensue may cause loss of time and expense of courts and litigants, as well as, possibly, the denial of inherent rights. Civil Serv. Comm'n v. Doyle, 162 Colo. 1, 424 P.2d 368 (1967).

Before a court enters a default judgment where a defendant has appeared, the requirements of this rule as well as the grounds urged for a default judgment, must be considered with utmost care. Civil Serv. Comm'n v. Doyle, 162 Colo. 1, 424 P.2d 368 (1967).

Before a court enters judgment by default in a case in which the defendant has appeared, the plaintiff must provide the notice required. Bankers Union Life Ins. Co. v. Fiocca, 35 Colo. App. 306, 532 P.2d 57 (1975).

No party should be defaulted unless grounds authorizing it are authoritatively established and are so clear that litigants may know without question that they are subject to default if they do not act in a certain manner. Missouri ex rel. De Vault v. Fidelity & Cas. Co., 107 F.2d 343 (8th Cir. 1939).

Court not representative of nonappearing party. Where the defendants fail to answer a complaint or to make any effort to appear before the trial court, the trial court is not obliged to, and indeed should not, assume a position adversarial to the plaintiffs and representative of the parties declining to appear. Homsher v. District Court, 198 Colo. 465, 602 P.2d 5 (1979).

Plaintiff's motion for default judgment is denied without a hearing where no cause of action is pleaded. Schenck v. Van Ningen, 719 P.2d 1100 (Colo. App. 1986).

A judgment by default is not designed to be a device to catch the unwary or even the negligent. R.F. v. D.G.W., 192 Colo. 528, 560 P.2d 837 (1977).

A default judgment entered in violation of this rule is void. Salter v. Bd. of County Comm'rs, 126 Colo. 39, 246 P.2d 890 (1952).

Where the defendant's attorney has filed an appearance with the court, the defendant has appeared for purposes of the notice requirement of this rule, and if a defendant is not served with notice, a default judgment entered against him is void. Schaffer v. Martin, 623 P.2d 77 (Colo. App. 1980).

The failure to give required notice is error. The action of a trial court in entering default

judgment on its own motion without the requisite three days' notice to defendant constitutes prejudicial reversible error. Emerick v. Emerick, 110 Colo. 52, 129 P.2d 908 (1942).

Although it is not specifically assigned as error, nevertheless it is cogent when considering the question of whether the court had the authority to enter the default judgment and also whether it exceeded its jurisdiction in doing so. Civil Serv. Comm'n v. Doyle, 162 Colo. 1, 424 P.2d 368 (1967).

The requirements of this rule have been fastidiously adhered to by the supreme court. Civil Serv. Comm'n v. Doyle, 162 Colo. 1, 424 P.2d 368 (1967).

The requirements of this rule, stating that a three-day written notice of application for default judgment shall be given, have been scrupulously adhered to by this court. R.F. v. D.G.W., 192 Colo. 528, 560 P.2d 837 (1977); Southerlin v. Automotive Elec. Corp., 773 P.2d 599 (Colo. App. 1988).

"Appeared in the action" as used in section (b) requires the defendant to communicate with the court in a manner that demonstrates defendant is aware of and intends to participate in the proceedings. Plaza del Lago Townhomes Ass'n v. Highwood Builders, 148 P.3d 367 (Colo. App. 2006).

The essence of an appearance as used in section (b)(2) (now (b)) is a cognitive submission of oneself to the jurisdiction of the court. People in Interest of J.M.W., 36 Colo. App. 398, 542 P.2d 392 (1975).

Ordinarily, a defendant enters a general appearance in a case by seeking relief which acknowledges jurisdiction or by other conduct manifesting consent to jurisdiction. People in Interest of J.M.W., 36 Colo. App. 398, 542 P.2d 392 (1975).

Presence requesting continuance to employ counsel does not constitute appearance. Presence in court without counsel resulting in a continuance to allow time to employ counsel did not constitute an appearance within the meaning of section (b)(2) (now (b)). People in Interest of J.M.W., 36 Colo. App. 398, 542 P.2d 392 (1975).

Purpose of the notice requirement of section (b)(2) (now (b)) of this rule is to protect those parties who, although delinquent in filing pleadings within the time periods specified, have indicated a clear purpose to defend by entry of their appearance. Bankers Union Life Ins. Co. v. Fiocca, 35 Colo. App. 306, 532 P.2d 57 (1975); Best v. Jones, 644 P.2d 89 (Colo. App. 1982); Sisneros v. First Nat. Bank of Denver, 689 P.2d 1178 (Colo. App. 1984).

Responsive pleading is timely when tendered to the clerk of the court following service of the three-day written notice required pursuant to section (b)(2) (now (b)) of this rule and prior to the entry of default judgment. Bankers Union Life Ins. Co. v. Fiocca, 35 Colo. App. 306, 532 P.2d 57 (1975).

Judgment obtained by default is entitled to complete legal effect. DeBoer v. District Court, 184 Colo. 112, 518 P.2d 942 (1974).

The notice provision in section (b) of this rule is applicable to divorce cases. The notice provision in section (b) of this rule as to serving party against whom default judgment is sought with notice of application therefor at least three days prior to hearing thereon applies in divorce cases, and if not followed it is ground for reversal. Holman v. Holman, 114 Colo. 437, 165 P.2d 1015 (1946).

The taking of evidence and entry of judgment in the absence of a party who knows his case is set for trial is not proceeding under the default provisions of this rule, but is instead a trial on the merits. Davis v. Klaes, 141 Colo. 19, 346 P.2d 1018 (1959); Sunshine v. Robinson, 168 Colo. 409, 451 P.2d 757 (1969).

If a party is absent, his failure to appear does not entitle him to additional notice. Davis v. Klaes, 141 Colo. 19, 346 P.2d 1018 (1959); Sunshine v. Robinson, 168 Colo. 409, 451 P.2d 757 (1969).

It is an abuse of discretion to enter a default judgment without notice to the parties themselves where their attorney has been discharged and has filed an application to withdraw. Colo. Ranch Estates, Inc. v. Halvorson, 163 Colo. 146, 428 P.2d 917 (1967).

Notice not necessary where defendants did not make any contact with the court before entry of judgment against them. Realty World-Range Realty, Ltd. v. Prochaska, 691 P.2d 761 (Colo. App. 1984).

The supreme court is disinclined to apply technical concepts in determining whether a party has entered an appearance for purposes of the notice requirement of section (b)(2) of this rule. R.F. v. D.G.W., 192 Colo. 528, 560 P.2d 837 (1977).

Colorado has taken a liberal approach in determining what constitutes an "appearance" under section (b)(2). Biella v. State Dept. of Hwys., 652 P.2d 1100 (Colo. App. 1982).

"Appearance" must be responsive to court action. To be entitled to notice of application for judgment under section (b)(2), a party's appearance must be responsive to the plaintiff's formal court action. The plaintiff's knowledge that the defendants plan to resist the suit is not enough. Biella v. State Dept. of Hwys., 652 P.2d 1100 (Colo. App. 1982); Sisneros v. First Nat. Bank of Denver, 689 P.2d 1178 (Colo. App. 1984).

Letter from defendant to court may be sufficient "appearance" under section (b)(2) to entitle the defendant to three days' notice and a hearing. Carls Constr., Inc. v. Gigliotti, 40 Colo. App. 535, 577 P.2d 1107 (1978).

Unsigned letter faxed to the court by defendant's son was sufficient "appearance" to trigger the notice requirement of section (b)(2). BS & C Enters., L.L.C. v. Barnett, 186 P.3d 128 (Colo. App. 2008).

Corporate officer's attempt to file documents is appearance. An attempt by an officer of a corporation to file documents with the court, while not technically an appearance on behalf of the corporation, is an "appearance" sufficient to trigger the notice requirement of section (b)(2). Best v. Jones, 644 P.2d 89 (Colo. App. 1982).

Appearance in small claims court is not appearance in county court. The defendant's appearance by attorney with regard to the same claim in the small claims court and the county court is not sufficient to trigger the requirement for notice under section (b)(2), because the the county court and the district court are separate and distinct courts, and actions in each court are separate and distinct lawsuits. An appearance in the former does not constitute an appearance in the latter. Yard v. Ambassador Bldr. Corp., 669 P.2d 1040 (Colo. App. 1983).

Payment of docket fee is not prerequisite to entry of appearance for the purpose of entitling a party to notice before entry of default judgment. Carls Constr., Inc. v. Gigliotti, 40 Colo. App. 535, 577 P.2d 1107 (1978).

Right to notice not extinguished by untimely answer. A party's right to notice under section (b)(2) is not extinguished by the fact that his appearance in the action was not made within the time required for an answer under C.R.C.P. 12(a) prior to entry of default. Carls Constr., Inc. v. Gigliotti, 40 Colo. App. 535, 577 P.2d 1107 (1978).

Where a party is not represented by a lawyer, a court should be reluctant to foreclose the opportunity of a litigant to present some defense. R.F. v. D.G.W., 192 Colo. 528, 560 P.2d 837 (1977).

Judgment of default vacated for failure to give notice required by this rule. R.F. v. D.G.W., 192 Colo. 528, 560 P.2d 837 (1977); Westbrook v. Burris, 757 P.2d 1142 (Colo. App. 1988).

Failure to comply with the notice provision of this rule mandates vacation of the entry of default as well as the default judgment, thus rendering further proceedings on the default issue unwarranted. Schaffer v. Martin, 623 P.2d 77 (Colo. App. 1980).

Express finding of proper venue not required. The requirement in section (b)(2) that the court "be satisfied" that venue is proper is not tantamount to a requirement that an express, written finding be made. Although it might be preferable to include such a finding in the order granting the default, it is not required by the rule. Wagner Equip. Co. v. Mountain States Mineral Enters., Inc., 669 P.2d 625 (Colo. App. 1983).

Improper venue is not a jurisdictional defect that renders a default judgment void. Swanson v. Precision Sales & Serv., 832 P.2d 1109 (Colo. App. 1992).

Hearing on motion for default not necessary where court has all materials required by rules and is satisfied as to sufficiency of service and that defendant is in default. Crow-Watson No. 8 v. Miranda, 736 P.2d 1260 (Colo. App. 1986).

No hearing on a motion for default judgment is necessary where only liquidated as opposed to unliquidated damages are involved and defendant, possessed with all of the information available to the court for rendering a judgment, fails to respond. Crow-Watson No. 8 v. Miranda, 736 P.2d 1260 (Colo. App. 1986).

Defaulting party has right to appear and present mitigating evidence at hearing on damages. Since, before a default judgment is entered, the court is required to conduct a hearing and take evidence on the amount of damages and section (b)(2) allows the defaulting party to receive notice of and attend such hearing, our adversary system requires that the defaulting party should be allowed to cross-examine witnesses and present mitigating evidence. Kwik Way Stores, Inc. v. Caldwell, 709 P.2d 36 (Colo. App. 1985), aff'd in part and rev'd in part on other grounds, 745 P.2d 672 (Colo. 1987).

A trial court is not required to take evidence before entering a default judgment, assuming that the court is satisfied as to sufficiency of service and the fact that defendant is actually in default. Orebaugh v. Doskocil, 145 Colo. 484, 359 P.2d 671 (1961).

A defendant who fails to answer within the required time thereby admits the allegations of the complaint, and allegations deemed admitted need not be proved. Orebaugh v. Doskocil, 145 Colo. 484, 359 P.2d 671 (1961).

A court under this rule has wide discretion as to whether a hearing is necessary prior to entry of a default judgment. Orebaugh v. Doskocil, 145 Colo. 484, 359 P.2d 671 (1961).

District court is without discretionary power to deny a motion for default judgment where the opposing party, not an agency of the state, fails to comply with a court order requiring that a certain act be done within a specified time and, after expiration of that time, fails to establish that such failure to act was a result of excusable neglect. Sauer v. Heckers, 34 Colo. App. 217, 524 P.2d 1387 (1974).

If the court decides to hold a hearing, it also has discretion as to the type of hearing and the degree of its formality. Orebaugh v. Doskocil, 145 Colo. 484, 359 P.2d 671 (1961).

While it may be better practice to have a reporter present when testimony is offered

prior to the entry of a default judgment, section (b)(2) (now (b)) does not require it. Orebaugh v. Doskocil, 145 Colo. 484, 359 P.2d 671 (1961).

It is the duty of the trial court to make sufficient findings to enable the appellate court to clearly understand the basis of the trial court's decision and to enable it to determine the ground on which it rendered its decision granting a default judgment. Norton v. Raymond, 30 Colo. App. 338, 491 P.2d 1403 (1971).

There must be proof of cause for divorce. The interest of the public in divorce cases, including the possibility of collusive arrangements therein, is such that a divorce may not be granted on a judgment by default without proof of a cause for divorce. Holman v. Holman, 114 Colo. 437, 165 P.2d 1015 (1946).

In default cases where testimony is taken, it must be by the court or referee. Hotchkiss v. First Nat'l Bank, 37 Colo. 228, 85 P. 1007 (1906).

Default may be entered for failing to give deposition. Judgment by default may be entered against a party who wilfully fails to appear in response to a proper notice to have his deposition taken under this rule. Salter v. Bd. of Comm'rs, 126 Colo. 39, 246 P.2d 890 (1952).

Judgment by default is the penalty for failure to have desposition taken. Salter v. Bd. of Comm'rs, 126 Colo. 39, 246 P.2d 890 (1952).

Before this penalty is imposed, there must be given an opportunity to show cause for nonappearance. Salter v. Bd. of Comm'rs, 126 Colo. 39, 246 P.2d 890 (1952).

Contempt is not a penalty that goes along with default judgment. Salter v. Bd. of Comm'rs, 126 Colo. 39, 246 P.2d 890 (1952).

It is necessary to assess damages. Upon default in an action where the taking of an account, or the proof of any fact, is necessary to enable the court to assess damages or give judgment, final judgment need not be rendered, and ordinarily is not, until the amount of damages is assessed in some appropriate manner. Melville v. Weybrew, 108 Colo. 520, 120 P.2d 189 (1941), cert. denied, 315 U.S. 811, 62 S. Ct. 795, 86 L. Ed. 1210, reh'g denied, 315 U.S. 830, 62 S. Ct. 913, 86 L. Ed. 1224 (1942).

A court is required under this rule to take evidence and to determine the amount of damages. Valdez v. Sams, 134 Colo. 488, 307 P.2d 189 (1957).

Exemplary damages or execution against the body cannot be awarded in the absence of a specific finding, based upon evidence, that the special circumstances which warrant the extraordinary remedy are in fact present. Valdez v. Sams, 134 Colo. 488, 307 P.2d 189 (1957).

IV. SETTING ASIDE DEFAULT.

Law reviews. For comment on Self v. Watt appearing below, see 26 Rocky Mt. L. Rev. 107 (1953). For comment on Coerber v. Rath appearing below, see 45 Den. L.J. 763 (1968).

Annotator's note. (1) Since section (c) of this rule is similar to §§ 50(e) and 81 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing those sections have been included in the annotations to this rule.

(2) For specific grounds and time to vacate default judgments, see the annotations under C.R.C.P. 60.

Negligence of counsel generally constitutes "good cause shown" for setting aside a default under section (c). Trujillo v. Indus. Comm'n, 648 P.2d 1094 (Colo. App. 1982).

A motion to vacate a default judgment is addressed to the sound discretion of the trial court. Koin v. Mutual Benefit Health & Accident Ass'n, 96 Colo. 163, 41 P.2d 306 (1935); Mountain v. Stewart, 112 Colo. 302, 149 P.2d 176 (1944); Self v. Watt, 128 Colo. 61, 259 P.2d 1074 (1953); Burr v. Allard, 133 Colo. 270, 293 P.2d 969 (1956); Riss v. Air Rental, Inc., 136 Colo. 216, 315 P.2d 820 (1957); White, Green & Addison Assocs. v. Monarch Oil & Uranium Corp., 141 Colo. 107, 347 P.2d 135 (1959); Walker v. Assocs. Loan Co., 153 Colo. 261, 385 P.2d 421 (1963); Coerber v. Rath, 164 Colo. 294, 435 P.2d 228 (1967); Gen. Aluminum Corp. v. District Court, 165 Colo. 445, 439 P.2d 340 (1968); Moskowitz v. Michaels Artists & Eng'r Supplies, Inc., 29 Colo. App. 44, 477 P.2d 465 (1970); Snow v. District Court, 194 Colo. 335, 572 P.2d 475 (1977).

The determination of whether to vacate or set aside a default judgment is within the sound discretion of the trial court. Dudley v. Keller, 33 Colo. App. 320, 521 P.2d 175 (1974).

The underlying goal in ruling on motions to set aside default judgments is to promote substantial justice. Whether substantial justice will be served by setting aside a default judgment on the ground of excusable neglect is to be determined by the trial court in the exercise of its sound discretion. Where that discretion is abused, an appellate court will set aside the trial court's order. Craig v. Rider, 651 P.2d 397 (Colo. 1982); Plaisted v. Colo. Springs Sch. Dist. #11, 702 P.2d 761 (Colo. App. 1985).

A motion to vacate a default judgment is addressed to the sound discretion of the trial court. Sumler v. District Ct., City & County of Denver, 889 P.2d 50 (Colo. 1995).

Section (c) of this rule and C.R.C.P. 60 (b) leave the matter of setting aside default judgments to the discretion of the trial judge. Ehrlinger v. Parker, 137 Colo. 514, 327 P.2d 267 (1958).

Same standards apply under section (c) of this rule and under C.R.C.P. 60(b). In considering either type of motion, the trial court should base its decision on (1) whether the neglect that

resulted in the entry of judgment by default was excusable; (2) whether the moving party has alleged a meritorious defense; and (3) whether relief from the challenged order would be consistent with considerations of equity. Dunton v. Whitewater West Recreation, Ltd., 942 P.2d 1348 (Colo. App. 1997).

There is a presumption of regularity applicable to trial court ruling setting aside default. Credit Inv. & Loan Co. v. Guar. Bank & Trust Co., 166 Colo. 471, 444 P.2d 633 (1968).

The ruling on setting aside default will not be disturbed unless it appears that there has been an abuse of discretion. Koin v. Mutual Benefit Health & Accident Ass'n, 96 Colo. 163, 41 P.2d 306 (1935); Mountain v. Stewart, 112 Colo. 302, 149 P.2d 176 (1944); Self v. Watt, 128 Colo. 61, 259 P.2d 1074 (1953); Burr v. Allard, 133 Colo. 270, 293 P.2d 969 (1956); Riss v. Air Rental, Inc., 136 Colo. 216, 315 P.2d 820 (1957); White, Green & Addison Assocs. v. Monarch Oil & Uranium Corp., 141 Colo. 107, 347 P.2d 135 (1959); Moskowitz v. Michaels Artists & Eng'r Supplies, Inc., 29 Colo. App. 44, 477 P.2d 465 (1970).

The court must refrain from vacating a default judgment until after the opened judgment results in a new judgment on the merits. Weaver Constr. Co. v. District Court, 190 Colo. 227, 545 P.2d 1042 (1976).

If a judgment results in favor of the defendant after a trial on the merits, then the original default judgment is vacated — the judgment and judgment lien are dissolved as though they never existed. Weaver Constr. Co. v. District Court, 190 Colo. 227, 545 P.2d 1042 (1976).

When a judgment is opened the defendant is allowed to answer to the merits of the claim, but the original judgment and judgment lien remain in effect as security pending the resolution of the trial on the merits. Thus, if a judgment results in plaintiff's favor after the original judgment is opened for a trial on the merits, his judgment lien will remain in full force and effect as if the original default judgment had not been opened. Weaver Constr. Co. v. District Court, 190 Colo. 227, 545 P.2d 1042 (1976).

To warrant reversal it must appear that there was an abuse of discretion. Walker v. Assocs. Loan Co., 153 Colo. 261, 385 P.2d 421 (1963).

An abuse of discretion in refusing to set aside a default judgment must be shown to warrant reversal. People in Interest of J.M.W., 36 Colo. App. 398, 542 P.2d 392 (1975).

Without a clear portrayal of an abuse of discretion, an appellate court will not reverse. Credit Inv. & Loan Co. v. Guar. Bank & Trust Co., 166 Colo. 471, 444 P.2d 633 (1968).

An appellate court has never hesitated to overrule a trial court where that discretion has been abused. Coerber v. Rath, 164 Colo. 294, 435 P.2d 228 (1967).

The discretion of the court in determining an application to vacate a default is not a capricious or arbitrary discretion, but is controlled by fixed legal principles, to be exercised in conformity with the spirit of the law, and in a manner to subserve, and not to impede or defeat, the ends of justice. Gumaer v. Bell, 51 Colo. 473, 119 P. 681 (1911); Burr v. Allard, 133 Colo. 270, 293 P.2d 969 (1956).

The discretion of the court in considering any application to vacate a default is controlled by fixed legal principles, to be exercised in conformity with the spirit of the law, and in a manner to serve, and not to impede or defeat, the ends of justice. Dudley v. Keller, 33 Colo. App. 320, 521 P.2d 175 (1974).

A successor judge may vacate default judgment when the original judge would have had an adequate legal basis to do so. Sumler v. District Ct., City & County of Denver, 889 P. 2d 50 (Colo. 1995).

Where there is nothing to indicate that setting aside a default and ordering a trial on the merits would unwarrantedly prejudice plaintiffs, a trial court abuses its discretion in refusing to set aside a default judgment. Coerber v. Rath, 164 Colo. 294, 435 P.2d 228 (1967).

Denial of a motion to set aside entry of default was an abuse of discretion where the motion provided a good faith explanation for defendant's behavior, was filed less than three weeks after entry of default, alleged a potentially meritorious defense, and plaintiff conceded that no prejudice would result from setting the default aside. Singh v. Mortensun, 30 P.3d 853 (Colo. App. 2001).

A reason for refusing to set aside a default is defendants' delay in making their motion. Ehrlinger v. Parker, 137 Colo. 514, 327 P.2d 267 (1958).

Where a defendant knows of the judgment against him and does not take prompt steps to vacate the same, but makes numerous efforts to satisfy or compromise such judgment, then these actions being contradictory and inconsistent, the refusal of the trial court to set aside the judgment is not an abuse of discretion. Ehrlinger v. Parker, 137 Colo. 514, 327 P.2d 267 (1958).

Parties cannot be permitted to disregard the process of the court and after a default judgment is rendered against them come in at their convenience and upon the mere allegation of the existence of a meritorious defense have judgment rendered against them vacated. Riss v. Air Rental, Inc., 136 Colo. 216, 315 P.2d 820 (1957); White, Green & Addison Assocs. v. Monarch Oil & Uranium Corp., 141 Colo. 107, 347 P.2d 135 (1959).

Where an application to vacate a default judgment is made promptly, a defense on the merits should be permitted. Drinkard v. Spencer, 72 Colo. 396, 211 P. 379 (1922); Walker v. Assocs. Loan Co., 153 Colo. 261, 385 P.2d 421 (1963).

Where a stockholder of a corporation, acting promptly after the entry of a default judgment against the latter, presents to the trial court a petition to have the judgment set aside and for leave to file an answer — it appearing from the petition that he was not a party to the original proceeding, that he would be prejudiced by the judgment if it were permitted to stand, and that he has a good defense to the action — the petition should be granted, since a denial constitutes prejudicial, reversible error. Senne v. Conley, 110 Colo. 270, 133 P.2d 381 (1943); Brown v. Deerksen, 163 Colo. 194, 429 P.2d 302 (1967).

There must be evidence and justification for any delay. Where a trial court, after a lapse of many years from entry of judgment, sets it aside upon the application of the defendant without evidence or showing of justification for delay in moving to vacate such judgment, the plaintiff is entitled to have original judgment reinstated. Haskell v. Gross, 145 Colo. 365, 358 P.2d 1024 (1961).

The burden is upon the defendant to establish the grounds on which he relies to set aside a default entered against him by clear and convincing proof. Browning v. Potter, 129 Colo. 478, 271 P.2d 418 (1954); Burr v. Allard, 133 Colo. 270, 293 P.2d 969 (1956); Ehrlinger v. Parker, 137 Colo. 514, 327 P.2d 267 (1958).

A motion to set aside a default judgment is a simple procedural motion taking place within the context of a substantive civil action; therefore, § 13-25-127, which governs the burden of proof for civil actions, is inapplicable to a motion to set aside a default judgment. Borer v. Lewis, 91 P.3d 375 (Colo. 2004).

In enacting § 13-25-127, the general assembly did not legislatively override the "clear and convincing" burden of proof that has been applied to proceedings to set aside default judgments. To decide otherwise would require the court to find § 13-25-127 unconstitutional as an impermissible infringement on the judiciary's authority to promulgate procedural rules. Borer v. Lewis, 91 P.3d 375 (Colo. 2004).

One must show facts that would produce a different judgment. One seeking to have a default judgment set aside must set forth facts which, if established, would produce a judgment other than the one entered. Ehrlinger v. Parker, 137 Colo. 514, 327 P.2d 267 (1958); Walker v. Assocs. Loan Co., 153 Colo. 261, 385 P.2d 421 (1963).

The court should vacate judgment. Where a default judgment has been entered and it is made to appear that in justice to a defendant he is entitled to be heard, and that the tendered defense, if established, would defeat the action, the trial court should vacate the judgment. Gumaer v. Bell, 51 Colo. 473, 119 P. 681 (1911); Walker v. Assocs. Loan Co., 153 Colo. 261, 385 P.2d 421 (1963).

Trial court erred in denying defendants' motion to vacate default judgment where defendants received no actual or constructive notice of court order authorizing plaintiffs to amend their complaint, where plaintiffs failed to serve defendants with a copy of the amended complaint after the court's order was issued, and where the allegations in the amended complaint against defendants were the same as in the original complaint and were specifically denied in defendant's answer to the original complaint. Roberts v. Novinger, 815 P.2d 996 (Colo. App. 1991).

Where a default judgment is set aside on jurisdictional grounds, it also must be vacated. Weaver Constr. Co. v. District Court, 190 Colo. 227, 545 P.2d 1042 (1976).

Lack of notice of a default judgment supporting a judgment lien is not a jurisdictional defect that renders the judgment and lien void. First Nat. Bank of Telluride v. Fleisher, 2 P.3d 706 (Colo. 2000).

Excusable neglect and meritorious defense ground for setting aside default judgment. The judge was acting within his jurisdiction under this rule when he set aside a default judgment on the ground of "excusable neglect" supported by a specific statement of meritorious defense. Weaver Constr. Co. v. District Court, 190 Colo. 227, 545 P.2d 1042 (1976).

A meritorious defense must be set forth. It is necessary in a proceeding to set aside a default judgment for the moving party to set forth a meritorious defense. Temple v. Miller, 30 Colo. App. 49, 488 P.2d 252 (1971).

Where a judgment is set aside on grounds other than those challenging the jurisdiction of the court, the judgment is opened and the moving party, after a showing of good cause and a meritorious defense, will be permitted to file an answer to the original complaint and participate in a trial on the merits. Weaver Constr. Co. v. District Court, 190 Colo. 227, 545 P.2d 1042 (1976).

There is a failure to show good cause without meritorious defense. One against whom a default judgment has been entered must allege a meritorious defense to the plaintiff's claim, otherwise there is a failure to show good cause. Coerber v. Rath, 164 Colo. 294, 435 P.2d 228 (1967).

A meritorious defense does not have to be proven in the hearing to set aside the judgment, for what is necessary is that the defendant allege facts which, if proven true, would alter the

judgment entered. Temple v. Miller, 30 Colo. App. 49, 488 P.2d 252 (1971).

A motion to set aside a default judgment should be considered in a manner calculated to promote substantial justice. Burlington Ditch, Reservoir & Land Co. v. Fort Morgan Reservoir & Irrigation Co., 59 Colo. 571, 151 P. 432 (1915); Walker v. Assocs. Loan Co., 153 Colo. 261, 385 P.2d 421 (1963); F. & S. Constr. Co. v. Christlieb, 166 Colo. 67, 441 P.2d 656 (1968); Norton v. Raymond, 30 Colo. App. 338, 491 P.2d 1403 (1971).

Where it is clear from the absence of evidence in the record that it is impossible to determine if substantial justice has been done, then, in the interest of substantial justice, the plaintiff should be required to prove his claim and the defendant should be given an opportunity to present his defense. Norton v. Raymond, 30 Colo. App. 338, 491 P.2d 1403 (1971).

Default must be first set aside in proper proceeding. Where a defendant has made default, and judgment has been entered against him, he is not entitled to file pleadings contesting the allegations of plaintiff until his default and the judgment entered thereon have been set aside in a proper proceeding; such a defendant has no standing in court to move for a new trial, either for cause or as a matter of right. Fraka v. Malernee, 129 Colo. 87, 267 P.2d 651 (1954).

Where defendants' motions do not attack the summons, but are directed instead to the default judgment, praying for an order authorizing the defendants to plead to the complaint, then, by this action, the defendants subject themselves to the jurisdiction of the court. Barra v. People, 18 Colo. App. 16, 69 P. 1074 (1902); Pierce v. Hamilton, 55 Colo. 448, 135 P. 796 (1913); Isham v. People, 82 Colo. 550, 262 P. 89 (1927); Brown v. Amen, 147 Colo. 468, 364 P.2d 735 (1961).

A party who seeks to set aside a default judgment and plead to the merits has thereby entered a general appearance and waived the right to question a summons. Wells Aircraft Parts Co. v. Allan J. Kayser Co., 118 Colo. 197, 194 P.2d 326 (1947).

Court acquires jurisdiction, but only to plead or answer, not to validate void default judgment. Since a general appearance has no retroactive force, then where a general appearance is made by defendants in seeking to set aside the default the court therefore acquires jurisdiction over them, but only to grant time to plead or answer to the complaint, and so the general appearance does not validate a void default judgment. Jones v. Colescott, 134 Colo. 552, 307 P.2d 464 (1957); Brown v. Amen, 147 Colo. 468, 364 P.2d 735 (1961).

Presumption of judgment's validity also includes required notices. The presumption of validity of a judgment entered by a court, which admittedly had jurisdiction of the parties and of the subject matter of the action, carries with it the presumption that notices required by this rule to be given in connection with the entry of judgment by default were complied with. Haskell v. Gross, 145 Colo. 365, 358 P.2d 1024 (1961).

Lack of notice is a serious procedural error that can, in some instances, violate the due process rights of the defaulting party and, therefore, require vacating the default judgment. First Nat. Bank of Telluride v. Fleisher, 2 P.3d 706 (Colo. 2000).

The burden is upon the party seeking to vacate a judgment to overcome the presumption of validity. Haskell v. Gross, 145 Colo. 365, 358 P.2d 1024 (1961).

Since the motion to set aside arose after the judgment was entered, the burden to prove a lack of jurisdiction because of inadequate service of process is on the party challenging the service of process and the resulting lack of jurisdiction. White Front Auto Sales, Inc. v. Mygatt, 810 P.2d 234 (Colo. App. 1990).

Overcoming the presumption of validity is not accomplished by presenting a record which fails to show that notice was served. Haskell v. Gross, 145 Colo. 365, 358 P.2d 1024 (1961).

Where the notice of trial is served upon an attorney who states that he intends to withdraw from the case, a trial court abuses its discretion in refusing to set aside a default judgment. Colo. Ranch Estates, Inc. v. Halvorson, 163 Colo. 146, 428 P.2d 917 (1967).

Review by writ of error is proper procedure. The only proper procedure to secure review of a trial court's order granting an application to set aside a default judgment is by writ of error after final judgment, not prohibition. Stiger v. District Court, 188 Colo. 403, 535 P.2d 508 (1975).

Verified answer in sufficient detail to be specifically informative is considered generally to amount to a meritorious defense for purposes of setting aside a default judgment. Coon v. Ginsberg, 32 Colo. App. 206, 509 P.2d 1293 (1973).

Gross negligence on the part of counsel resulting in a default judgment is considered excusable neglect on the part of the client entitling him to have the judgment set aside. Dudley v. Keller, 33 Colo. App. 320, 521 P.2d 175 (1974).

Gross negligence causing default judgment excusable where attorney's gross negligence could not be imputed to his client. Sumler v. District Ct., City & County of Denver, 889 P.2d 50 (Colo. 1995).

When no appeal was taken from an order denying a motion to set aside default judgment, all matters in controversy were finally adjudicated and a second motion to set aside the

default judgment was a nullity and should be stricken. Federal Lumber Co. v. Hanley, 33 Colo. App. 18, 515 P.2d 480 (1973).

A default judgment may only be the subject of collateral attack when the trial court lacked jurisdiction over the parties or the subject matter. DeBoer v. District Court, 184 Colo. 112, 518 P.2d 942 (1974).

Where a default judgment has been entered and made final, it is not a proper subject of collateral attack particularly by strangers to the original action, although the rule prohibiting such attack applies to parties as well. DeBoer v. District Court, 184 Colo. 112, 518 P.2d 942 (1974).

Criteria to be utilized by court in ruling on motion to set aside a default judgment include whether the neglect that resulted in entry of judgment by default was excusable, whether the moving party has alleged a meritorious defense, and whether relief from the challenged order would be consistent with equitable considerations, such as the protection of action taken in reliance on the order and the prevention of prejudice by reason of evidence lost or impaired by the passage of time. A consideration of all these factors together in a single hearing would provide the most complete information upon which to base the exercise of informed discretion and would be the preferable procedure in most cases. Craig v. Rider, 651 P.2d 397 (Colo. 1982).

The preferred procedure is to consider all three criteria in single hearing, as evidence relating to one factor might shed light on another and consideration of all three factors will provide the most complete information for an informed decision. Buckmiller v. Safeway Stores, Inc., 727 P.2d 1112 (Colo. 1986).

Motion to set aside default judgment under section (c) of this rule on basis of failure to prosecute and motion to vacate judgment under C.R.C.P. 60(b) on basis of excusable neglect are sufficiently analogous to justify application of same standards to either motion; thus, same three criteria which are legal standard are applicable in both motions. Buckmiller v. Safeway Stores, Inc., 727 P.2d 1112 (Colo. 1986).

Party must justify default before asserting meritorious defense. A party in default is not entitled to have an adverse judgment set aside simply because of a weakness in the other party's judgment; rather, the defaulting party must first stand upon the strength of his own justification for being in default and is not entitled to assert a meritorious defense until he successfully does so. Craig v. Rider, 628 P.2d 623 (Colo. App. 1980), rev'd on other grounds, 651 P.2d 397 (Colo. 1982).

Party's negligence is not "excusable". Negligence on the part of the one of the parties or its employees cannot be deemed "excusable neglect". Wagner Equip. Co. v. Mountain States Mineral Enters., Inc., 669 P.2d 625 (Colo. App. 1983).

A stockbroker's failure to file a timely answer was due to his own carelessness and does not constitute "good cause shown" or "excusable neglect". Johnston v. S.W. Devanney & Co., Inc., 719 P.2d 734 (Colo. App. 1986).

Default judgment was not void because process was adequately served and trial court therefore had personal jurisdiction over defendant. In case where process was properly served upon defendant's registered agent pursuant to C.R.C.P. 4, agent's failure to timely respond because of his own carelessness and negligence did not constitute excusable neglect. Therefore, trial court erred in setting aside the default judgment pursuant to C.R.C.P. 60(b)(1) and (b)(3). Goodman Assocs., LLC v. WP Mtn. Props., LLC, 222 P.3d 310 (Colo. 2010).

Excusable neglect means more than ordinary negligence or carelessness; it occurs where there is a failure to take proper steps at the proper time as a result of some unavoidable occurrence. Plaisted v. Colo. Springs Sch. Dist. #11, 702 P.2d 761 (Colo. App. 1985).

Lack of prejudice to the plaintiff, absent other factors indicating good cause, is insufficient to show an abuse of discretion in denying a motion to set aside a default. Snow v. District Court, 194 Colo. 335, 572 P.2d 475 (1977); Johnston v. S.W. Devanney & Co., Inc., 719 P.2d 734 (Colo. App. 1986).

Even though motion of defaulting party contains allegations which, if proven, would constitute a meritorious defense, the trial court is not required to set aside the default judgment when it affords that party a full and fair opportunity to present and argue the alleged meritorious defense and concludes that the defense is not proven. Michael Shinn & Assocs., Inc. v. Dertina, 697 P.2d 422 (Colo. App. 1985).

Abuse of discretion found where trial court refused to set aside the damages portion of a judgment. Johnston v. S.W. Devanney & Co., Inc., 719 P.2d 734 (Colo. App. 1986).

Rule as basis for jurisdiction. Kopel v. Davie, 163 Colo. 57, 428 P.2d 712 (1967).

V. OFFICER OR AGENCY OF STATE.

The department of corrections' mere failure to respond timely is insufficient grounds for a default judgment. Since the department is a state agency, the plaintiff must establish his claims with sufficient evidence before a default judgment may enter. Reeves v. Colo. Dept. of Corr., 155 P.3d 648 (Colo. App. 2007).

Section (e) does not require an adversary hearing after notice to the state. Biella v. State Dept. of Hwys., 652 P.2d 1100 (Colo. App. 1982).

Evidence held sufficiently "satisfactory to the court" to meet the requirements of section (e). Biella v. State Dept. of Hwys., 652 P.2d 1100 (Colo. App. 1982).

VI. JUDGMENT ON SUBSTITUTED SERVICE.

A plaintiff fails to follow this rule where he does not apply for the judgment by written motion setting forth with particularity the grounds in support of the motion and the relief sought as required by C.R.C.P. 7(b). Norton v. Raymond, 30 Colo. App. 338, 491 P.2d 1403 (1971).

Where a plaintiff contends that an affidavit, filed when an oral motion for default is made, constitutes the required proof, such is not the case when the affidavit is basically a form statement and has only one phrase relating to the plaintiff's claim for relief, for even if otherwise acceptable, such an affidavit offers nothing as to the nature of the grounds of proof of plaintiff's claim. Norton v. Raymond, 30 Colo. App. 338, 491 P.2d 1403 (1971).

A default judgment cannot be entered in plaintiff's favor without plaintiff making some showing of the right to such. Osborne v. Holford, 40 Colo. App. 365, 575 P.2d 866 (1978).

Rule 56. Summary Judgment and Rulings on Questions of Law

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, after the expiration of 21 days from the commencement of the action or after filing of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the claiming party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, move with or without supporting affidavits for a summary judgment in the defending party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. Unless otherwise ordered by the court, any motion for summary judgment shall be filed no later than 91 days (13 weeks) prior to trial. A cross-motion for summary judgment shall be filed no later than 70 days (10 weeks) prior to trial. The motion may be determined without oral argument. The opposing party may file and serve opposing affidavits within the time allowed for the responsive brief, unless the court orders some lesser or greater time. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this Rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or by further affidavits. When a motion for summary judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of the opposing party's pleadings, but the opposing party's response by affidavits or otherwise provided in this Rule, must set forth specific facts showing that

there is a genuine issue for trial. If there is no response, summary judgment, if appropriate, shall be entered.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the opposing party cannot for reasons stated present by affidavit facts essential to justify its opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this Rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(h) Determination of a Question of Law. At any time after the last required pleading, with or without supporting affidavits, a party may move for determination of a question of law. If there is no genuine issue of any material fact necessary for the determination of the question of law, the court may enter an order deciding the question.

Source: (a), (b), (c), (f), and (g) amended July 9, 1992, effective October 1, 1992; (a) and (c) amended and effective June 28, 2007; (a) and (c) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Cross references: For depositions and discovery, see C.R.C.P. 26 to 37; for civil contempt, see C.R.C.P. 107.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, "Comments on the Rules of Civil Procedure", see 22 Dicta 154 (1945). For article, "Use of Summary Judgments and the Discovery Procedure", see 24 Dicta 193 (1947). For article, "Pre-Trial in Colorado in Words and at Work", see 27 Dicta 157 (1950). For article, "Notes on Proposed Amendments to Colorado Rules of Civil Procedure", see 27 Dicta 165 (1950). For article, "Amendments to the Colorado Rules of Civil Procedure", see 28 Dicta 242 (1951). For article, "Judgment: Rules 54-63", see 23 Rocky Mt. L. Rev. 581 (1951). For note, "Comments on Last Clear Chance — Procedure and Substance", see 32 Dicta 275 (1955). For article, "One Year Review of Civil Procedure and Appeals", see 37 Dicta 21 (1960). For article, "One Year Review of Civil Procedure and Appeals", see 38 Dicta 133 (1961). For article, "One Year Review of Civil Procedure and Appeals", see 39 Dicta 133 (1962). For article, "One Year Review of Contracts", see 39 Dicta 161 (1962). For article, "One Year Review of Civil Procedure and Appeals", see 40 Den. L. Ctr. J. 66 (1963). For article, "One Year Review of Torts", see 40 Den. L. Ctr. J. 160 (1963). For note, "One Year Review of Civil Procedure", see 41 Den. L. Ctr. J. 67 (1964). For article, "The One Percent Solution", see 11 Colo. Law. 86 (1982). For article, "A Litigator's Guide to Summary Judgments", see 14 Colo. Law. 216 (1985). For article, "Federal Practice and Procedure", which discusses a recent Tenth Circuit decision dealing with conversion of a motion to dismiss into a motion for summary judgment, see 62 Den. U. L. Rev. 220 (1985). For comment, "Anderson v. Liberty Lobby, Inc.: Federal Rules Decision or First Amendment Case?", see 59 U. Colo. L. Rev. 933 (1988).

The obvious purpose to be served by this rule is to further the prompt administration of justice, expedite litigation by avoiding needless trials, and enable one speedily to obtain a judgment by preventing the interposition of unmer-

itorious defenses for purpose of delay. Blaine v. Yockey, 117 Colo. 29, 184 P.2d 1015 (1947).

The summary judgment rule is designed to pierce through the allegations of fact in the pleadings. Abrahamsen v. Mountain States Tel. & Tel. Co., 177 Colo. 422, 494 P.2d 1287 (1972).

This rule is designed to avoid an unnecessary trial. This rule allowing summary judgment is designed to pierce through the allegations of fact in pleadings and to avoid an unnecessary trial where the matter submitted in support of a motion for summary judgment shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law under section (c). Terrell v. Walter E. Heller Co., 165 Colo. 463, 439 P.2d 989 (1968); Ruscitti v. Sackheim, 817 P.2d 1046 (Colo. App. 1991).

The function of this rule authorizing summary judgments is to avoid the expense and delay of trials when all facts are admitted or when a party is unable to support by any competent evidence a contention of fact. Norton v. Dartmouth Skis, Inc., 147 Colo. 436, 364 P.2d 866 (1961).

This rule provides a method whereby it is possible to determine whether a genuine cause of action or defense thereto exists and whether there is a genuine issue of fact warranting the submission of the case to a jury. Blaine v. Yockey, 117 Colo. 29, 184 P.2d 1015 (1947).

Violation of section (c) of this rule, providing the opportunity for a response from the opposing party, found to be harmless error under the circumstances. Union Ins. Co. v. Hottenstein, 83 P.3d 1196 (Colo. App. 2003).

Issue of sovereign immunity properly decided under C.R.C.P. 12(b)(1) rather than this rule since sovereign immunity issue is one of subject matter jurisdiction. DiPaolo v. Boulder Valley Sch. Dist., 902 P.2d 439 (Colo. App. 1995).

Judgments by confession on notes are not affected. Cross v. Moffat, 11 Colo. 210, 17 P. 771 (1888).

Judgment of dismissal for failure to state claim upon which relief can be granted may be entered upon motion for summary judgment. Van Schaack v. Phipps, 38 Colo. App. 140, 558 P.2d 581 (1976).

C.R.C.P. 56 is applicable in a termination of parental rights proceeding under the Children's Code. Because termination of the parent-child relationship is a drastic remedy that affects a parent's liberty interest, a court deciding a summary judgment motion seeking to terminate parental rights must apply the standard of clear and convincing evidence to the applicable statutory criteria. People in Interest of A.E., 914 P.2d 534 (Colo. App. 1996).

Court's ruling that the issue of paternity could not be raised in the child support proceeding because it had been previously litigated was based on undisputed facts, and was tantamount to a partial judgment on the pleadings, or a partial summary judgment. As such, no findings of fact and conclusions of law were required. McNeece v. McNeece, 39 Colo. App. 160, 562 P.2d 767 (1977).

This rule applies to dependency and neglect. No genuine issue of material fact existed on date of adjudication of dependency and neglect case and, therefore, trial court properly adjudicated child dependent and neglected pursuant to summary judgment rule. In Interest of S.B., 742 P.2d 935 (Colo. App. 1987), cert. denied, 754 P.2d 1177 (Colo. 1988).

This rule applies to eminent domain proceedings. Allowing summary judgment in appropriate eminent domain cases does not abridge a landowner's constitutional right to demand a jury. City of Steamboat Springs v. Johnson, 252 P.3d 1142 (Colo. App. 2010).

Party wishing to file a motion for summary judgment in dependency and neglect proceeding cannot comply with both § 19-3-505 (3) and section (c) of this rule. Pursuant to C.R.C.P. 81, the timing of § 19-3-505 (3) controls. People ex rel. A.C., 170 P.3d 844 (Colo. App. 2007).

Under the doctrine of res judicata, a final judgment on the merits is considered conclusive in any subsequent litigation involving either the same parties or those in privity with them, the same subject matter, and same claims for relief. Foley Custom Homes, Inc. v. Flater, 888 P.2d 363 (Colo. App. 1994).

The preclusive effect of the doctrine of res judicata applies not only to the claims and issues that were actually decided, but also to any claims or issues that could have been raised in the first proceeding. Foley Custom Homes, Inc. v. Flater, 888 P.2d 363 (Colo. App. 1994).

Res judicata does not apply to bar state action where state and federal claims were based on different claims for relief, and state claims were not truly "available to the parties" in the prior federal action because state claims could only have been asserted in federal court as pendent to federal claims for relief, and federal claim was dismissed on motion for summary judgment, requiring dismissal of pendent state claims. City & County of Denver v. Block 173, 814 P.2d 824 (Colo. 1991).

Claim to quiet title in certain usufructuary rights was absolutely barred by the doctrine of res judicata where there was a prior judgment involving the same subject matter and cause of action and the plaintiffs were in privity with the parties to the previous action. Rael v. Taylor, 832 P.2d 1011 (Colo. App. 1991).

Res judicata did not apply where corporate plaintiff seeking to enforce agreement in second case was not identical to the individual shareholder who relied upon the agreement in the

first case and was not in privity with shareholder since the corporation was asserting its own claim and there was nothing in the record to suggest that the corporation's claim was adjudicated in the first case. Foley Custom Homes, Inc. v. Flater, 888 P.2d 363 (Colo. App. 1994).

Collateral estoppel. Findings of federal district court insufficient to support summary judgment on state claims where identity of issues necessary to invoke collateral estoppel was absent between issues actually and necessarily decided by the federal district court and those necessary to preclude summary judgment on landowner's "bad faith" claims in state court. City & County of Denver v. Block 173, 814 P.2d 824 (Colo. 1991).

The function of the doctrines of res judicata and collateral estoppel is to avoid relitigation of the same claims or issues because of the cost imposed upon the parties by multiple lawsuits, the burden upon the judicial system, and need for finality in the judicial process; however, the requirement that the same parties or their privies must have appeared in the first proceeding is intended to avoid penalizing one who did not appear. Foley Custom Homes, Inc. v. Flater, 888 P.2d 363 (Colo. App. 1994).

Collateral estoppel and res judicata may apply to give preclusive effect to an arbitration award. Union Ins. Co. v. Hottenstein, 83 P.3d 1196 (Colo. App. 2003).

A motion for summary judgment based upon an assertion of the lack of existence of a duty of due care is to be subjected to the same standard as is any other motion for summary judgment. Sewell v. Pub. Serv. Co. of Colo., 832 P.2d 994 (Colo. App. 1991).

Applied in Eklund v. Safeco Ins. Co. of Am., 41 Colo. App. 96, 579 P.2d 1185 (1978); Posey v. Intermountain Rural Elec. Ass'n, 41 Colo. App. 7, 583 P.2d 303 (1978); Martin v. County of Weld, 43 Colo. App. 49, 598 P.2d 532 (1979); SaBell's, Inc. v. Flens, 42 Colo. App. 221, 599 P.2d 950 (1979); Nelson v. Strode Motors, Inc., 198 Colo. 366, 600 P.2d 74 (1979); Town of De Beque v. Enewold, 199 Colo. 110, 606 P.2d 48 (1980); Ruff v. Kezer, 199 Colo. 182, 606 P.2d 441 (1980); First Hyland Greens Ass'n v. Griffith, 618 P.2d 745 (Colo. App. 1980); Campbell v. Home Ins. Co., 628 P.2d 96 (Colo. 1981); DiChellis v. Peterson Chiropractic Clinic, 630 P.2d 103 (Colo. App. 1981); People in Interest of K.A.J., 635 P.2d 921 (Colo. App. 1981); In re George, 650 P.2d 1353 (Colo. App. 1982); Wheeler v. County of Eagle ex rel. County Comm'rs, 666 P.2d 559 (Colo. 1983); Knoche v. Morgan, 664 P.2d 258 (Colo. App. 1983); DuBois v. Myers, 684 P.2d 940 (Colo. App. 1984); Am. West Motel Brokers, Inc. v. Wu, 697 P.2d 34 (Colo. 1985); Frontier Exploration v. Blocker Exploration, 709 P.2d 39 (Colo. App. 1985), aff'd in part and rev'd in part on other grounds, 740 P.2d 983 (Colo. 1987); Churchey v. Adolph Coors Co., 725 P.2d 38 (Colo. App. 1986), aff'd in part and rev'd in part on other grounds, 759 P.2d 1336 (Colo. 1988); Cooper v. Peoples Bank & Trust Co., 725 P.2d 78 (Colo. App. 1986); Shaw v. Gen. Motors Corp., 727 P.2d 387 (Colo. App. 1986); Giralt v. Vail Vill. Inn Assocs., 759 P.2d 801 (Colo. App. 1988), cert. denied, 488 U.S. 1042, 109 S. Ct. 868, 102 L. Ed. 2d 991 (1989); Jardel Enters., Inc. v. Triconsultants, Inc., 770 P.2d 1301 (Colo. App. 1988); DeRubis v. Broadmoor Hotel, Inc., 772 P.2d 681 (Colo. App. 1989); Kane v. Town of Estes Park, 786 P.2d 411 (Colo. 1990); AF Prop. v. Dept. of Rev., 852 P.2d 1267 (Colo. App. 1992); Dickman v. Jackalope, Inc., 870 P.2d 1261 (Colo. App. 1994); Anderson v. Somatogen, Inc., 940 P.2d 1079 (Colo. App. 1996); Bankr. Estate of Morris v. COPIC Ins. Co., 192 P.3d 519 (Colo. App. 2008).

II. FOR CLAIMANT.

Law reviews. For article, "Plaintiff's Advantageous Use of Discovery, Pre-Trial and Summary Judgment", see 40 Den. L. Ctr. J. 192 (1963).

Summary judgment is proper where adverse party fail to respond by affidavit or otherwise to moving party's affidavit. GTM Invs. v. Depot, Inc., 694 P.2d 379 (Colo. App. 1984).

Applied in People ex rel. Flanders v. Neary, 113 Colo. 12, 154 P.2d 48 (1944).

III. FOR DEFENDING PARTY.

Section (b) of this rule, does not require that a defendant plead before he files a motion for summary judgment. Welp v. Crews, 149 Colo. 109, 368 P.2d 426 (1962).

Since this rule authorizes a motion for summary judgment by the defendant "at any time" and since the theory of the motion is that the defending party is entitled to judgment as a matter of law, there is normally no necessity to serve an answer, whose function is to develop issues, until the motion for summary judgment is disposed of. Welp v. Crews, 149 Colo. 109, 368 P.2d 426 (1962).

This rule authorizes a defending party to file a motion for summary judgment prior to answering the complaint. Guerrero v. City of Colo. Springs, 507 P.2d 881 (Colo. App. 1972).

Where a defendant files only a motion for summary judgment, he neither files an answer nor does he ask the trial court for leave to plead a defense, and, if no request is made for an evidentiary hearing, he cannot complain that the trial court denied him the opportunity of presenting a defense when he in fact made no effort to present one. Mercantile Bank & Trust

Co. v. Hunter, 31 Colo. App. 200, 501 P.2d 486 (1972).

Where a defendant raises several defenses in the trial court which are not ruled upon there, when the trial court grants a motion for summary judgment, they cannot be considered as sources of error on appeal of the granted motion. McKinley Constr. Co. v. Dozier, 175 Colo. 397, 487 P.2d 1335 (1971).

By arguing the merits of defendant's motions for summary judgment without raising an objection in the trial court as to the manner in which an affirmative defense thereby is asserted, plaintiffs effectively waive any objection they may have to this procedure. Cox v. Pearl Inv. Co., 168 Colo. 67, 450 P.2d 60 (1969).

A motion for summary judgment goes to merits of action and is inconsistent with special appearance for motion to quash service of process for lack of "in personam" jurisdiction. Texair Flyers, Inc. v. District Court, 180 Colo. 432, 506 P.2d 367 (1973).

A case is properly determined on a motion for summary judgment where the pleadings, the affidavits, and the deposition filed in the matter show that no genuine issue of material fact exists, the court properly determines as a matter of law that a statute bars plaintiff's action, and defendant is entitled to judgment. Nicks v. Electron Corp., 29 Colo. App. 114, 478 P.2d 683 (1970); Phelps v. Gates, 40 Colo. App. 504, 580 P.2d 1268 (1978).

When a defendant's motion for summary judgment becomes untenable in view of his conduct in the matter at issue, a trial court commits error in granting the motion. W. R. Hall Transp. & Storage Co. v. Gunnison Mining Co., 154 Colo. 72, 388 P.2d 768 (1964).

Summary judgment may be based on expiration of statute of limitations. Maes v. Tuttolimondo, 31 Colo. App. 248, 502 P.2d 427 (1972).

Plaintiff's failure to allege facts will support summary judgment. The absence of specific factual allegations will support a summary judgment for the defendant on the issue that plaintiff's claim was barred by the statute of limitations, even though plaintiff contends that there are issues of material fact because there might possibly be facts which would toll the statute of limitations and avoid the plea, if he alleges no such facts and raises no such issues. Norton v. Dartmouth Skis, Inc., 147 Colo. 436, 364 P.2d 866 (1961).

Section (b) of this rule does not require affidavits in support of the motion for summary judgment, and judgment can be rendered on the pleadings where there is no dispute as to the facts. Torbit v. Griffith, 37 Colo. App. 460, 550 P.2d 350 (1976).

The defense of "res judicata" may, in a proper case, be raised and disposed of by a summary judgment proceeding. Kaminsky v. Kaminsky, 145 Colo. 492, 359 P.2d 675, 95 A.L.R.2d 643 (1961); Brennan v. City & County of Denver, 156 Colo. 215, 397 P.2d 876 (1964).

To sustain the defense of "res judicata", facts in support of it must be affirmatively shown either by the evidence adduced at the trial or by way of uncontroverted facts properly presented either in a motion for summary judgment or by a motion to dismiss under C.R.C.P. 12(b) where the court, on the basis of facts properly presented outside of the pleadings, is enabled to treat the same as a motion for summary judgment under this rule 56. Ruth v. Dept. of Hwys., 153 Colo. 226, 385 P.2d 410 (1963).

The fact that plaintiffs' Jefferson county action for rescission of their partnership agreement with defendants was pending resolution on appeal did not mean that it was not a "final judgment" for purposes of res judicata in their Adams county action for breach of contract. Miller v. Lunnon, 703 P.2d 640 (Colo. App. 1985), overruled in Rantz v. Kaufman, 109 P.3d 132 (Colo. 2005).

For the purposes of issue preclusion, a judgment that is still pending on appeal is not final. Rantz v. Kaufman, 109 P.3d 132 (Colo. 2005) (overruling Miller v. Lunnon, 703 P.2d 640 (Colo. App. 1985)).

C.R.C.P. 12(b), provides that, if, on a motion asserting the defense to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in this rule. Alexander v. Morrison-Knudsen Co., 166 Colo. 118, 444 P.2d 397 (1968), cert. denied, 393 U.S. 1063, 89 S. Ct. 715, 21 L. Ed. 2d 706 (1969).

A judgment of dismissal for failure to state a claim upon which relief can be granted may be entered upon a motion for summary judgment. Smith v. Mills, 123 Colo. 11, 225 P.2d 483 (1950); Enger v. Walker Field, Colo. Pub. Airport Auth., 181 Colo. 253, 508 P.2d 1245 (1973).

It is wholly immaterial whether the trial court considers the judgment of dismissal proper under the provisions of C.R.C.P. 12 or this rule, if the defendant was entitled to judgment under either rule. Haigler v. Ingle, 119 Colo. 145, 200 P.2d 913 (1948).

The judgment must specifically disclose the inadequacy of the complaint. Smith v. Mills, 123 Colo. 11, 225 P.2d 483 (1950).

Permission to amend should be given where there is a possibility by amendment of an adequate statement of claim. Smith v. Mills, 123 Colo. 11, 225 P.2d 483 (1950).

A trial court does not err in granting a motion for summary judgment on the ground that the claim made is a compulsory

counterclaim which should have been raised in an earlier case and is therefore barred. Visual Factor, Inc. v. Sinclair, 166 Colo. 22, 441 P.2d 643 (1968).

Where no material issue of fact was before the trial court in regard to a specific determination, summary judgment in favor of the defendant was proper. Valenzuela v. Mercy Hosp., 34 Colo. App. 5, 521 P.2d 1287 (1974).

Because the department of health care policy and financing's claim was not time barred and a corrected notice was sent to the estate in time to allow the affected parties a full opportunity to be heard, the estate was not entitled to dismissal of the department's claim on summary judgment. In re Estate of Kochevar, 94 P.3d 1253 (Colo. App. 2004).

Applied in People ex rel. Knott v. City of Montrose, 109 Colo. 487, 126 P.2d 1040 (1942); Klancher v. Anderson, 113 Colo. 478, 158 P.2d 923 (1945); Mitchell v. Town of Eaton, 176 Colo. 473, 491 P.2d 587 (1971); Dominguez v. Babcock, 696 P.2d 338 (Colo. App. 1984), aff'd, 727 P.2d 362 (Colo. 1986); Cain v. Guzman, 761 P.2d 295 (Colo. App. 1988).

IV. MOTION AND PROCEEDINGS.

A. In General.

Law reviews. For comment on Norton v. Dartmouth Skis appearing below, see 34 Rocky Mt. L. Rev. 259 (1962). For note, "The Use of Summary Judgment in Colorado", see 34 Rocky Mt. L. Rev. 490 (1962).

Provisions inapplicable to summary judgment motions. Because of the drastic nature of summary judgment, provisions under C.R.C.P. 121, 1-15, concerning confession of motions are inapplicable to motions, for summary judgment under this rule. Seal v. Hart, 755 P.2d 462 (Colo. App. 1988).

When the record is not adequate to permit a conclusion that no material fact dispute exists, the entry of summary judgment is inappropriate. Kral v. Am. Hardware Mut. Ins. Co., 784 P.2d 759 (Colo. 1989).

For conflict between this rule and second judicial district rule 24, which provides that in filing a motion for summary judgment the moving party shall file a memorandum brief in support of the motion and that the adverse party may serve an answer brief within 10 days after service of the movant's brief, but failure to so do is not to be considered as a confession of the motion and which allows for oral argument if a request therefor is endorsed upon the briefs, see Loup-Miller Constr. Co. v. City & County of Denver, 38 Colo. App. 405, 560 P.2d 480 (1976).

Failure to give an opportunity to respond to authority cited in support of or in opposition to a motion is harmless unless prejudice is shown. Benson v. Colo. Comp. Ins. Auth., 870 P.2d 624 (Colo. App. 1994).

Ten-day period is essential. It is essential that in order to avoid surprise and to allow for a full and considered response, the party against whom the motion for summary judgment is directed be allowed the full period in which to serve his affidavits. Jardon v. Meadowbrook-Fairview Metro. Dist., 190 Colo. 528, 549 P.2d 762 (1976) (decided prior to the 1983 amendment).

The 10-day provision in section (c) was inserted in the rule to avoid surprise and to allow for a full and considered response. Cherry v. A-P-A Sports, Inc., 662 P.2d 200 (Colo. App. 1983).

On a motion for summary judgment where no factual issue is present, no motion for new trial is necessary. Brooks v. Zabka, 168 Colo. 265, 450 P.2d 653 (1969).

A motion to reconsider a summary judgment order is properly characterized as a motion for new trial under C.R.C.P. 59(d)(4). Zolman v. Pinnacol Assurance, 261 P.3d 490 (Colo. App. 2011).

A motion under C.R.C.P. 59 is not a prerequisite to appeal from a summary judgment. Valenzuela v. Mercy Hosp., 34 Colo. App. 5, 521 P.2d 1287 (1974).

Nonmovant is entitled to notice of issue regarding which evidence must be introduced to avoid granting of summary judgment; lacking such notice, summary judgment cannot be granted. Wallman v. Kelley, 976 P.2d 330 (Colo. App. 1998); Antelope Co. v. Mobil Rocky Mountain, Inc., 51 P.3d 995 (Colo. App. 2001).

B. Purpose and Effect.

The purpose of a motion for summary judgment is to save litigants the expense and time connected with a trial when, as a matter of law based upon admitted facts, one of the parties cannot prevail. O. C. Kinney, Inc. v. Paul Hardeman, Inc., 151 Colo. 571, 379 P.2d 628 (1963); Abrahamsen v. Mountain States Tel. & Tel. Co., 177 Colo. 422, 494 P.2d 1287 (1972); People in Interest of F.L.G., 39 Colo. App. 194, 563 P.2d 379 (1977); Ginter v. Palmer & Co., 196 Colo. 203, 585 P.2d 583 (1978); Wright v. Bayly Corp., 41 Colo. App. 313, 587 P.2d 799 (1978).

This rule was designed to enable parties and courts to expedite litigation by avoiding needless trials. In re Bunger v. Uncompahgre Valley Water Users Ass'n, 192 Colo. 159, 557 P.2d 389 (1976); DuBois v. Myers, 684 P.2d 940 (Colo. App. 1984).

The intent and purpose of this rule is that, where the facts are undisputed or so certain as not to be subject to dispute, a court is in posi-

tion to determine the issue strictly as a matter of law. Morlan v. Durland Trust Co., 127 Colo. 5, 252 P.2d 98 (1952); Central Bank & Trust Co. v. Robinson, 137 Colo. 409, 326 P.2d 82 (1958); Rogerson v. Rudd, 140 Colo. 548, 345 P.2d 1083 (1959).

Where there is no genuine issue as to any material fact, the issues are properly resolved as matters of law. Enger v. Walker Field, Colo. Pub. Airport Auth., 181 Colo. 253, 508 P.2d 1245 (1973).

The purpose of summary judgment is to permit the parties to pierce the formal allegations of the pleadings and save the time and expense connected with trial when, as a matter of law, based on undisputed facts, one party could not prevail. Peterson v. Halsted, 829 P.2d 373 (Colo. 1992); Graven v. Vail Assocs., Inc., 888 P.2d 310 (Colo. App. 1994).

No matter how enticing in an area of congested dockets is a device to dispose of cases without the delay and expense of traditional trials with their sometime cumbersome and time consuming characteristics, summary judgment was not devised for, and must not be used as, a substitute for trial. Sullivan v. Davis, 172 Colo. 490, 474 P.2d 218 (1970).

Its wholesome utility is, in advance of trial, to test, not as formerly on bare contentions found in the legal jargon of pleadings, but on the intrinsic merits, whether there is in actuality a real basis for relief or defense. Sullivan v. Davis, 172 Colo. 490, 474 P.2d 218 (1970); Shaw v. Gen. Motors Corp., 727 P.2d 387 (Colo. App,. 1986).

A summary judgment denies a litigant the right to trial of his case and should therefore not be granted where there appears any controversy concerning material facts. McCormick v. Diamond Shamrock Corp., 175 Colo. 406, 487 P.2d 1333 (1971); McKinley Constr. Co. v. Dozier, 175 Colo. 397, 487 P.2d 1335 (1971); Mt. Emmons Mining Co. v. Town of Crested Butte, 690 P.2d 231 (Colo. 1984); Smith v. Cutty's Inc., 742 P.2d 347 (Colo. App. 1987).

The summary judgment procedure is not intended to deprive a litigant of the right to trial on the merits of the case. Tamblyn v. City & County of Denver, 118 Colo. 191, 194 P.2d 299 (1948).

When defendants file their motion for summary judgment they admit thereby all facts properly pleaded by plaintiff, as they appeared in the record at that time, but such admissions imputed by law are confined to consideration of such motion only and within the limits of movants' theory of the law of the case. Morlan v. Durland Trust Co., 127 Colo. 5, 252 P.2d 98 (1952).

C. Evidence and Burden of Proof.

In considering motion for summary judgment, trial court must accept plaintiffs' pleadings as true unless the depositions and admissions on file, together with the affidavits, clearly disclose there is no genuine issue as to any material fact, with any doubts being resolved in plaintiffs' favor. Norton v. Leadville Corp., 43 Colo. App. 527, 610 P.2d 1348 (1979).

On the hearing of a motion for summary judgment the material allegations of the nonmoving party's pleadings must be accepted as true, even in the face of denial by the moving party's pleadings. Abrahamsen v. Mountain States Tel. & Tel. Co., 177 Colo. 422, 494 P.2d 1287 (1972).

The material allegations of a complaint must be accepted as true even in the face of denials in the answer. Parrish v. De Remer, 117 Colo. 256, 187 P.2d 597 (1947); Tamblyn v. City & County of Denver, 118 Colo. 191, 194 P.2d 299 (1948); Carter v. Thompkins, 133 Colo. 279, 294 P.2d 265 (1956).

There shall be no assessment of credibility of proposed evidence. Neither the trial court nor an appellate court may attempt any assessment of the credibility of proposed evidence in conjunction with a motion for summary judgment. Discovery Land & Dev. Co. v. Colo.-Aspen Dev. Corp., 40 Colo. App. 292, 577 P.2d 1101 (1977).

This rule is properly to be exercised only where the facts are clear and undisputed, leaving as the sole duty of the court the determination of the correct legal principles applicable thereto. Morlan v. Durland Trust Co., 127 Colo. 5, 252 P.2d 98 (1952); Central Bank & Trust Co. v. Robinson, 137 Colo. 409, 326 P.2d 82 (1958); Rogerson v. Rudd, 140 Colo. 548, 345 P.2d 1083 (1959).

Summary judgment is appropriate only in the clearest of cases, where no doubt exists concerning the facts. Roderick v. City of Colo. Springs, 193 Colo. 104, 563 P.2d 3 (1977).

Summary judgment is appropriate where the admitted facts demonstrate that a party cannot prevail. Kuehn v. Kuehn, 642 P.2d 524 (Colo. App. 1981).

Summary judgment is proper only when there is no genuine issue as to any material fact and when the moving party is entitled to judgment as a matter of law. Backus v. Apishapa Land & Cattle Co., 44 Colo. App. 59, 615 P.2d 42 (1980); Camacho v. Honda Motor Co., Ltd., 741 P.2d 1240 (Colo. 1987), cert. dismissed, 485 U.S. 901, 108 S. Ct. 1067, 99 L. Ed. 2d 229 (1988); W. Am. Ins. Co. v. Baumgartner, 812 P.2d 696 (Colo. App. 1990), cert. granted, judgment vacated, and case remanded to the Colorado court of appeals for reconsideration in light of Hecla Min. Co. v. New Hampshire Ins. Co., 811 P.2d 1083 (Colo. 1991), 812 P.2d 654 (Colo. 1991); Kenna v. Huber, 179 P.3d 189 (Colo. App. 2007), rev'd on other grounds, 205 P.3d 1158 (Colo. 2009); Suss Pontiac-GMC,

Inc. v. Boddicker, 208 P.3d 269 (Colo. App. 2008).

Summary judgment is appropriate in cases where a public official or public figure seeks to recover damages resulting from a defamatory statement. DiLeo v. Koltnow, 200 Colo. 119, 613 P.2d 318 (1980).

Summary judgment is appropriate only when there is no genuine issue as to any material fact. Norton v. Leadville Corp., 43 Colo. App. 527, 610 P.2d 1348 (1979).

Summary judgment is a drastic remedy and is never warranted except on a clear showing that there exists no genuine issue as to any material fact. All doubts as to the existence of such an issue must be resolved against the moving party. Ridgeway v. Kiowa Sch. Dist. C-2, 794 P. 2d 1020 (Colo. App. 1989); Aspen Wilderness Workshop, Inc. v. Colo. Water Conservation Bd., 901 P.2d 1251 (Colo. 1995); Christoph v. Colo. Comm. Corp., 946 P.2d 519 (Colo. App. 1997); Brawner-Ahlstrom v. Husson, 969 P.2d 738 (Colo. App. 1998).

Absence of genuine issue of fact must be apparent. To authorize the granting of summary judgment the complete absence of any genuine issue of fact must be apparent. Hatfield v. Barnes, 115 Colo. 30, 168 P.2d 552 (1946); Koon v. Steffes, 124 Colo. 531, 239 P.2d 310 (1951); Morlan v. Durland Trust Co., 127 Colo. 5, 252 P.2d 98 (1952); Abrahamsen v. Mountain States Tel. & Tel. Co., 177 Colo. 422, 494 P.2d 1287 (1972); Halsted v. Peterson, 797 P.2d 801 (Colo. App. 1990), rev'd on other grounds, 829 P.2d 373 (Colo. 1992).

Summary judgment is proper only when the pleadings, affidavits, depositions, or admissions show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Civil Serv. Comm'n v. Pinder, 812 P.2d 645 (Colo. 1991); Travers v. Rainey, 888 P.2d 372 (Colo. App. 1994); Merkley v. Pittsburgh Corning Corp., 910 P.2d 58 (Colo. App. 1995); Schultz v. Wells, 13 P.3d 846 (Colo. App. 2000); Vigil v. Franklin, 81 P.3d 1084 (Colo. App. 2003), rev'd on other grounds, 103 P.3d 322 (Colo. 2004); A.C. Excavating v. Yacht Club II Homeowners Ass'n, 114 P.3d 862 (Colo. 2005).

Summary judgment is proper when the nonmoving party points to unsworn expert reports, C.R.C.P. 26 disclosures, allegations in the pleadings, and arguments of counsel made in its prior motion for summary judgment because these items lack verification and are not competent to dispel the argument that there were no facts to support the allegations. In contrast, the moving party supported their motion with sworn testimony of experts and sworn testimony of the nonmoving party's C.R.C.P. 30(b)(6) designee that had no evidence to support the nonmoving party's claims. D.R. Horton, Inc. v. D&S Landscaping, LLC, 215 P.3d 1163 (Colo. App. 2008).

"Clear and convincing" standard of proof applies in determining a motion for summary judgment in a libel action brought by a public official or public figure. Pietrafeso v. D.P.I., Inc., 757 P.2d 1113 (Colo. App. 1988).

Where the undisputed evidence permits off-setting inferences, the party against whom a motion for summary judgment is made is entitled to all favorable inferences which may be reasonably drawn from the evidence. O'Herron v. State Farm Mut. Auto. Ins. Co., 156 Colo. 164, 397 P.2d 227 (1964).

A motion for summary judgment should be denied if under the evidence reasonable men might reach different conclusions. Morlan v. Durland Trust Co., 127 Colo. 5, 252 P.2d 98 (1952); O'Herron v. State Farm Mut. Auto. Ins. Co., 156 Colo. 164, 397 P.2d 227 (1964); Hasegawa v. Day, 684 P.2d 936 (Colo. App. 1983), overruled on other grounds in Casebolt v. Cowan, 829 P.2d 352 (Colo. 1992); Graven v. Vail Assocs., Inc., 888 P.2d 310 (Colo. App. 1994).

A summary judgment should never be entered, save in those cases where the movant is entitled to such beyond all doubt, and the facts conceded should show with such clarity the right to a judgment as to leave no room for controversy or debate; they must show affirmatively that plaintiff would not be entitled to recover under any and all circumstances. Smith v. Mills, 123 Colo. 11, 225 P.2d 483 (1946); Discovery Land & Dev. Co. v. Colo.-Aspen Dev. Corp., 40 Colo. App. 292, 577 P.2d 1101 (1977).

In assessing a summary judgment motion a court must view all facts in the light most favorable to the nonmoving party, give the nonmoving party the benefit of all favorable inferences that may reasonably be drawn from the evidence, and resolve all doubts as to the existence of a material fact against the moving party. Vigil v. Franklin, 81 P.3d 1084 (Colo. App. 2003), rev'd on other grounds, 103 P.3d 322 (Colo. 2004).

Summary judgment is proper when movant's direct, positive, and uncontradicted evidence is opposed only by an unsupported contention that a contrary inference from the evidence might be possible. Iowa Nat'l Mut. Ins. Co. v. Boatright, 33 Colo. App. 124, 516 P.2d 439 (1973).

It is error for trial court to treat moving party's factual allegations as true when granting summary judgment. Han Ye Lee v. Colo. Times, Inc., 222 P.3d 957 (Colo. App. 2009).

Determination of propriety of summary judgment. Summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. In determining whether summary judgment is proper, the non-

moving party is entitled to the benefit of all favorable inferences that may reasonably be drawn from the undisputed facts, and all doubts must be resolved against the moving party. Casebolt v. Cowan, 829 P.2d 352 (Colo. 1992); Clementi v. Nationwide Mut. Fire Ins. Co., 16 P.3d 223 (Colo. 2000); A.C. Excavating v. Yacht Club II Homeowners Ass'n, 114 P.3d 862 (Colo. 2005); Suss Pontiac-GMC, Inc. v. Boddicker, 208 P.3d 269 (Colo. App. 2008).

Summary judgment was proper when deeds in question conveyed easements of specified width and set forth legal descriptions of their exact locations. Trial court properly refused to consider extraneous circumstances to vary the explicit terms. Pickens v. Kemper, 847 P.2d 648 (Colo. App. 1993).

Ultimate burden of persuasion in connection with motion for summary judgment always rests on moving party. Continental Air Lines, Inc. v. Keenan, 731 P.2d 708 (Colo. 1987); Kelly v. Central Bank & Trust Co., 794 P.2d 1037 (Colo. App. 1989); Civil Serv. Comm'n v. Pinder, 812 P.2d 645 (Colo. 1991); Boyett v. Smith, 888 P.2d 294 (Colo. App. 1994), aff'd, 908 P.2d 493 (Colo. 1995); Aspen Wilderness Workshop, Inc. v. Colo. Water Conservation Bd., 901 P.2d 1251 (Colo. 1995).

The party moving for a summary judgment has the burden of demonstrating clearly the absence of a genuine issue of fact in order to prevail. O'Herron v. State Farm Mut. Auto. Ins. Co., 156 Colo. 164, 397 P.2d 227 (1964); Primock v. Hamilton, 168 Colo. 524, 452 P.2d 375 (1969); Ginter v. Palmer & Co., 196 Colo. 203, 585 P.2d 583 (1978); Chambliss/Jenkins Assocs. v. Forster, 650 P.2d 1315 (Colo. App. 1982); Camacho v. Honda Motor Co., Ltd., 741 P.2d 1240 (Colo. 1987), cert. dismissed, 485 U.S. 901, 108 S. Ct. 1067, 99 L. Ed. 2d 229 (1988); Murphy v. Dairyland Ins. Co., 747 P.2d 691 (Colo. App. 1987); Brawner-Ahlstrom v. Husson, 969 P.2d 738 (Colo. App. 1998); Schultz v. Wells, 13 P.3d 846 (Colo. App. 2000).

Moving party has initial burden of producing and identifying those portions of record and affidavits that demonstrate the absence of any genuine issue of material fact. Continental Air Lines, Inc. v. Keenan, 731 P.2d 708 (Colo. 1987); Boyett v. Smith, 888 P.2d 294 (Colo. App. 1994), aff'd, 908 P.2d 493 (Colo. 1995); Johnston v. Cigna Corp., 916 P.2d 643 (Colo. App. 1996); Brannan Sand & Gravel v. F.D.I.C., 928 P.2d 1337 (Colo. App. 1996), rev'd on other ground, 940 P.2d 393 (Colo. 1997).

Party moving for summary judgment may satisfy initial burden of production by demonstrating that there is absence of evidence in record to support nonmoving party's case, where party moves for summary judgment on issue on which he would not bear ultimate burden of persuasion at trial. Continental Air Lines, Inc. v. Keenan, 731 P.2d 708 (Colo. 1987).

Absent any significant probative evidence to defeat a properly supported motion for summary judgment, discrediting testimony is normally not sufficient to defeat the motion. Kelly v. Central Bank & Trust Co., 794 P.2d 1037 (Colo. App. 1989).

All doubts thereon must be resolved against the moving party. Hatfield v. Barnes, 115 Colo. 30, 168 P.2d 552 (1946); Koon v. Steffes, 124 Colo. 531, 239 P.2d 310 (1951); Morlan v. Durland Trust Co., 127 Colo. 5, 252 P.2d 98, 36 A.L.R.2d 874 (1952); Credit Inv. & Loan Co. v. Guaranty Bank & Trust Co., 143 Colo. 393, 353 P.2d 1098 (1960); Primock v. Hamilton, 168 Colo. 524, 452 P.2d 375 (1969); Abrahamsen v. Mountain States Tel. & Tel. Co., 177 Colo. 422, 494 P.2d 1287 (1972); Roderick v. City of Colo. Springs, 193 Colo. 104, 563 P.2d 3 (1977); Chambliss/Jenkins Assocs. v. Forster, 650 P.2d 1315 (Colo. App. 1982); Tapley v. Golden Big O Tires, 676 P.2d 676 (Colo. 1983); Dominguez v. Babcock, 727 P.2d 362 (Colo. 1986); Banyai v. Arruda, 799 P.2d 441 (Colo. App. 1990); Hauser v. Rose Health Care Sys., 857 P.2d 524 (Colo. App. 1993).

In determining whether summary judgment is proper, the trial court must resolve all doubts as to whether an issue of fact exists against the moving party. Jones v. Dressel, 623 P.2d 370 (Colo. 1981); Ruscitti v. Sackheim, 817 P.2d 1046 (Colo. App. 1991); Johnston v. Cigna Corp., 916 P.2d 643 (Colo. App. 1996); AviComm, Inc. v. Colo. Pub. Utils. Comm'n, 955 P.2d 1023 (Colo. 1998); Van Alstyne v. Housing Auth. of City of Pueblo, 985 P.2d 97 (Colo. App. 1999).

Party against whom a motion is made is entitled to all favorable inferences which may reasonably be drawn from the evidence. Halsted v. Peterson, 797 P.2d 801 (Colo. App. 1990), rev'd on other grounds, 829 P.2d 373 (Colo. 1992); Aspen Wilderness Workshop, Inc. v. Colo. Water Conservation Bd., 901 P.2d 1251 (Colo. 1995); Merkley v. Pittsburgh Corning Corp., 910 P.2d 58 (Colo. App. 1995); Brannan Sand & Gravel v. F.D.I.C., 928 P.2d 1337 (Colo. App. 1996), rev'd on other ground, 940 P.2d 393 (Colo. 1997); AviComm, Inc. v. Colo. Pub. Utils. Comm'n, 955 P.2d 1023 (Colo. 1998); Brawner-Ahlstrom v. Husson, 969 P.2d 738 (Colo. App. 1998); Van Alstyne v. Housing Auth. of City of Pueblo, 985 P.2d 97 (Colo. App. 1999).

It is the burden of the moving party to demonstrate the absence of a triable factual issue, and any doubts as to the existence of such an issue must be resolved against that party. Although the party resisting summary judgment is entitled to the benefit of all favorable inferences that may be drawn from the facts presented, the moving party's request must be granted where

the facts are undisputed and the opposing party cannot prevail as a matter of law. Am. Water Dev., Inc. v. City of Alamosa, 874 P.2d 352 (Colo. 1994).

Once the moving party affirmatively shows specific facts probative of its right to judgment, it becomes necessary for the nonmoving party to set forth facts showing that there is a genuine issue for trial. Durnford v. City of Thornton, 29 Colo. App. 349, 483 P.2d 977 (1971); Fort Collins Motor Homes, Inc. v. City of Ft. Collins, 30 Colo. App. 445, 496 P.2d 1074 (1972); Meyer v. Schwartz, 638 P.2d 821 (Colo. App. 1981); Buttermore v. Firestone Tire & Rubber Co., 721 P.2d 701 (Colo. App. 1986); Civil Serv. Comm'n v. Pinder, 812 P.2d 645 (Colo. 1991); Ruscitti v. Sackheim, 817 P.2d 1046 (Colo. App. 1991); Snook v. Joyce Homes, Inc., 215 P.3d 1210 (Colo. App. 2009).

Once the movant shows that genuine issues are absent, the burden shifts, and unless the opposing party demonstrates true factual controversy, summary judgment is proper. Heller v. First Nat'l Bank, 657 P.2d 992 (Colo. App. 1982); Pearson v. Sublette, 730 P. 2d 909 (Colo. App. 1986); Snook v. Joyce Homes, Inc., 215 P.3d 1210 (Colo. App. 2009).

Once party moving for summary judgment has met initial burden of production, burden shifts to nonmoving party to establish that there is triable issue of fact. Continental Air Lines, Inc. v. Keenan, 731 P.2d 708 (Colo. 1987); Churchey v. Adolph Coors Co., 759 P.2d 1336 (Colo. 1988); Hauser v. Rose Health Care Sys., 857 P.2d 524 (Colo. App. 1993); Merkley v. Pittsburgh Corning Corp., 910 P.2d 58 (Colo. App. 1995); Schultz v. Wells, 13 P.3d 846 (Colo. App. 2000).

Burden is on opposing party. Once a movant makes a convincing showing that genuine issues are lacking, this rule requires that the opposing party adequately demonstrate by relevant and specific facts that a real controversy exists. Ginter v. Palmer & Co., 196 Colo. 203, 585 P.2d 583 (1978); Webster v. Mauz, 702 P.2d 297 (Colo. App. 1985); Knittle v. Miller, 709 P.2d 32 (Colo. App. 1985); Closed Basin Landowners' Ass'n v. Rio Grande, 734 P.2d 627 (Colo. 1987).

Only if the moving party meets his burden of establishing that no genuine issue of any material fact exists is a case appropriate for summary judgment, and if the moving party meets his burden, the opposing party may, but is not required to, submit an opposing affidavit; obviously, it is perilous for the opposing party to neither proffer an evidentiary explanation nor file a responsive affidavit. Ginter v. Palmer & Co., 196 Colo. 203, 585 P.2d 583 (1978).

Burden showing that material issue of fact existed was met in an action for principal and interest due on promissory notes where record contained an affidavit of the borrower stating that the bank made representations that the proceeds from second loan made to the borrower would be used to repay the initial loan made to such borrower. Federal Deposit Ins. Corp. v. Cassidy, 779 P.2d 1382 (Colo. App. 1989).

In response to a motion for summary judgment, an adverse party must by affidavit or otherwise set forth specific facts showing there is a genuine issue for trial. Brown v. Teitelbaum, 831 P.2d 1081 (Colo. App. 1991); Snook v. Joyce Homes, Inc., 215 P.3d 1210 (Colo. App. 2009).

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

The sham affidavit doctrine is based on the premise that, had prior deposition testimony been incorrect, the affiant should have corrected the deposition under C.R.C.P. 30(e) and, having not utilized that opportunity, should ordinarily not be allowed to later contradict that testimony simply to survive summary judgment. Luttgen v. Fischer, 107 P.3d 1152 (Colo. App. 2005).

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

In determining whether an affidavit presents a sham issue of fact, the court should consider (1) whether the affiant was cross-examined during his or her earlier testimony, (2) whether the affiant had access to the pertinent evidence at the time of his or her earlier testimony or whether the affidavit was based on newly discovered evidence, and (3) whether the earlier testimony reflected confusion which the affidavit attempted to explain. Luttgen v. Fischer, 107 P.3d 1152 (Colo. App. 2005).

Affidavit containing specific factual allegations of widespread practice of systematic denial without justification of worker's compensation claims raises a genuine issue of material fact as to whether the worker's due process rights have been violated. Walter v. City & County of Denver, 983 P.2d 88 (Colo. App. 1998).

Plaintiff's speculation that further discovery may uncover specific facts showing that there is a genuine issue for trial is insuffi-

cient. An affirmative showing of specific facts, uncontradicted by any counter affidavits, requires a trial court to conclude that no genuine issue of material fact exists. WRWC, LLC v. City of Arvada, 107 P.3d 1002 (Colo. App. 2004).

Summary judgment inappropriate when burden not met. While a party against whom a summary judgment is sought may take some risk by not submitting controverting affidavits or other evidence, nevertheless, if the moving party's proof does not itself demonstrate the lack of a genuine factual issue, summary judgment is inappropriate. Wolther v. Schaarschmidt, 738 P.2d 25 (Colo. App. 1986).

An affirmative showing of specific facts probative of right to judgment uncontradicted by any counter affidavits submitted leaves a trial court with no alternative but to conclude that no genuine issue of material fact exists. Terrell v. Walter E. Heller & Co., 165 Colo. 463, 439 P.2d 989 (1968); Civil Serv. Comm'n v. Pinder, 812 P.2d 645 (Colo. 1991).

Where no counter affidavit is filed to indicate any genuine issue as to a material fact when the affidavit and depositions clearly disclose that plaintiff's complaint cannot be sustained, then as a matter of law a summary judgment is proper. O. C. Kinney, Inc. v. Paul Hardeman, Inc., 151 Colo. 571, 379 P.2d 628 (1963); Reisig v. Resolution Trust Corp., 806 P.2d 397 (Colo. App. 1990).

Where plaintiff's counter affidavit filed does not touch the facts determinative of the issue of presence for the purpose of service and on this issue as framed by the pleading his reply to defendant's answer and affirmative defenses state the mere legal conclusion that the defendant is outside of the state and not subject to service, no facts are alleged, and summary judgment is proper. Norton v. Dartmouth Skis, Inc., 147 Colo. 436, 364 P.2d 866 (1961).

There is not any material issue of fact to be resolved, where the answer states that the motion to vacate the judgment or for a new trial has not been ruled upon, when subsequent to this statement, there is filed in support of the motion for summary judgment an attorney's affidavit to the effect that the motion had been ruled upon, to which is attached a copy of the order denying said motion, certified by the clerk of the court under the seal of the court to be a true copy of the order as it appears in the records of that court, although had defendant filed a counter affidavit there might remain a real issue. Carter v. Carter, 148 Colo. 495, 366 P.2d 586 (1961).

Failure of party opposing summary judgment to file responsive affidavit does not relieve moving party of burden to establish that summary judgment is appropriate. People v. Hernandez & Assocs., Inc., 736 P.2d 1238 (Colo. App. 1986).

Oral argument not necessary. Trial court did not err in resolving the question on the basis of submitted written arguments. United Bank of Denver v. Ferris, 847 P.2d 146 (Colo. App. 1992).

To prevail on a summary judgment motion on the basis that the statute of limitations had run, the defendant must establish a lack of disputed facts as to when the plaintiff knew or should have known of the alleged fraud. First Interstate Bank v. Berenbaum, 872 P.2d 1297 (Colo. App. 1993).

D. When Motion May be Granted.

A summary judgment may be granted only where there is no genuine issue as to any material fact. Credit Inv. & Loan Co. v. Guaranty Bank & Trust Co., 143 Colo. 393, 353 P.2d 1098 (1960); Lutz v. Miller, 144 Colo. 351, 356 P.2d 242 (1960); City of Westminster v. Church, 167 Colo. 1, 445 P.2d 52 (1968); Pritchard v. Temple, 168 Colo. 555, 452 P.2d 381 (1969); First Nat. Bank v. Lohman, 827 P.2d 583 (Colo. App. 1992); Harless v. Geyer, 849 P.2d 904 (Colo. App. 1992).

To warrant the granting of summary judgment, the situation must be such that no material factual issue remains in the case. Morlan v. Durland Trust Co., 127 Colo. 5, 252 P.2d 98 (1952); Central Bank & Trust Co. v. Robinson, 137 Colo. 409, 326 P.2d 82 (1958); Rogerson v. Rudd, 140 Colo. 548, 345 P.2d 1083 (1959); Huydts v. Dixon, 199 Colo. 260, 606 P.2d 1303 (1980); Dominguez v. Babcock, 727 P.2d 362 (Colo. 1986); Crouse v. City of Colo. Springs, 766 P.2d 655 (Colo. 1988).

Generally, when presented with a summary judgment issue, a court must decline to enter such a judgment if there exists a genuine dispute over any material fact. Sewell v. Pub. Serv. Co. of Colo., 832 P.2d 994 (Colo. App. 1991).

A summary judgment is a drastic remedy and is never warranted except on a clear showing that there is no genuine issue as to any material fact. Hatfield v. Barnes, 115 Colo. 30, 168 P.2d 552 (1946); Morland v. Durland Trust Co., 127 Colo. 5, 252 P.2d 98 (1952); Credit Inv. & Loan Co. v. Guaranty Bank & Trust Co., 143 Colo. 393, 353 P.2d 1098 (1960); Primock v. Hamilton, 168 Colo. 524, 452 P.2d 375 (1969); Abrahamsen v. Mountain States Tel. & Tel. Co., 177 Colo. 422, 494 P.2d 1287 (1972); Ginter v. Palmer & Co., 196 Colo. 203, 585 P.2d 583 (1978); Wright v. Bayly Corp., 41 Colo. App. 313, 587 P.2d 799 (1978); Ams. United for Separation of Church & State Fund, Inc. v. State, 648 P.2d 1072 (Colo. 1982); Hasegawa v. Day, 684 P.2d 936 (Colo. App. 1983), overruled on other grounds in Casebolt v. Cowan, 829 P.2d 352 (Colo. 1992); Closed Basin Landowners' Ass'n v. Rio Grande, 734

P.2d 627 (Colo. 1987); Wayda v. Comet Intern. Corp., 738 P.2d 391 (Colo. App. 1987); Kral v. Am. Hardware Mut. Ins. Co., 784 P.2d 759 (1989); Moore & Assocs. Realty, Inc. v. Arrowhead at Vail, 892 P.2d 367 (Colo. App. 1994); Crystal Homes, Inc. v. Radetsky, 895 P.2d 1179 (Colo. App. 1995); Brannan Sand & Gravel v. F.D.I.C., 928 P.2d 1337 (Colo. App. 1996), rev'd on other ground, 940 P.2d 393 (Colo. 1997); Lazy Dog Ranch v. Telluray Ranch Corp., 948 P.2d 74 (Colo. App. 1997); Terrones v. Tapia, 967 P.2d 216 (Colo. App. 1998); Clementi v. Nationwide Mut. Fire Ins. Co., 16 P.3d 223 (Colo. 2000); Lewis v. Emil Clayton Plumbing Co., 25 P.3d 1254 (Colo. App. 2000).

Summary judgment is a drastic remedy and is only warranted upon a clear showing that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. Bailey v. Clausen, 557 P.2d 1207 (Colo. 1976); Pueblo West Metro. Dist. v. Southeastern Colo. Water Conservancy Dist., 689 P.2d 594 (Colo. 1984); Churchey v. Adolph Coors Co., 759 P.2d 1336 (Colo. 1988); Greenwood Trust Co. v. Conley, 938 P.2d 1141 (Colo. 1997); Van Alstyne v. Housing Auth. of City of Pueblo, 985 P.2d 97 (Colo. App. 1999); Waskel v. Guar. Nat'l Corp., 23 P.3d 1214 (Colo. App. 2000); Goodwin v. Thieman, 74 P.3d 526 (Colo. App. 2003).

Summary judgment is a drastic remedy and should be granted only where the evidential and legal prerequisites are clearly established. Gleason v. Guzman, 623 P.2d 378 (Colo. 1981).

Where a factual issue has been raised as to a material fact, the matter should not have been disposed of by summary judgment. Brodie v. Mastro, 638 P.2d 800 (Colo. App. 1981).

A "genuine issue" cannot be raised by counsel simply by means of argument, be it before the trial court or on appeal; certainly the spirit of this rule suggests that if a party really contends that the area in question has in fact been roped off by proper authorities he has the duty to inform the trial court in the manner provided by this rule concerning summary judgments, and not to merely attempt to present the issue by hypothetical argument. Sullivan v. Davis, 172 Colo. 490, 474 P.2d 218 (1970); Schultz v. Wells, 13 P.3d 846 (Colo. App. 2000).

Trial court has discretion to enter summary judgment simultaneously with denying nonmovant's request for discovery. Section (f) neither requires nor prohibits collapsing the rulings; therefore, the trial court has discretion. The ruling may be reviewed under the abuse of discretion standard. Bailey v. Airgas-Intermtn., Inc., 250 P.3d 746 (Colo. App. 2010).

Where there is no disputed material issue of fact regarding insurance company's duty to defend individual in a civil action because the claims are cast entirely within the insurance policy exclusions, summary judgment is appropriate. Nikolai v. Farmers Alliance Mut. Ins., 830 P.2d 1070 (Colo. App. 1991).

Where the proceedings have indicated that a genuine issue exists, the supreme court has consistently rejected appealing shortcuts, even though it is likely that on a trial the trier will resolve the disputed issues as one of fact in the same manner as when thought to have been one of law alone, and the supreme court just as consistently rejected any notions that pretense or apparent formal controversy can thwart applications of this rule or hamstring the court in determining whether it is a proper case for it. Sullivan v. Davis, 172 Colo. 490, 474 P.2d 218 (1970).

Moving party must be entitled to summary judgment as matter of law. A party is entitled to a summary judgment when there are pleadings, affidavits, depositions, or admissions on file showing that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. O. C. Kinney, Inc. v. Paul Hardeman, Inc., 151 Colo. 571, 379 P.2d 628 (1963); Durnford v. City of Thornton, 29 Colo. App. 349, 483 P.2d 977 (1971); In re Estate of Mall v. Father Flanagan's Boys' Home, 30 Colo. App. 296, 491 P.2d 614 (1971); Fort Collins Motor Homes, Inc. v. City of Ft. Collins, 30 Colo. App. 445, 496 P.2d 1074 (1972); Van Schaack v. Phipps, 38 Colo. App. 140, 558 P.2d 581 (1976)); Chambliss/ Jenkins Assocs. v. Forster, 650 P.2d 1315 (Colo. App. 1982).

Entry of summary judgment under this rule is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. In re Bunger v. Uncompahgre Valley Ass'n, 192 Colo. 159, 557 P.2d 389 (1976); Koch v. Sadler, 759 P.2d 792 (Colo. App. 1988); Cung La v. State Farm Auto Ins. Co., 830 P.2d 1007 (Colo. 1992); Suss Pontiac-GMC, Inc. v. Boddicker, 208 P.3d 269 (Colo. App. 2008).

When a party is entitled to prevail as a matter of law, summary judgment is proper. Happy Canyon Inv. Co. v. Title Ins. Co., 38 Colo. App. 385, 560 P.2d 839 (1976).

A summary judgment is proper only where there is no genuine issue as to any material fact, which may be indicated by the pleadings, affidavits, depositions, and/or admissions, and where the moving party is entitled to judgment as a matter of law. Bailey v. Clausen, 192 Colo. 297, 557 P.2d 1207 (1976); Pearson v. Sublette, 730 P.2d 909 (Colo. App. 1986); Krane v. Saint Anthony Hosp. Sys., 738 P.2d 75 (Colo. App. 1987).

The phrase "as a matter of law", as used in section (c), contains no distinction between legal and equitable principles, so, if there is no question concerning material facts, and the only contention arises over the application of a

rule of law, whether "legal" or "equitable" in nature, a summary judgment may be entered. Linch v. Game & Fish Comm'n, 124 Colo. 79, 234 P.2d 611 (1951).

Material fact defined. In the context of a summary judgment proceeding, an issue of material fact is one, the resolution of which will affect the outcome of the case. Krane v. Saint Anthony Hosp. Sys., 738 P.2d 75 (Colo. App. 1987).

Where there is no genuine issue of material fact in dispute, summary judgment is proper. Varela v. Colo. Milling & Elevator Co., 31 Colo. App. 49, 499 P.2d 1206 (1972); Abrahamsen v. Mountain States Tel. & Tel. Co., 177 Colo. 422, 494 P.2d 1287 (1972).

A summary judgment is proper, even when factual matters are involved, if the record indicates that the factual matters are not in dispute. Edwards v. Price, 191 Colo. 46, 550 P.2d 856 (1976), appeal dismissed, 429 U.S. 1056, 97 S. Ct. 778, 50 L. Ed. 2d 773 (1977).

Where there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law, summary judgment is warranted. Am. Water Dev., Inc. v. City of Alamosa, 874 P.2d 352 (Colo. 1994).

Where the pleadings and the deposition clearly show that as a matter of law one is not entitled to the relief he seeks, then, under such circumstances, it was proper for the court to grant summary judgment. Goeddel v. Aircraft Fin., Inc., 152 Colo. 419, 382 P.2d 812 (1963).

Unless the depositions and admissions on file, together with the affidavits, clearly disclose that there is no genuine issue as to any material fact, as a matter of law, the summary judgment should be entered. Parrish v. De Remer, 117 Colo. 256, 187 P.2d 597 (1947); Carter v. Thompkins, 133 Colo. 279, 294 P.2d 265 (1956); Abrahamsen v. Mountain States Tel. & Tel. Co., 177 Colo. 422, 494 P.2d 1287 (1972).

Summary judgment was properly issued where briefs contained sufficient information upon which the judge could base his decision, even though the hearing did not address all of the issues before the court. Lane v. Arkansas Valley Publ'g Co., 675 P.2d 747 (Colo. App. 1983), cert. denied, 467 U.S. 1252, 104 S. Ct. 3534, 82 L. Ed. 2d 840 (1984).

Issuance of summary judgment after a hearing that was held within eight days of filing of motion and after parent's offer of proof as to what he would state in opposing affidavits comported with the rule that permits a party to file opposing affidavits within fifteen days. People in Interest of B.M., 738 P.2d 45 (Colo. App. 1987).

It is also proper where plaintiff failed to file a responsive brief or obtain additional time to file and never acted to postpone ruling or to indicate that he intended to challenge the facts submitted by the defendant prior to the court's ruling on the motion. Ceconi v. Geosurveys, Inc., 682 P.2d 68 (Colo. App. 1984); Buttermore v. Firestone Tire & Rubber Co., 721 P.2d 701 (Colo. App. 1986).

Proximate cause deemed "matter of law" only in clearest cases. Proximate cause is a "matter of law" for the court only in the clearest cases when the facts are undisputed and it is plain that all intelligent persons can draw but one inference from them. Moon v. Platte Valley Bank, 634 P.2d 1036 (Colo. App. 1981).

If scope and interpretation of insurance policy language, which is question of law, is dispositive of claim, summary judgment of dismissal is justified. W. Am. Ins. Co. v. Baumgartner, 812 P.2d 696 (Colo. App. 1990), cert. granted, judgment vacated, and case remanded to the Colorado court of appeals for reconsideration in light of Hecla Min. Co. v. New Hampshire Ins. Co., 811 P.2d 1083 (Colo. 1991), 812 P.2d 654 (Colo. 1991).

Summary judgment on claim of negligent infliction of emotional distress proper where no proof of physical injury and plaintiff not in zone of danger. Card v. Blakeslee, 937 P.2d 846 (Colo. App. 1996).

E. When Motion Should be Denied.

Trial courts should not grant motions or deny a trial where there is the slightest doubt. Trial courts should exercise great care in granting motions for summary judgment, and should not deny a litigant a trial where there is the slightest doubt as to the facts. Smith v. Mills, 123 Colo. 11, 225 P.2d 483 (1950).

Factual question raised by expert precludes summary judgment. Where a plaintiff in an automobile product liability action presents an expert who raises a factual question about the reasonableness of the defendant manufacturer's design strategies, the drastic remedy of summary judgment is improper, and the issue of whether the design of the car involved in the accident unreasonably increased the risks of injury by collision should be presented to the jury. Roberts v. May, 41 Colo. App. 82, 583 P.2d 305 (1978); Camacho v. Honda Motor Co., Ltd., 741 P.2d 1240 (Colo. 1987), cert. dismissed, 485 U.S. 901, 108 S. Ct. 1067, 99 L. Ed. 2d 229 (1988).

Where a plaintiff in a medical malpractice action presents an expert who raises a factual question about the probability of a heart attack, the issue should be presented to the jury. Sharp v. Kaiser Found. Health Plan, 710 P.2d 1153 (Colo. App. 1985), aff'd, 741 P.2d 714 (Colo. 1987).

A litigant is entitled to have disputed facts determined by trial, and it is only in the clearest of cases, where no doubt exists concerning the facts, that a summary judgment is war-

ranted. Moses v. Moses, 180 Colo. 397, 505 P.2d 1302 (1973).

It was error for trial court to grant summary judgment when a material question of fact existed with respect to whether petitioner was denied the opportunity to call a witness with information relevant to his defense. People v. Diaz, 862 P.2d 1031 (Colo. App. 1993).

Potential existence of conspiracy to defraud bankrupt company's judgment creditor should have precluded issuance of summary judgment. Magin v. DVCO Fuel Sys. Inc., 981 P.2d 673 (Colo. App. 1999).

If any doubt resides in the mind of the court after a consideration of the motion, its resolution must be against the motion. O'Herron v. State Farm Mut. Auto. Ins. Co., 156 Colo. 164, 397 P.2d 227 (1964).

If reasonable persons might reach different conclusions or might draw different inferences from uncontroverted facts, summary judgment should be denied. Halsted v. Peterson, 797 P.2d 801 (Colo. App. 1990), rev'd on other grounds, 829 P.2d 373 (Colo. 1992).

Because reasonable persons could disagree as to whether any reasonable use exists for property rezoned from light industrial to agricultural use, summary judgment is not appropriate. Jafay v. Bd. of County Comm'rs of Boulder County, 848 P.2d 892 (Colo. 1993).

Summary judgment should not be granted in case of doubt. Abrahamsen v. Mountain States Tel. & Tel. Co., 177 Colo. 422, 494 P.2d 1287 (1972).

Even where it is extremely doubtful that a genuine issue of fact exists, summary judgment is not appropriate. Abrahamsen v. Mountain States Tel. & Tel. Co., 177 Colo. 422, 494 P.2d 1287 (1972).

The question of foreseeability in the context of the legal issue of duty remains a disputed factual issue, if differing factual inferences may be drawn from the evidence, making the entry of summary judgment improper. Sewell v. Pub. Serv. Co. of Colo., 832 P.2d 994 (Colo. App. 1991).

Where there exists a genuine issue as to a very material fact which must be determined, a motion for summary judgment should be denied. Tamblyn v. City & County of Denver, 118 Colo. 191, 194 P.2d 299 (1948).

Where there is an issue as to whether a doctor, who admittedly knew of the high risk of scarring to a particular patient, knowingly concealed that information from the patient, a material issue of fact remains such that summary judgment is inappropriate. Brodie v. Mastro, 638 P.2d 800 (Colo. App. 1981).

Summary judgment may not be entered if genuine issues of material fact remain for resolution. Smith v. Hoffman, 656 P.2d 1327 (Colo. App. 1982).

It is elementary that summary judgment may not be granted where unresolved genuine issues of material facts remain for determination. Rogerson v. Rudd, 140 Colo. 548, 345 P.2d 1083 (1959).

A trial court acts precipitously in granting a motion for summary judgment where there are genuine issues as to several material facts. Pritchard v. Temple, 168 Colo. 555, 452 P.2d 381 (1969).

Where issues remain to be adjudicated, it is error to enter a summary judgment. Harvey v. Morris, 148 Colo. 489, 367 P.2d 352 (1961).

Where it is perfectly clear from the pleadings and interrogatories and the answers thereto that there is a genuine issue, it is error to enter summary judgment. McCormick v. Diamond Shamrock Corp., 175 Colo. 406, 487 P.2d 1333 (1971).

Where evidence showed that management fired whistle blower in retaliation for whistle blowing, grant of summary judgment dismissing wrongful discharge claim reversed and remanded despite employer's conflicting evidence. Webster v. Konczak Corp., 976 P.2d 317 (Colo. App. 1998).

Where an issue of fact is raised which is not determinable on affidavits and answers to interrogatories propounded, a motion for summary judgment should be denied. Hatfield v. Barnes, 115 Colo. 30, 168 P.2d 552 (1946).

Summary judgment is usually inappropriate in cases dealing with potentially unconstitutional motivations. Because evidence concerning motive is almost always subject to a variety of conflicting interpretations, a full trial on the merits is normally the only way to separate permissible motivations from those that merely mask unconstitutional actions. Ridgeway v. Kiowa Sch. Dist. C-2, 794 P. 2d 1020 (Colo. App. 1989).

In light of the various defenses in defendants' answer which raise genuine issues of material fact, a trial court is correct in denying the plaintiff's motion for summary judgment against the defendants. Credit Inv. & Loan Co. v. Guaranty Bank & Trust Co., 166 Colo. 471, 444 P.2d 633 (1968).

Defenses based on business judgment rule and denial of harm to corporation precluded summary judgment in case involving unlawful distribution of corporate assets. Such assertions only emphasize that there are disputed issues of material fact. Polk v. Hergert Land & Cattle Co., 5 P.3d 402 (Colo. App. 2000).

When defendants' motion for summary judgment is overruled, their admission of facts under their legal theory terminates, and it is error for a trial court to give any consideration thereto in connection with its determination of plaintiff's motion. This leaves plaintiff's motion for summary judgment completely unsupported by anything except such as it had itself placed

in the record, and which definitely discloses uncertainty of fact and disputable issues for trial. Morlan v. Durland Trust Co., 127 Colo. 5, 252 P.2d 98 (1952).

It does not follow that, merely because each side moves for a summary judgment, there is no issue of material fact, for, although a defendant may, on his own motion, assert that, accepting his legal theory, the facts are undisputed, he may be able and should always be allowed to show that, if plaintiff's legal theory be adopted, a genuine dispute as to a material fact exists. Morlan v. Durland Trust Co., 127 Colo. 5, 252 P.2d 98 (1952).

The fact that each side in moving for summary judgment in his or its favor, respectively, asserts that there is no genuine issue as to any material fact does not necessarily make it so, and does not bar the court from determining otherwise. Morlan v. Durland Trust Co., 127 Colo. 5, 252 P.2d 98 (1952).

An arbitration clause providing arbitration of certain issues only does not mean that the parties cannot agree to submit to arbitration other matters in dispute between them, even though the contract does not require it, and so, where it is impossible to tell whether the defenses were actually submitted for arbitration, a trial court is in error in summarily striking these defenses from the answer filed in the arbitration proceeding and on such basis improvidently granting summary judgment. Int'l Serv. Ins. Co. v. Ross, 169 Colo. 451, 457 P.2d 917 (1969).

Summary judgment improper if record inadequate. Where the record has not been adequately developed on a material factual issue, summary judgment is not proper. Moore v. 1600 Downing St., Ltd., 668 P.2d 16 (Colo. App. 1983); Mt. Emmons Mining Co. v. Town of Crested Butte, 690 P.2d 231 (Colo. 1984).

Where it could not be said as a matter of law that plaintiffs' remedy at law would be adequate to compensate them for the loss suffered, the granting of summary judgment was improper. Benson v. Nelson, 725 P.2d 71 (Colo. App. 1986).

Where the moving party filed only a general denial to plaintiff's complaint, summary judgment was improper. Shaw v. Gen. Motors Corp., 727 P.2d 387 (Colo. App. 1986).

Summary judgment in an action for principal and interest due on promissory notes was improper where the determination as to the appropriate primary interest rate could not be made on the face of promissory notes, the motion lacked supporting documentation regarding such rate, and the moving party's supporting brief stating the amount claimed as interest was not verified. Fed. Deposit Ins. Corp. v. Cassidy, 779 P.2d 1382 (Colo. App. 1989).

Summary judgment was improperly granted when ambiguity in preemptive clause in contract could be resolved by extrinsic evidence showing the intent of the parties and that parties understood their rights and obligations under said clause. Polemi v. Wells, 759 P.2d 796 (Colo. App. 1988).

Reinsurers were not entitled to summary judgment based only on interinsurance exchange's inability to produce actual reinsurance certificates, where affidavit and computer printout indicating serial number of each reinsurance certificate, name of subscriber, period of insurance, and premium charged were based on admissible facts. Benham v. Pryke, 703 P.2d 644 (Colo. App. 1985), rev'd on other grounds, 744 P.2d 67 (Colo. 1987).

A question of fact remained on claim to quiet title where § 38-41-116 allowed purchaser to bring an action to enforce any right or title he may have under a contract within ten years from the date of delivery of general warranty deed and parties intent concerning when delivery of the deed was to take place required determination. Bent v. Ferguson, 791 P.2d 1241 (Colo. App. 1990).

A question of fact remained on claim concerning entitlement to royalty payments from the production and sale of natural gas. Westerman v. Rogers, 1 P.3d 228 (Colo. App. 1999).

F. Responsibility of Court.

In passing upon a motion for summary judgment, it is no part of the court's function to decide issues of fact but solely to determine whether there is an issue of fact to be tried. Morlan v. Durland Trust Co., 127 Colo. 5, 252 P.2d 98 (1952).

Any issue of fact must be determined by the court or jury at a trial and should not be determined by the court on a motion for summary judgment. Primock v. Hamilton, 168 Colo. 524, 452 P.2d 375 (1969); Meyer v. Schwartz, 638 P.2d 821 (Colo. App. 1981).

The fact that both parties make motions for summary judgment, and each contends in support of his respective motion that no genuine issue of fact exists, does not require the court to rule that no fact issue exists. Each, in support of his own motion, may be willing to concede certain contentions of his opponent, which concession, however, is only for the purpose of the pending motion. If the motion is overruled, the concession is no longer effective. Appellants' concession that no genuine issue of fact existed was made in support of their own motion for summary judgment. The concession does not continue over into the supreme court's separate consideration of appellee's motion for summary judgment in his behalf after appellants' motion was overruled. Morlan v. Durland Trust Co., 127 Colo. 5, 252 P.2d 98 (1952).

It was an abuse of discretion for trial court to fail to rule on the defendants' motion for extension of time until the date summary judgment motion in favor of plaintiff was granted, at which time, the court denied defendants' motion for extension of time. Pursell v. Hull, 708 P.2d 490 (Colo. App. 1985).

Trial court did not abuse discretion by ruling on summary judgment motion when motion to compel was pending. Card v. Blakeslee, 937 P.2d 846 (Colo. App. 1996).

G. Review.

On appeal of a grant of summary judgment, where there was no testimony taken in the case, the reviewing court must determine the posture of the case as it went before the trial judge on the basis of the pleadings, the affidavits, interrogatories, and answers thereto, and the depositions which are in the record. McKinley Constr. Co. v. Dozier, 175 Colo. 397, 487 P.2d 1335 (1971).

Following denial of motion for summary judgment, failure to renew motion at the close of the evidence operates as a waiver of the summary judgment motion and precludes appellate review. Feiger, Collison & Killmer v. Jones, 926 P.2d 1244 (Colo. 1996).

A stipulation that, if review is sought by any party, the procedure of considering and determining the legal issue upon a motion for summary judgment will not be assigned as a ground of error does not preclude plaintiffs in error from urging that the contents of a deposition could not be used on review as a basis for determining legality of a trust agreement. Denver Nat'l Bank v. Brecht, 137 Colo. 88, 322 P.2d 667 (1958).

Review of judgment granting a motion for summary judgment is de novo. Aspen Wilderness Workshop, Inc. v. Colo. Water Conservation Bd., 901 P.2d 1251 (Colo. 1995); Brawner-Ahlstrom v. Husson, 969 P.2d 738 (Colo. App. 1998); Van Alstyne v. Housing Auth. of City of Pueblo, 985 P.2d 97 (Colo. App. 1999); A.C. Excavating v. Yacht Club II Homeowners Ass'n, 114 P.3d 862 (Colo. 2005); Meyerstein v. City of Aspen, __ P.3d __ (Colo. App. 2011).

An order denying motion for summary judgment is interlocutory and not subject to review. Trans Cent. Airlines v. McBreen & Assocs., 31 Colo. App. 71, 497 P.2d 1033 (1972); Manuel v. Ft. Collins Newspapers, Inc., 631 P.2d 1114 (Colo. 1981); Banyai v. Arruda, 799 P.2d 441, (Colo. App. 1990); Feiger, Collison & Killmer v. Jones, 926 P.2d 1244 (Colo. 1996).

No review of summary judgment denial after trial on merits. A trial court's denial of a motion for summary judgment may not be considered on appeal from a final judgment entered after a trial on the merits. Manuel v. Fort Collins Newspapers, Inc., 631 P.2d 1114 (Colo. 1981).

In order to preserve an issue raised by summary judgment for appeal, the party asserting the argument must make a motion for directed verdict or for judgment notwithstanding the verdict. Failure to do so operates as an abandonment, and therefore a waiver, and the issue cannot then be reviewed on appeal. Feiger, Collison & Killmer v. Jones, 926 P.2d 1244 (Colo. 1996); Karg v. Mitchek, 983 P.2d 21 (Colo. App. 1998).

In reviewing the propriety of a summary judgment, an appellate court must apply the principle that the moving party has the burden of establishing the lack of a triable factual issue, and all doubts as to the existence of such an issue must be resolved against the moving party. Churchey v. Adolph Coors Co., 759 P.2d 1336 (Colo. 1988); Peterson v. Halsted, 829 P.2d 373 (Colo. 1992); Graven v. Vail Assocs., Inc., 888 P.2d 310 (Colo. App. 1994).

Section (c) is the applicable standard of review to be applied by an administrative law judge when ruling upon a motion for summary judgment in a workers' compensation claim. Fera v. Indus. Claim Appeals Office, 169 P.3d 231 (Colo. App. 2007).

H. Illustrations.

If differing factual inferences may be drawn from the evidence, the question of foreseeability remains a disputed factual issue, and the entry of summary judgment in such circumstances is improper. Sewell v. Pub. Serv. Co. of Colo., 832 P.2d 994 (Colo. App. 1991).

Section (c) authorizes a trial court to enter a decree for specific performance of a contract upon motion for a summary judgment over the objection that a summary judgment can only be granted in an action at law, as technically distinguished from an equitable proceeding. Linch v. Game & Fish Comm'n, 124 Colo. 79, 234 P.2d 611 (1951).

Court erred in granting summary judgment in negligence case where evidence presented material issue of fact as to whether a defendant water district assumed a duty to have water available for the plaintiff's lumberyard located outside of said district's boundaries; the water district placed a fire hydrant at the said lumberyard upon the fire district's request specifically for the protection of the lumber company. Wheatridge Lumber Co. v. Valley Water Dist., 790 P.2d 874 (Colo. App. 1989).

Generally, the issue of a party's intent is a question of fact, and is not an appropriate issue for summary disposition. Wolther v. Schaarschmidt, 738 P.2d 25 (Colo. App. 1986).

Whether an actor owes a duty of due care to another is a question of law for resolution

by the court. Sewell v. Pub. Serv. Co. of Colo., 832 P.2d 994 (Colo. App. 1991).

A motion for summary judgment based upon an assertion of the lack of existence of a duty of due care is to be subjected to the same standard as is any other motion for summary judgment; hence, if the record evidence is insufficient to allow the court to determine the question of foreseeability as a matter of law, such motion must be denied. Sewell v. Pub. Serv. Co. of Colo., 832 P.2d 994 (Colo. App. 1991).

Material question of fact whether employee hired for indefinite term could be terminated at will precluded entry of summary judgment for employee in wrongful discharge action, where employee manual outlined termination procedures that employer proposed to follow, and employee allegedly received copy of manual either at start or during course of employment. Continental Air Lines, Inc. v. Keenan, 731 P.2d 708 (Colo. 1987).

Summary judgment was properly denied where plaintiff's evidence failed to show the existence of a right of employment or protected contractual rights that were violated by the defendant's action and the evidence was insufficient to overcome the defendants' claim of qualified immunity. Wilkerson v. State, 830 P.2d 1121 (Colo. App. 1992).

Defendant entitled to summary judgment on claim of negligent hiring since evidence was insufficient to satisfy the test set forth in Connes v. Molalla Transport Sys., Inc. Spencer v. United Mortg. Co., 857 P.2d 1342 (Colo. App. 1993).

A living trust is valid and binding as against a motion for summary judgment where such does not disclose within its four corners that it is sham or an abortive attempt on the part of a settlor to evade the statute of wills. Denver Nat'l Bank v. Brecht, 137 Colo. 88, 322 P.2d 667 (1958).

Where trial court found that failure to pay entire bonus as specified in top lease of mineral estate defeated the entire agreement, there was no genuine issue of material fact and the trial court properly quieted title to mineral interest in plaintiffs. Sohio Petroleum Co. v. Grynberg, 757 P.2d 1125 (Colo. App. 1988).

Issue of whether contract is adhesion contract does not preclude entry of summary judgment in the absence of any genuine issue of material fact. Jones v. Dressel, 623 P.2d 370 (Colo. App. 1981).

Summary judgment was appropriate in case involving dismissal, for academic reasons, of student from university clinical program where the evidence submitted detailed the grounds for discharge and no evidence was submitted that the procedure applied departed from accepted academic norms. Dillingham v. Univ. of Colo., Bd. of Regents, 790 P.2d 851 (Colo. App. 1989).

Summary judgment was appropriate in case involving failing grade of student in pediatrics course necessary to complete junior year where student failed to demonstrate that failing grade was given for any reason other than his unsatisfactory academic performance. Davis v. Regis Coll., Inc., 830 P.2d 1098 (Colo. App. 1991).

Civil service commission was entitled to judgment as a matter of law restricting access to examination results where person requesting access presented no evidence disputing the factual issue of whether substantial injury to the public interest would result if the information were not restricted under § 24-72-204 (6). Civil Serv. Comm'n v. Pinder, 812 P.2d 645 (Colo. 1991).

Where there is no disputed material issue of fact regarding insurance company's duty to defend individual in a civil action because the claims are cast entirely within the insurance policy exclusions, summary judgment is appropriate. Nikolai v. Farmers Alliance Mut. Ins., 830 P.2d 1070 (Colo. App. 1991).

Summary judgment is appropriate where insurance company met its burden by submitting affidavits establishing that it did not engage in intentional conduct probative of waiver and insured failed to raise a genuine issue of disputed fact by refuting the showing. Nikolai v. Farmers Alliance Mut. Ins. Co., 830 P.2d 1070 (Colo. App. 1991).

Summary judgment improperly granted when there existed a material question of fact as to whether petitioner's use of or presence in vehicle was causally related to injuries incurred and therefore covered under automobile insurance policy. Cung La v. State Farm Auto. Ins. Co., 830 P.2d 1007 (Colo. 1992).

Summary judgment improperly granted when the doctrine of collateral estoppel improperly applied. Bebo Constr. Co. v. Mattox & O'Brien, 990 P.2d 78 (Colo. 1999).

Record established defendant's entitlement to summary judgment on claims of trespass and breach of deed of trust and plaintiff not entitled to compensation for items allegedly stolen by defendant's agent since agent was not acting within the scope of his employment at the time of the theft. Spencer v. United Mortg. Co., 857 P.2d 1342 (Colo. App. 1993).

Defendant entitled to summary judgment on claim for outrageous conduct where plaintiff failed to establish a sufficient basis for such claim. Spencer v. United Mortg. Co., 857 P.2d 1342 (Colo. App. 1993).

I. Continuance for Discovery.

Under section (f), an abuse of discretion may result when the court refuses to grant a party a reasonable continuance to permit use

of discovery procedures as provided by the rules of civil procedure and when it is premature to grant a motion for summary judgment. Miller v. First Nat. Bank, 156 Colo. 358, 399 P.2d 99 (1965); Holland v. Bd. of County Comm'rs, 883 P.2d 500 (Colo. App. 1994).

Where plaintiff had a reasonable period within which to conduct discovery and was given reasonable notice that no further extensions of time would be granted, summary judgment was proper. Holland v. Bd. of County Comm'rs, 883 P.2d 500 (Colo. App. 1994).

It is not an abuse of discretion to deny a section (f) request where movant has failed to demonstrate that the proposed discovery is necessary and could produce facts that would preclude summary judgment. Henisse v. First Transit, Inc., 220 P.3d 980 (Colo. App. 2009), rev'd on other grounds, 247 P.3d 577 (Colo. 2011).

V. CASE NOT FULLY ADJUDICATED.

Under section (d) of this rule, a court may grant a partial summary judgment as to material facts existing without substantial controversy and reserve disputed facts for subsequent proceedings. City of Westminster v. Church, 167 Colo. 1, 445 P.2d 52 (1968); Hauser v. Rose Health Care Sys., 857 P.2d 524 (Colo. App. 1993).

By its terms, section (d) involves an adjudication of less than the entire action, and consequently, a disposition pursuant to this rule does not purport to be a final judgment. Instead, a trial court remains free to reconsider an earlier partial summary judgment ruling absent the entry of judgment under C.R.C.P. 54(b). Forbes v. Goldenhersh, 899 P.2d 246 (Colo. App. 1994).

Where summary judgment order reserved until trial on all issues other than the amount of admitted liability, and one of these issues would be the amount of interest to be awarded, plaintiff properly raised the question of interest in its motion to amend the judgment. Kwal Paints, Inc. v. Travelers Indem. Co., 34 Colo. App. 74, 525 P.2d 471 (1974), aff'd, 189 Colo. 66, 536 P.2d 1136 (1975).

Partial summary judgment affirmed. Certified Indem. Co. v. Thompson, 180 Colo. 341, 505 P.2d 962 (1973); Werkmeister v. Robinson Dairy, Inc., 669 P.2d 1042 (Colo. App. 1983).

Court abused its discretion in refusing to reconsider and vacate partial summary judgment in favor of one of several defendants where, following defendant's belated production of a key document, an issue as to a material fact was seen to arise. Halter v. Waco Scaffolding & Equip. Co., 797 P.2d 790 (Colo. App. 1990).

VI. FORM OF AFFIDAVITS.

This rule permits a motion for a summary judgment with or without supporting affidavits. O. C. Kinney, Inc. v. Paul Hardeman, Inc., 151 Colo. 571, 379 P.2d 628 (1963); Johnson v. Mountain Sav. & Loan Ass'n, 162 Colo. 474, 426 P.2d 962 (1967).

Although the party moving for a summary judgment has the burden of showing that he is entitled to judgment, still, it has always been perilous for an opposing party neither to proffer any evidentiary explanatory material nor file a section (f) affidavit. Sullivan v. Davis, 172 Colo. 490, 474 P.2d 218 (1970).

Although it may be risky for a party not to respond to a motion for summary judgment, the absence of a response does not relieve the moving party of its burden to establish that summary judgment is appropriate. USA Leasing, Inc. v. Montelongo, 25 P.3d 1277 (Colo. App. 2001).

Where an affidavit is filed by plaintiff's attorney rather than a witness and does not affirmatively show that the attorney has personal knowledge of the relevant facts, the requirements of section (e) are not met. USA Leasing, Inc. v. Montelongo, 25 P.3d 1277 (Colo. App. 2001).

An affidavit that sets forth only a conclusory assertion without factual allegations to support it does not meet the requirements of section (e). USA Leasing, Inc. v. Montelongo, 25 P.3d 1277 (Colo. App. 2001).

A litigant by merely asserting a fact, without any evidence to support it, cannot avoid a summary disposition of his case. Norton v. Dartmouth Skis, Inc., 147 Colo. 436, 364 P.2d 866 (1961).

Particularly on such issues as good faith, intent, and purpose, the bald declaration of a party by affidavit is not sufficient to resolve the issue in the face of a pleaded denial, and a motion for summary judgment should be denied. Hatfield v. Barnes, 115 Colo. 30, 168 P.2d 552 (1946).

A "genuine issue" cannot be raised by counsel simply by means of argument, be it before the trial court or on appeal; certainly the spirit of this rule suggests that if a party really contends that the area in question has in fact been roped off by proper authorities he has the duty to inform the trial court in the manner provided by this rule concerning summary judgments, and not to merely attempt to present the issue by hypothetical argument. Sullivan v. Davis, 172 Colo. 490, 474 P.2d 218 (1970).

A "genuine issue" cannot be raised by counsel simply by means of argument. People in Interest of F.L.G., 39 Colo. App. 194, 563 P.2d 379 (1977).

Argument of counsel alone cannot create a factual issue. Ginter v. Palmer & Co., 39 Colo. App. 221, 566 P.2d 1358 (1977), rev'd on other grounds, 196 Colo. 203, 585 P.2d 583 (1978).

The purpose of a motion for summary judgment would be defeated if at a hearing on such

motion oral argument and the taking of testimony were allowed as a matter of right. People in Interest of F.L.G., 39 Colo. App. 194, 563 P.2d 379 (1977).

In a breach of contract proceeding, a party seeking damages for future lost profits must establish with reasonable, but not necessarily mathematical, certainty both the fact of the injury and the amount of the loss. Terrones v. Tapia, 967 P.2d 216 (Colo. App. 1998).

In summary judgment proceeding in a breach of contract action, a party seeking damages for future lost profits must present sufficient evidence to compute a fair approximation of future loss. Terrones v. Tapia, 967 P.2d 216 (Colo. App. 1998).

A court may enter summary judgment precluding recovery for lost profits if a plaintiff offers only speculation or conjecture to establish damages. Terrones v. Tapia, 967 P.2d 216 (Colo. App. 1998).

When a movant makes out a convincing showing that genuine issues of fact are lacking, it is required that the adversary adequately demonstrate by receivable facts that a real, not formal, controversy exists, and, of course, he does not do that by mere denial or holding back evidence. Sullivan v. Davis, 172 Colo. 490, 474 P.2d 218 (1970); Guerrero v. City of Colo. Springs, 507 P.2d 881 (Colo. App. 1972).

Once a movant makes a convincing showing that genuine issues are lacking, section (e) requires that the opposing party adequately demonstrate by relevant and specific facts that a real controversy exists. Hadley v. Moffat County Sch. Dist. Re-1, 641 P.2d 284 (Colo. App. 1981); McLaughlin v. Allen, 689 P.2d 1169 (Colo. App. 1984).

Where plaintiffs' affidavits failed to reveal that any discovery relating to plaintiffs' allegations would have resulted in any facts that would preclude summary judgment, trial court did not abuse its discretion in suspending discovery under section (f). Sundheim v. Bd. of County Comm'rs of Douglas County, 904 P.2d 1337 (Colo. App. 1995), aff'd, 926 P.2d 545 (Colo. 1996).

Where a plaintiff offers no evidence to contradict an affirmative showing of nonliability made by defendants in support of their motion for summary judgment, nor did the plaintiff show that any other evidence he might have produced at trial would contradict the evidence, a trial court has no alternative but to conclude that there is no genuine issue of fact upon which the defendants could be found liable, and it properly grants their motions for summary judgment. Guerrero v. City of Colo. Springs, 507 P.2d 881 (Colo. App. 1972).

Where a defendant asserts a counterclaim and plaintiff denies the allegation in a reply, but does not file an affidavit denying such, the plaintiff is not entitled to summary judgment. McKinley Constr. Co. v. Dozier, 175 Colo. 395, 487 P.2d 1335 (1971).

A party is not compelled to try his case on affidavits with no opportunity to cross-examine affiants. Hatfield v. Barnes, 115 Colo. 30, 168 P.2d 552 (1946); Parrish v. De Remer, 117 Colo. 256, 187 P.2d 597 (1946); Primock v. Hamilton, 168 Colo. 524, 452 P.2d 375 (1969).

Where affidavits show conflict, there is a genuine issue of material fact which should be determined by a fact-finding body after both parties have presented evidence in support of their respective positions. McKinley Constr. Co. v. Dozier, 175 Colo. 397, 487 P.2d 1335 (1971).

This rule provides for sworn or certified copies of all pertinent papers which are referred to in the affidavits to accompany the motion. Johnson v. Mountain Sav. & Loan Ass'n, 162 Colo. 474, 426 P.2d 962 (1967).

While technically it is an error not to have certified the papers attached to such motion, one waives any objection to the lack of certification by their reliance upon some of these exhibits as bases for their position and for their appeal. Johnson v. Mountain Sav. & Loan Ass'n, 162 Colo. 474, 426 P.2d 962 (1967).

An affidavit of counsel which only recites that the attached documents are certified copies of a court judgment does comply with the provisions of C.R.C.P. 59(e) (now 59(a)(4)). Kaminsky v. Kaminsky, 145 Colo. 492, 359 P.2d 675 (1961).

Single purpose affidavit does not violate rule of "personal knowledge". An affidavit of counsel which serves the single purpose of placing before the court certified copies of relevant documents does not violate the requirements of the rule that affidavits be made on "personal knowledge". Kaminsky v. Kaminsky, 145 Colo. 492, 359 P.2d 675 (1961).

Certified court records in and of themselves constitute a sufficient affidavit in support of a motion for summary judgment. Kaminsky v. Kaminsky, 145 Colo. 492, 359 P.2d 675 (1961).

Court cannot consider files, records, and other documents in prior case involving another party in the same manner. Parrish v. De Remer, 117 Colo. 256, 187 P.2d 597 (1947).

Mere allegations of fraudulent concealment insufficient to establish genuine issue of fact. Where the plaintiff had neither pleaded nor proved that the defendant was connected with or responsible for the non-availability to her of her hospital records, in the context of the defendant's motion for summary judgment, therefore, the plaintiff's "mere allegations" of fraudulent concealment by the defendant were insufficient to set up a genuine issue of fact as to the defendant's asserted fraudulent acts and, accordingly, as to the equitable estoppel urged by the plaintiff. Mishek v. Stanton, 200 Colo. 514, 616 P.2d 135 (1980).

Affidavit containing hearsay meets requirements of this rule since hearsay would be admissible in court under exception to hearsay rule. K.H.R. by and through D.S.J. v. R.L.S., 807 P.2d 1201 (Colo. App. 1990).

Amendment of complaint by argument and affidavit. When there are allegations in a complaint and facts appearing in an affidavit which may be construed as supporting the theories of estoppel and waiver, and these theories are argued to the trial court, although the theories were not specifically alleged in the complaint, the trial court must treat the complaint as amended for purposes of considering a motion for summary judgment. Discovery Land & Dev. Co. v. Colo.-Aspen Dev. Corp., 40 Colo. App. 292, 577 P.2d 1101 (1977).

Failure to state admissible facts in affidavit may justify summary judgment. A failure to state admissible facts in the affidavit, based on the affiant's personal knowledge, may justify the court in entering summary judgment for the opposing party. In re Estate of Abbott, 39 Colo. App. 536, 571 P.2d 311 (1977).

Thus, summary judgment was proper where discrepancies were inadmissible to create a disputed issue of fact. Affidavits based on inadmissible hearsay are insufficient for purposes of summary judgment determination. Henderson v. Master Klean Janitorial, Inc., 70 P.3d 612 (Colo. App. 2003).

Depositions held insufficient basis for summary judgment. Where none of the depositions offered in support of a motion for summary judgment show that any of the persons deposed had personal knowledge of actions being sued on or of the amount or details of the claimed losses, the testimony in the depositions is not admissible and the depositions cannot stand as the basis for the summary judgment. Nat'l Sur. Corp. v. Citizens State Bank, 651 P.2d 460 (Colo. App. 1982).

Court's ruling without oral argument not denial of due process. Defendant was not denied due process of law by the fact that the court ruled on the motion for summary judgment without oral argument. People in Interest of F.L.G., 39 Colo. App. 194, 563 P.2d 379 (1977).

Due process does not include the right to oral argument on a motion for summary judgment, especially where the party against whom the motion is directed had ample opportunity to file any affidavits or legal arguments he might have had during the time between the filing of the motion and the date for hearing. People in Interest of F.L.G., 39 Colo. App. 194, 563 P.2d 379 (1977).

Neither the law of the case doctrine nor collateral estoppel precluded plaintiffs from contesting an issue addressed in first motion for summary judgment from submitting affidavits in opposition to same issue in a subsequent motion for summary judgment. Stotler v. Geibank Indus. Bank, 827 P.2d 608 (Colo. App. 1992).

Applied in Commercial Indus. Const., Inc. v. Anderson, 683 P.2d 378 (Colo. App. 1984); Wasalco, Inc. v. El Paso County, 689 P.2d 730 (Colo. App. 1984); Conrad v. Imatani, 724 P.2d 89 (Colo. App. 1986); People v. Hernandez and Assocs., Inc., 736 P.2d 1238 (Colo. App. 1986); McDaniels v. Laub, 186 P.3d 86 (Colo. App. 2008).

VII. WHEN AFFIDAVITS UNAVAILABLE.

A trial court abuses its discretion in refusing to grant one a reasonable continuance to permit utilization of the discovery procedures provided by the rules of civil procedure, and it is precipitous and premature in granting a motion for summary judgment. Miller v. First Nat'l Bank, 156 Colo. 358, 399 P.2d 99 (1965).

Where responses to discovery, although not timely filed, demonstrate a disputed issue concerning material fact, a motion for summary judgment is improper. Moses v. Moses, 180 Colo. 398, 505 P.2d 1302 (1973).

By not answering requests for admissions in a summary judgment motion, the relevant subject matters of the requests for admissions are deemed admitted under C.R.C.P. 36. Cox v. Pearl Inv. Co., 168 Colo. 67, 450 P.2d 60 (1969).

Trial court does not err when it rules on motion ex parte unless a party requests oral argument or a continuance. People ex rel. Garrison v. Lamm, 622 P.2d 87 (Colo. App. 1980).

Whether to grant a request for discovery pursuant to section (f) lies within the discretion of the trial court. It is not an abuse of discretion to deny a section (f) discovery request if the movant has failed to demonstrate that the proposed discovery is necessary and could produce facts that would preclude summary judgment. A-1 Auto Repair & Detail v. Bilunas-Hardy, 93 P.3d 598 (Colo. App. 2004).

VIII. FORM OF JUDGMENT.

Findings of fact and conclusions of law are not required when ruling on a motion under this rule or under C.R.C.P. 12. United Bank of Denver v. Ferris, 847 P.2d 146 (Colo. App. 1992).

Absent circumstances not present in the case, the denial of a motion for summary judgment may not be considered on appeal from a final judgment after trial on the merits. Manuel v. Fort Collins Newspapers, Inc., 631 P.2d 1114 (Colo. 1981); Grogan v. Taylor, 877 P.2d 1374 (Colo. App. 1993); Fire Ins. Exch. v. Rael by Rael, 895 P.2d 1139 (Colo. App. 1995).

Rule 57. Declaratory Judgments

(a) Power to Declare Rights, etc.; Force of Declaration. District and superior courts within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceedings shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

(b) Who May Obtain Declaration of Rights. Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

(c) Contract Construed Before Breach. A contract may be construed either before or after there has been a breach thereof.

(d) For What Purposes Interested Person May Have Rights Declared. Any person interested as or through an executor, administrator, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust, or of the estate of a decedent, an infant, lunatic, or insolvent, may have a declaration of rights or legal relations in respect thereto:

(1) To ascertain any class of creditors, devisees, legatees, heirs, next of kin or other; or

(2) To direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity; or

(3) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.

(e) Not a Limitation. The enumeration in sections (b), (c), and (d) of this Rule does not limit or restrict the exercise of the general powers conferred in section (a) of this Rule, in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty.

(f) When Court May Refuse to Declare Right. The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

(g) Review. All orders, judgments, and decrees under this Rule may be reviewed as other orders, judgments, and decrees.

(h) Further Relief. Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application is deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith.

(i) Issues of Fact. When a proceeding under this Rule involves the determination of an issue of fact, such issues may be tried and determined in the same manner as issues of facts are tried and determined in other actions in the court in which the proceeding is pending.

(j) Parties; Municipal Ordinances. When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and is entitled to be heard, and if the statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general of the state shall also be served with a copy of the proceeding and is entitled to be heard.

(k) Rule is Remedial; Purpose. This Rule is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and is to be liberally construed and administered.

(l) Interpretation and Construction. This Rule shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it,

and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgment and decrees.

(m) Trial by Jury; Remedies; Speedy Hearing. Trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

Cross references: For declaratory judgments, see article 51 of title 13, C.R.S.; for jury trials of right, see C.R.C.P. 38; for trial by jury or by the court, see C.R.C.P. 39.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, "Declaratory Judgments in Colorado", see 6 Dicta 20 (Feb. 1929). For article, "A Decade of Colorado Law: Conflict of Laws, Security, Contracts and Equity", see 23 Rocky Mt. L. Rev. 247 (1951). For article, "Judgment: Rules 54-63", see 23 Rocky Mt. L. Rev. 581 (1951). For article, "One Year Review of Cases on Contracts", see 33 Dicta 57 (1956). For article, "One Year Review of Civil Procedure", see 34 Dicta 69 (1957). For article, "One Year Review of Criminal Law and Procedure", see 39 Dicta 81 (1962). For comment on Meier v. Schooley appearing below, see 34 Rocky Mt. L. Rev. 414 (1962). For comment, "Pre-Enforcement Judicial Review: CF & I Steel Corp. v. Colorado Air Pollution Control Commission", see 58 Den. L.J. 693 (1981). For article, "Declaratory Judgment Actions to Resolve Insurance Coverage Questions", see 18 Colo. Law. 2299 (1989).

Annotator's note. Since this rule is similar to CSA, C. 93, §§ 78 to 92, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this rule.

The declaratory judgment act is constitutional. San Luis Power & Water Co. v. Trujillo, 93 Colo. 385, 26 P.2d 537 (1933).

The Colorado declaratory judgment act is incorporated in this rule. People ex rel. Inter-Church Temperance Movement v. Baker, 133 Colo. 398, 297 P.2d 273 (1956); State Bd. of Control for State Homes for Aged v. Hays, 149 Colo. 400, 369 P.2d 431 (1962).

Review pursuant to this rule is appropriate where C.R.C.P. 106(a)(4) relief is unavailable because the challenged action is legislative or because review of the record is an insufficient remedy. Grant v. District Court, 635 P.2d 201 (Colo. 1981).

Declaratory relief under this rule is an appropriate means of challenging administrative governmental actions that are not subject to review under C.R.C.P. 106(a)(4). Chellsen v. Pena, 857 P.2d 472 (Colo. App. 1992).

Review pursuant to this rule is appropriate even in the context of a quasi-judicial proceeding where a declaratory judgment is requested and C.R.C.P. 106(a)(4) does not provide an adequate remedy. Constitutional questions and challenges to the overall validity of a statute or ordinance are more properly reviewed under this rule. Native Am. Rights Fund, Inc. v. City of Boulder, 97 P.3d 283 (Colo. App. 2004).

Review under this rule is not available where sufficient review has already been provided under C.R.C.P. 106(a)(4). Denver Ctr. for Performing Arts v. Briggs, 696 P.2d 299 (Colo. 1985); Carney v. Civil Serv. Comm'n, 30 P.3d 861 (Colo. App. 2001).

Plaintiffs' claim for declaratory relief asserting that planning commission did not provide sufficient notice to them of a permit review meeting was properly dismissed under C.R.C.P. 106(b). Because C.R.C.P. 106(a)(4) is the exclusive remedy for reviewing quasi-judicial decisions, all claims that effectively seek such review (whether framed as claims under section (a)(4) of this rule or not) are subject to the 30-day deadline under C.R.C.P. 106(b). Thus, claims for declaratory relief under this rule that seek review of quasi-judicial decisions must be filed within 30 days. JJR 1, LLC v. Mt. Crested Butte, 160 P.3d 365 (Colo. App. 2007).

The granting of declaratory relief is a matter resting in the sound discretion of the trial court and is not precluded even when there is

another adequate remedy. Troelstrup v. District Court, 712 P.2d 1010 (Colo. 1986).

Ordinances legislative in nature are reviewable under this rule. Ordinances establishing general policies, such as a zoning ordinance, even though accompanied by procedures for notice and public hearing, are, when determining the proper procedure for review, legislative in nature and reviewable under this rule when the constitutional application of the ordinance is involved. Margolis v. District Court, 638 P.2d 297 (Colo. 1981).

A zoning ordinance amendment is subject to review pursuant to this rule and is not reviewable pursuant to C.R.C.P. 106(a)(4) where it is an amendment of general application, may be enacted by initiative, and is subject to referendum. Russell v. City of Central, 892 P.2d 432 (Colo. App. 1995).

Although a master plan is ordinarily not reviewable under this rule, the plan is reviewable when it is no longer advisory. Since the plan at issue was adopted as a zoning resolution by the board of county commissioners acting in a legislative capacity, it is no longer advisory. Condiotti v. Bd. of County Comm'rs, 983 P.2d 184 (Colo. App. 1999).

It is permissible to join § 24-4-106 action and action under this rule for purposes of review. Utah Int'l, Inc. v. Bd. of Land Comm'rs, 41 Colo. App. 72, 579 P.2d 96 (1978).

Action under rule attacking constitutionality of administrative regulation not barred as untimely. While agency rules and regulations are indeed reviewable under § 24-4-106 (4), expiration of that section's filing period does not invariably bar as untimely an action under this rule attacking the constitutionality of an administrative regulation promulgated by § 24-4-103 rule-making. Collopy v. Wildlife Comm'n, 625 P.2d 994 (Colo. 1981).

Court lacks subject matter jurisdiction in action for declaratory judgment when plaintiff has not exhausted administrative remedies. Leete v. Bd. of Med. Exam'rs, 807 P.2d 1249 (Colo. App. 1991).

Declaratory judgment is proper procedure for preenforcement challenge to regulation. Declaratory judgment is a proper procedure by which to make a preenforcement challenge to a regulation promulgated by a state agency. CF&I Steel Corp. v. Colo. Air Pollution Control Comm'n, 199 Colo. 270, 610 P.2d 85 (1980).

Action for declaratory judgment is appropriate method for challenging governmental action that is not quasi-judicial and therefore not subject to C.R.C.P. 106(a)(4) review. Russell v. City of Central, 892 P.2d 432 (Colo. App. 1995).

The supreme court will not render an advisory opinion in declaratory judgment actions. Associated Master Barbers, Local 115 v. Journeyman Barbers, Local 205, 132 Colo. 52, 285 P.2d 599 (1955).

There can be no coercive judgment in a proceeding under the declaratory judgment rule. Taylor v. Tinsley, 138 Colo. 182, 330 P.2d 954 (1958).

Declaratory judgment is not the proper remedy to determine status of a person confined in the state penitentiary, the proper remedy being habeas corpus where if warranted a coercive order could be entered. Taylor v. Tinsley, 138 Colo. 182, 330 P.2d 954 (1958).

Court may treat improper petition for a habeas corpus as a petition for declaratory relief to serve the interests of finality and judicial economy. Collins v. Gunter, 834 P.2d 1283 (Colo. 1992).

The only new remedy afforded by the declaratory judgment law is to provide an adequate remedy in cases where no cause of action has arisen authorizing an executory judgment and where no relief is or could be claimed, and, while relief under this statute cannot be had where another established remedy is available, it is not intended to abolish the well-known causes of action, nor does it afford an additional remedy where an adequate one existed before, and it should not be resorted to where there is no necessity for a declaratory judgment. Taylor v. Tinsley, 138 Colo. 182, 330 P.2d 954 (1958).

This act is not intended to repeal the statute prohibiting judges from giving legal advice nor to impose the duties of the profession upon the courts, nor to provide advance judgments as the basis of commercial enterprises, nor to settle mere academical questions. Taylor v. Tinsley, 138 Colo. 182, 330 P.2d 954 (1958).

Where, under the pleadings in an action for a declaratory judgment, no question is presented which is properly cognizable under the uniform declaratory judgments act, the suit should be dismissed. Fairall v. Frisbee, 104 Colo. 553, 92 P.2d 748 (1939).

In a declaratory judgment action in which the court rules against the position of the plaintiff, it should enter a declaratory judgment and not sustain a motion to dismiss. Karsh v. City & County of Denver, 176 Colo. 406, 490 P.2d 936 (1971).

The uniform declaratory judgments act was never intended to be a substitute for, or a short cut to, proper pleading and specifically provides that all issues of fact shall be tried and determined as in other cases. Home Owners' Loan Corp. v. Meyer, 110 Colo. 501, 136 P.2d 282 (1943).

Actions for declaratory judgment were not intended as a substitute for statutory procedure. Shotkin v. Perkins, 118 Colo. 584, 199 P.2d 295, cert. denied, 335 U.S. 888, 69 S. Ct. 230, 93 L. Ed. 426 (1948), reh'g denied, 335 U.S. 909, 69 S. Ct. 409, 93 L. Ed. 442, cert. denied, 338 U.S. 907, 70 S. Ct. 303, 94 L. Ed.

558 (1949), reh'g denied, 338 U.S. 952, 70 S. Ct. 479, 94 L. Ed. 588 (1950); Hays v. City & County of Denver, 127 Colo. 154, 254 P.2d 860 (1953).

Termination of a dissolution proceeding as a result of the death of one of the parties did not render the controversy over the antenuptial agreement moot. Even though the death of one spouse mooted the dissolution proceeding, because the antenuptial agreement had a practical legal effect on an ongoing probate proceeding, the trial court was in error when it ruled the agreement invalid. Schwartz v. Schwartz, 183 P.3d 552 (Colo. 2008).

Applied in State Bd. of Cosmetology v. District Court, 187 Colo. 175, 530 P.2d 1278 (1974); Cline v. City of Boulder, 35 Colo. App. 349, 532 P.2d 770 (1975); City of Arvada v. City & County of Denver, 36 Colo. App. 146, 539 P.2d 1294 (1975); City & County of Denver v. City of Arvada, 192 Colo. 88, 556 P.2d 76 (1976); Mohler v. Buena Vista Bank & Trust Co., 42 Colo. App. 4, 588 P.2d 894 (1978); Newton v. Nationwide Mut. Fire Ins. Co., 197 Colo. 462, 594 P.2d 1042 (1979); Hide-A-Way Massage Parlor, Inc. v. Bd. of County Comm'rs, 198 Colo. 175, 597 P.2d 564 (1979); Jeffrey v. Colo. State Dept. of Soc. Servs., 198 Colo. 265, 599 P.2d 874 (1979); Bd. of County Comm'rs v. Fifty-First Gen. Ass'y, 198 Colo. 302, 599 P.2d 887 (1979); DuHamel v. People ex rel. City of Arvada, 42 Colo. App. 491, 601 P.2d 639 (1979); Spiker v. City of Lakewood, 198 Colo. 528, 603 P.2d 130 (1979); CF & I Steel Corp. v. Colo. Air Pollution Control Comm'n, 44 Colo. App. 111, 606 P.2d 1306 (1978); Estate of Daigle, 634 P.2d 71 (Colo. 1981); Stone Envtl. Eng'r Servs., Inc. v. Colo. Dept. of Health, 631 P.2d 1185 (Colo. App. 1981); Empire Sav., Bldg. & Loan Ass'n v. Otero Sav. & Loan Ass'n, 640 P.2d 1151 (Colo. 1982); Tri-State Generation & Transmission Co. v. City of Thornton, 647 P.2d 670 (Colo. 1982); Citizens for Free Inter. v. Dept. of Rev., 649 P.2d 1054 (Colo. 1982); Two G's, Inc. v. Kalbin, 666 P.2d 129 (Colo. 1983); DuPuis v. Charnes, 668 P.2d 1 (Colo. 1983); Denver & R.G.W.R.R. v. City & County of Denver, 673 P.2d 354 (Colo. 1983); Martynes & Assocs. v. Devonshire Square Apts., 680 P.2d 246 (Colo. App. 1984); Lakewood Fire Protect. v. City of Lakewood, 710 P.2d 1124 (Colo. App. 1985).

II. POWER TO DECLARE RIGHTS; FORCE OF DECLARATION.

Since the adoption of the uniform declaratory judgments act, the supreme court is permitted to declare and adjudge rights and liabilities under a given state of facts irrespective of whether it directly supplies remedies to enforce them. Employers Mut. Ins. Co. v. Bd. of County Comm'rs, 102 Colo. 177, 78 P.2d 380 (1938).

A declaratory judgment can only be taken to be a determination as to the rights of the parties before the court. Farmers Elevator Co. v. First Nat'l Bank, 176 Colo. 168, 489 P.2d 318 (1971).

For a declaratory judgment to be binding, the necessary parties must be before the court. Beacom v. Bd. of County Comm'rs, 657 P.2d 440 (Colo. 1983).

A declaratory judgment is conclusive as to questions raised by parties and passed upon by court. Atchison v. City of Englewood, 180 Colo. 407, 506 P.2d 140 (1973); City & County of Denver v. Chuck Ruwart Chevrolet, Inc., 32 Colo. App. 191, 508 P.2d 789 (1973).

The equitable jurisdiction of a court may be invoked to meet the ends of justice in order that a multiplicity of suits may be prevented. Hamilton v. City & County of Denver, 176 Colo. 6, 490 P.2d 1289 (1971).

The plaintiff in requesting a declaratory judgment should not be required to risk violation of the statute in order to obtain a declaration of its validity. Colo. State Bd. of Optometric Exam'rs v. Dixon, 165 Colo. 488, 440 P.2d 287 (1968).

A case was clearly within the contemplation of this provision where certain beneficiaries of a life insurance policy brought an action against an insurance company to establish the applicability of a double indemnity clause to the death of the insured whose death was caused by an overdose of luminal: A contract was involved, persons were interested, and there was a controversy concerning the construction of the policy. Equitable Life Assur. Soc'y v. Hemenover, 100 Colo. 231, 67 P.2d 80 (1937).

Trial court abused its discretion in dismissing due process claim based on ripeness where professors already worked under an employment contract, they entered into the contract in reliance on the terms stated in the contract, and they faced uncertainty as to the terms of the contract because it was later modified with the intent to apply it retroactively. Saxe v. Bd. of Trs. of Metro. State Coll., 179 P.3d 67 (Colo. App. 2007).

III. WHO MAY OBTAIN DECLARATION OF RIGHTS.

The general assembly is without power to require courts to exercise nonjudicial functions; but it is not without the power to impose upon courts jurisdiction over certain enumerated actions seeking declaratory judgments on matters that lend themselves to and receive judicial determination in otherwise litigated cases, as it at once appears, such would not be nonjudicial in their nature. San Luis Power & Water Co. v. Trujillo, 93 Colo. 385, 26 P.2d 537 (1933).

Declaratory judgment act neither expands nor contracts the jurisdiction of Colorado's courts. In creating a new remedy the general assembly did not by implication grant political subdivisions of the state the right to sue the state. Romer v. Fountain Sanitation Dist., 898 P.2d 37 (Colo. 1995).

One whose rights are affected by statute may have its construction or validity determined by a declaratory judgment. Toncray v. Dolan, 197 Colo. 382, 593 P.2d 956 (1979).

One whose rights are favorably affected by a statute is entitled to seek a judicial determination thereof so long as the court is provided with a properly adverse context. Silverstein v. Sisters of Charity, 38 Colo. App. 286, 559 P.2d 716 (1976).

One whose rights or status may be affected by statute is entitled to have any question of construction determined provided that a substantial controversy between adverse parties of sufficient immediacy to warrant the issuance of a declaratory judgment exists. Silverstein v. Sisters of Charity, 38 Colo. App. 286, 559 P.2d 716 (1976).

Proper forum for challenge to constitutionality of statute or ordinance under which an administrative agency acts is district court where declaratory judgment can be sought. Arapahoe Roofing & Sheet Metal v. Denver, 831 P.2d 451 (Colo. 1992).

A liberal construction of the statute and the rule rejects the proposition that a person adversely affected by a statute and seeking relief from uncertainty and insecurity with respect to his rights by reason of a statute or a rule of a board or commission must take the risk of prosecutions, fines, imprisonment, loss of property, or loss of profession in order to secure adjudication of his rights. Colo. State Bd. of Optometric Exam'rs v. Dixon, 165 Colo. 488, 440 P.2d 287 (1968).

This rule establishes the procedural mechanism for implementation of the declaratory judgment act. Romer v. Fountain Sanitation Dist., 898 P.2d 37 (Colo. 1995).

A proceeding for declaratory judgment must be based upon an actual controversy. Farmers Elevator Co. v. First Nat'l Bank, 176 Colo. 168, 489 P.2d 318 (1971); Beacom v. Bd. of County Comm'rs, 657 P.2d 440 (Colo. 1983).

When the questions presented are not uncertain or hypothetical, and they are presented in an action seeking a declaratory judgment, they are no less justiciable than if presented by injunction or otherwise. San Luis Power & Water Co. v. Trujillo, 93 Colo. 385, 26 P.2d 537 (1933).

Although a declaratory judgment action must be based on an actual controversy, a party need not violate the challenged statute or regulation in order to obtain a declaration of its invalidity. It is sufficient that a party will be adversely affected by the challenged regulation. Bowen/Edwards v. Bd. of County Comm'rs, 812 P.2d 656 (Colo. App. 1990), aff'd in part and rev'd in part on other grounds, 830 P.2d 1045 (Colo. 1992).

The right to a declaratory judgment extends to a party who claims to be adversely affected by a regulation. Plaintiff contended that he was an interested party under a written agreement between the social security administration and the department of human services. Thus, even if the authorization signed by the plaintiff allowing the social security administration to send his federal benefits check directly to the department of human services itself were not deemed a contract, plaintiff stated a claim for declaratory relief and was entitled to have a determination on the merits rather than dismissal. Martinez v. Dept. of Human Servs., 97 P.3d 152 (Colo. App. 2003).

A justiciable controversy existed, and so the dismissal of a declaratory judgment claim was an abuse of discretion, where a town's ordinance limited a developer's rights under an existing contract with the town, notwithstanding the fact that the developer had not applied for a permit from the town. Lot Thirty-Four Venture, L.L.C. v. Town of Telluride, 976 P.2d 303 (Colo. App. 1998), aff'd on other grounds, 3 P.3d 30 (Colo. 2000).

Court is not required to reply to mere speculative inquiries. Gabriel v. Bd. of Regents, 83 Colo. 582, 267 P. 407 (1928).

Specific threat of enforcement of a rent control statute created a sufficient actual controversy for purposes of this rule. Meyerstein v. City of Aspen, __ P.3d __ (Colo. App. 2011).

A declaratory judgment may not issue under the provisions of section (b) of this rule on the validity of a city ordinance to create a storm sewer district, where the proposed ordinance is in contemplation only and has not been passed by the city council. City & County of Denver v. Denver Land Co., 85 Colo. 198, 274 P. 743 (1929).

As desirable as it might be to have an announcement of the court upon a question, it would be improper for it to decide in the absence of the necessary parties. City & County of Denver v. Denver Land Co., 85 Colo. 198, 274 P. 743 (1929); Continental Mut. Ins. Co. v. Cochrane, 89 Colo. 462, 4 P.2d 308 (1931).

No proceeding lies under our declaratory judgment act to obtain merely an advisory opinion. Farmers Elevator Co. v. First Nat'l Bank, 176 Colo. 168, 489 P.2d 318 (1971).

The declaratory judgment leaves the parties to pursue the remedies which the law provides, after performing its office of declaring the existence of a certain liability. San Luis Power & Water Co. v. Trujillo, 93 Colo. 385, 26 P.2d 537 (1933).

Preventative relief in some instances is just as properly a matter of judicial function as remedial relief and if given by a declaratory order in the construction of a statute, it is res judicata as to the questions of construction raised between the parties and passed upon. San Luis Power & Water Co. v. Trujillo, 93 Colo. 385, 26 P.2d 537 (1933).

Plaintiff had standing to pursue declaratory judgment action where the complaint demonstrated that the regulations threatened to cause it injury by alleging it would be adversely affected by compliance with the regulations, that if it complied with the regulations, it would suffer economic injury because the Board's permit fees and bond requirements are greater than those of the state, and that if it proceeded with oil and gas development without a county permit it would be subject to criminal sanctions. Bowen/Edwards v. Bd. of County Comm'rs, 812 P.2d 656 (Colo. App. 1990), aff'd in part and rev'd in part on other grounds, 830 P.2d 1045 (Colo. 1992).

The fact that a party confesses judgment in part or in whole does not automatically lead to a declaratory judgment as prayed for by the plaintiffs. Bennett v. City of Fort Collins, 190 Colo. 198, 544 P.2d 982 (1975).

The declaratory judgment is applicable to a dispute over the right to the use of spring waters not tributary to any natural stream. Colo. & Utah Coal Co. v. Walter, 75 Colo. 489, 226 P. 864 (1924).

For determination of rights under the teachers' salary law, see Washington County High Sch. Dist. v. Bd. of Comm'rs, 85 Colo. 72, 273 P. 879 (1928).

In an action under the declaratory judgments act to determine whether or not a municipality has the power to issue bonds and levy taxes for the payment thereof, the city auditor, being a person whose legal relations are affected by the proposal, is the proper person to initiate the proceedings. McNichols v. City & County of Denver, 101 Colo. 316, 74 P.2d 99 (1937).

Where results to occur from the enforcement of a statutory provision can be predicted with certainty or where the basic right of the state to enter legislative fields said to be the domain of the federal government is questioned, a court properly may declare with respect to the validity of a statute. Am. Fed'n of Labor v. Reilly, 113 Colo. 90, 155 P.2d 145 (1944).

A court should not enter into a speculative inquiry for the purpose of upholding or condemning statutory provisions, the effect of which, in concrete situations not yet developed, could not be definitely perceived. Am. Fed'n of Labor v. Reilly, 113 Colo. 90, 155 P.2d 145 (1944).

The validity of zoning ordinances has been challenged by certiorari review under C.R.C.P. 106(a)(4) and declaratory relief under this rule, and on occasion, these forms of relief have been pursued simultaneously. Snyder v. City of Lakewood, 189 Colo. 421, 542 P.2d 371 (1975).

Judicial review remedy for rezoning challenge. As a general rule, judicial review by way of C.R.C.P. 106(a)(4) is the exclusive remedy for one challenging a rezoning determination on a parcel of property. However, where persons have not had prior notice of a rezoning hearing and have not participated in it, certiorari review is not always an effective remedy, and a hearing de novo under a declaratory judgment is a proper and effective remedy. Norby v. City of Boulder, 195 Colo. 231, 577 P.2d 277 (1978).

Income tax statute and regulations may be determined by declaratory judgment. Where a taxpayer's liability for income taxes turns on the construction of a statute and the validity, or invalidity, of regulations purporting to interpret that statute, the case is well within the purpose of a declaratory judgment. Toncray v. Dolan, 197 Colo. 382, 593 P.2d 956 (1979).

Relief may be afforded to persons uncertain about rights under penal statute. Relief in the nature of a declaratory judgment will be afforded in appropriate circumstances to those persons who claim uncertainty and insecurity with respect to their rights under a penal statute or law. Rathke v. MacFarlane, 648 P.2d 648 (Colo. 1982).

An action for declaratory judgment may be properly maintained by an insurance company to determine if it will be liable to its insured for a defense and for payment of a possible judgment arising from a specified occurrence. Beeson v. State Auto. & Cas. Underwriters, 32 Colo. App. 62, 508 P.2d 402, aff'd, 183 Colo. 284, 516 P.2d 623 (1973).

Insurance coverage may be declared. When a reasonable likelihood is established that alleged tortious conduct of an insured is excluded from coverage under his homeowner's policy, a trial judge may appropriately exercise discretion in affording insurer opportunity to obtain declaration of its obligations under the policy prior to the personal injury trial. Troelstrup v. District Court, 712 P.2d 1010 (Colo. 1986).

Physicians who were denied staff privileges at private hospital were not entitled to relief in form of declaratory judgment that hospital's board violated state law by not following hospital's bylaws. Green v. Lutheran Med. Ctr. Bd. of Dirs., 739 P.2d 872 (Colo. App. 1987).

Declaratory judgment actions may be filed to determine the existence of, or rights under, an oral contract. Berenergy Corp. v. Zab, Inc., 94 P.3d 1232 (Colo. App. 2004), aff'd, 136 P.3d 252 (Colo. 2006).

A licensee of the owner of real estate is entitled to declaratory judgment regarding a proposed modification to an easement on the owner's property, particularly where both the owner and its licensee are parties to the proceeding. City of Boulder v. Farmer's Reservoir & Irrig. Co., 214 P.3d 563 (Colo. App. 2009).

Although section (b) of this rule details situations in which declaratory judgment actions may be brought, it does not restrict the court's ability to grant declaratory relief in other situations when appropriate. Berenergy Corp. v. Zab, Inc., 94 P.3d 1232 (Colo. App. 2004), aff'd, 136 P.3d 252 (Colo. 2006).

IV. CONTRACT CONSTRUED BEFORE BREACH.

The purpose of this rule is for a judicial declaration of rights under a contract. Associated Master Barbers, Local 115 v. Journeyman Barbers, Local 205, 132 Colo. 52, 285 P.2d 599 (1955).

A proposed contract affords plaintiff no right to have it construed. Associated Master Barbers, Local 115 v. Journeyman Barbers, Local 205, 132 Colo. 52, 285 P.2d 599 (1955).

One who is not a party to a contract is without standing to obtain a declaratory judgment determining the validity of such contract. Associated Master Barbers, Local 115 v. Journeyman Barbers, Local 205, 132 Colo. 52, 285 P.2d 599 (1955).

In an action under the declaratory judgments act to determine the validity of a contract, the complaint failing to allege that the validity of the contract had been questioned, or that a question had arisen under it, no cause of action was stated. Gabriel v. Bd. of Regents, 83 Colo. 582, 267 P. 407 (1928).

Section (c) inapplicable where undetermined, extrinsic facts. Although § 13-51-107 and section (c) of this rule provide that a contract may be interpreted prior to breach, these provisions are inapplicable where the dispute requires an interpretation in light of extrinsic facts which are not yet determinable. McDonald's Corp. v. Rocky Mt. McDonald's, Inc., 42 Colo. App. 143, 590 P.2d 519 (1979).

V. FOR WHAT PURPOSES INTERESTED PERSONS MAY HAVE RIGHTS DECLARED.

Section (d) of this rule confers no new authority concerning wills and trusts, because district courts had full and complete jurisdiction before the passage of the declaratory judgments act to construe wills and trusts and to control executors and trustees in the administration of estates. Mulcahy v. Johnson, 80 Colo. 499, 252 P. 816 (1927).

A declaratory judgment is a proper proceeding when the amounts involved are substantial and there is a threat of multiplicity of suits, particularly when the plaintiffs are public employees. Hamilton v. City & County of Denver, 176 Colo. 6, 490 P.2d 1289 (1971).

VI. WHEN COURT MAY REFUSE TO DECLARE RIGHT.

Declaratory judgment actions should be considered only in cases where "the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding, and it follows that when neither of these results can be accomplished, the court should decline to render the declaration prayed". People ex rel. Inter-Church Temperance Movement v. Baker, 133 Colo. 398, 297 P.2d 273 (1956).

A declaratory judgment is appropriate when it will terminate a controversy. Heron v. City & County of Denver, 159 Colo. 314, 411 P.2d 314 (1966).

The district court properly dismissed a declaratory judgment complaint for lack of a justiciable controversy concerning the plaintiff's alleged right to select the location of the defendant's proposed oil and gas wells where the defendant had not yet submitted an application for a permit to drill wells at specific locations. Burkett v. Amoco Prod. Co., 85 P.3d 576 (Colo. App. 2003).

Where parties whose interests would be affected by the action were not made parties thereto, and declaratory judgment would not terminate litigation, a holding that necessary and indispensable parties were not before the trial court was not error. Ahern v. Baker, 148 Colo. 408, 366 P.2d 366 (1961).

It is not the function of the courts, even by way of declaration, to adjudicate with respect to administrative orders in the absence of a showing that a judgment, if entered, would afford a plaintiff present relief. Taylor v. Tinsley, 138 Colo. 182, 330 P.2d 954 (1958).

A judicial tribunal is not required to render a judicial opinion on a matter which has become moot. Crowe v. Wheeler, 165 Colo. 289, 439 P.2d 50 (1968).

A case is moot when a judgment, if rendered, will have no practical legal effect upon an existing controversy. Crowe v. Wheeler, 165 Colo. 289, 439 P.2d 50 (1968).

An action is considered moot when it no longer presents a justiciable controversy because the issues involved have become academic or dead, and in a declaratory judgment action there is a tendency to construe the mootness doctrine more narrowly. Sigma Chi

Fraternity v. Regents of Univ. of Colo., 258 F. Supp. 515 (D. Colo. 1966).

Declaratory judgment proceedings may not be invoked to resolve a question which is nonexistent, even though it can be assumed that at some future time such question may arise. Taylor v. Tinsley, 138 Colo. 182, 330 P.2d 954 (1958); Heron v. City & County of Denver, 159 Colo. 314, 411 P.2d 314 (1966).

The jurisdiction of the court to enter declaratory judgments does not properly extend to entering advisory judgments as to hypothetical issues which may never arise. Heron v. City & County of Denver, 159 Colo. 314, 411 P.2d 314 (1966).

In action for declaratory judgment under this rule, the complaint must state a question which is existent and not one which is academic or nonexistent; there must be a justiciable issue or legal controversy extant, and not a mere possibility that at some future time such question may arise. Heron v. City & County of Denver, 159 Colo. 314, 411 P.2d 314 (1966).

In a suit to procure a declaratory judgment fixing the applicability of the sales tax to certain merchandising transactions, where it appears from the record that matters other than those shown by the pleadings must be presented to disclose the real controversy, the actual dispute can only be resolved by a consideration of proven or stipulated facts, and in such a situation the trial court, although properly holding that a demurrer to the complaint should have been overruled, should have, notwithstanding defendant elected to stand upon his demurrer, refused to render judgment granting the relief asked until evidence was produced affording a basis for conclusions with respect to proper declarations to be made and the relief to be granted. Armstrong v. Carman Distrib. Co., 108 Colo. 223, 115 P.2d 386 (1941).

Applied in City & County of Denver v. Denver Land Co., 85 Colo. 198, 274 P. 743 (1929).

VII. REVIEW.

When an administrative remedy has not been sought in a timely manner, this rule does not provide jurisdiction for judicial review. Jefferson Sch. D. R-1 v. Div. of Labor, 791 P.2d 1217 (Colo. App. 1990).

Since judicial review would not be significantly aided by an additional administrative decision, petitioner's failure to appeal should not bar his only defense to a criminal prosecution. Hamilton v. City & County of Denver, 176 Colo. 6, 490 P.2d 1289 (1971).

Applied in McNichols v. City & County of Denver, 101 Colo. 316, 74 P.2d 99 (1937); Young v. Bd. of County Comm'rs, 102 Colo. 342, 79 P.2d 654 (1938).

VIII. FURTHER RELIEF.

This rule provides for further relief based on a declaratory judgment, but unless such relief is asked in the same action wherein the declaratory judgment is sought, and in connection therewith, it can be obtained only as to damages accruing subsequent to the date of the declaratory judgment. Lane v. Page, 126 Colo. 560, 251 P.2d 1078 (1952).

Because a declaratory judgment should not be sought in order to try a controversy by piecemeal, or to try particular issues without settling the entire controversy, where the damages were antecedent and might with propriety have been determined in the same proceeding in which declaratory judgment alone was sought, such judgment should operate as a bar to any subsequent claim therefor. This is in accord with the general rule. Lane v. Page, 126 Colo. 560, 251 P.2d 1078 (1952).

A declaratory judgment does not constitute absolute bar to subsequent proceedings where parties are seeking other remedies, even though based upon claims which could have been asserted in original action. Atchison v. City of Englewood, 180 Colo. 407, 506 P.2d 140 (1973); City & County of Denver v. Chuck Ruwart Chevrolet, Inc., 32 Colo. App. 191, 508 P.2d 789 (1973); Eason v. Bd. of County Comm'rs of County of Boulder, 961 P.2d 537 (Colo. App. 1997).

Subsequent relief sought by party to prior declaratory judgment action need not be sought by amendment of complaint in original action, but may be sought by separate action. Atchison v. City of Englewood, 180 Colo. 407, 506 P.2d 140 (1973).

Relief is not limited by language of statute or rule to prevailing party in declaratory judgment action. Atchison v. City of Englewood, 180 Colo. 407, 506 P.2d 140 (1973).

Reversal of an underlying declaratory judgment is not the "further relief" contemplated by § 13-51-112 and section (h) of this rule but is, instead, ordinary postjudgment relief. While "further relief" is not limited to the original prevailing party, nevertheless, such relief must seek remedies different from those granted in the declaratory judgment. Spencer v. Bd. of County Comm'rs, 39 P.3d 1272 (Colo. App. 2001).

Where plaintiff received no personal direct benefit from prosecuting declaratory judgment action, but the subject matter of the judgment was enhanced or preserved by the litigation, plaintiff's attorney is permitted a reasonable fee which should be awarded by the trial court. Agee v. Trustees of Pension Bd., 33 Colo. App. 268, 518 P.2d 301 (1974).

IX. ISSUES OF FACT.

The majority rule is that whether a party is entitled to have disputed issues of fact decided by a jury is not determined by the fact that a declaratory judgment is sought, but whether the right to a jury trial existed prior to the passage of the declaratory judgment act in the type of action involved, if so, there is a right to trial by jury in such action. Baumgartner v. Schey, 143 Colo. 373, 353 P.2d 375 (1960).

The right to jury trial must be determined by the real, meritorious controversy between parties, as shown by the whole case, and in determining the essential character of a suit or remedy within this rule, the entire pleadings and all issues raised are to be examined and not merely the plaintiff's declaration, complaint, petition, or evidence, but a plaintiff may not defeat a defendant's right to a jury trial by framing his complaint so that his action would be cognizable only in equity under the old procedure, by the blending of a claim cognizable at law with a demand for equitable relief, by an allegation of an equitable cause of action which does not exist, or by joining a legal with an equitable cause of action; and at least, a joinder of legal and equitable causes of actions in a complaint does not deprive the defendant of a right to trial by jury of the purely legal issues. Baumgartner v. Schey, 143 Colo. 373, 353 P.2d 375 (1960).

If the action in which declaratory relief is sought would have been an action at law had it been permitted to mature without intervention of declaratory procedure, the right to trial by jury of disputed questions of fact is not affected. Baumgartner v. Schey, 143 Colo. 373, 353 P.2d 375 (1960).

That pleadings, depositions, admissions or affidavits contain undisputed matter and can be taken as true is not decisive of the question of whether there is a genuine issue of any material fact, because an issue of fact may arise from countervailing inferences which are permissible from evidence accepted as true. O'Herron v. State Farm Mut. Auto. Ins. Co., 156 Colo. 164, 397 P.2d 227 (1964).

In an action for declaratory judgment, where the evidence was in conflict as to whether a tenant was entitled to remain in possession under the farm lease for the succeeding crop year, and trial to a jury resulted in a verdict favorable to the tenant, it was error to set the verdict aside and give judgment for plaintiff, defendant being entitled to a jury trial. Baumgartner v. Schey, 143 Colo. 373, 353 P.2d 375 (1960).

Factual determinations may be necessary in order to declare rights, status, or legal relations, and an action for declaratory judgment may be properly maintained by an insurance company to fix liability vel non, notwithstanding that factual determinations are necessary to make a declaration on the controlling issue. O'Herron v. State Farm Mut. Auto. Ins. Co., 156 Colo. 164, 397 P.2d 227 (1964); Am. Family Mut. Ins. Co. v. Bowser, 779 P.2d 1376 (Colo. App. 1989).

X. PARTIES - MUNICIPAL ORDINANCES.

A case for a declaratory judgment, under a statute providing for declaratory judgments in cases of actual controversies only, which shall have the effect of final judgments, must be formally presented with proper parties. People ex rel. Inter-Church Temperance Movement v. Baker, 133 Colo. 398, 297 P.2d 273 (1956).

A plaintiff, seeking a determination of any cause by means of a judgment declaring rights, liabilities, and jural relations, must comply with the provisions of the declaratory judgment statute by naming all of the persons as parties who have a right to defend the action, or who are interested therein, or who will be affected by the making of a declaration of rights. People ex rel. Inter-Church Temperance Movement v. Baker, 133 Colo. 398, 297 P.2d 273 (1956).

The indispensable and necessary parties in any declaratory judgment action are those who have conflicting legal interests in the controversy to be adjudicated and whose rights will be affected thereby, and the trial court should insist that jurisdiction be obtained of all such parties either personally or in an appropriate class action under the provisions of C.R.C.P. 23; otherwise the court should dismiss the action, for a declaratory judgment action is intended to completely terminate the controversy, and if the court does not have jurisdiction of such interested parties, its judgment would not settle the questions presented and thus lead to multifarious litigation. People ex rel. Inter-Church Temperance Movement v. Baker, 133 Colo. 398, 297 P.2d 273 (1956).

All "parties who have or claim any interest which would be affected by the declaration" must be made parties to the proceeding, for neither in the declaratory judgment action nor in any other judicial proceeding may the rights of persons not parties to a judicial proceeding be bound by the action of a court in that proceeding. People ex rel. Inter-Church Temperance Movement v. Baker, 133 Colo. 398, 297 P.2d 273 (1956).

Only persons who have a legally cognizable interest must be made parties to an action, and no real controversy is presented until a judgment is entered. Connecticut Gen. Life Ins. Co. v. A.A.A. Waterproofing, Inc., 911 P.2d 684 (Colo. App. 1995), aff'd on other grounds sub nom. Constitution Assoc. v. N.H. Ins. Co., 930 P.2d 556 (Colo. 1996).

The interest which a party must have in the subject matter in order to make him a necessary party defendant must be a present substantial interest, as distinguished from a mere expectancy or future contingent interest. Game & Fish Comm'n v. Feast, 157 Colo. 303, 402 P.2d 169 (1965).

It is not necessary to make the state of Colorado a party defendant when two agencies of the state government are parties defendant and are represented by the state attorney general, because when suit is brought against an agency or department of the state government, it is in effect against the state itself. Game & Fish Comm'n v. Feast, 157 Colo. 303, 402 P.2d 169 (1965).

Attorney general must be served with a copy of the declaratory judgment proceeding and afforded the opportunity to be heard, but it is within his discretion whether he elects to be heard. Lakewood Pawnbrokers, Inc. v. City of Lakewood, 182 Colo. 315, 512 P.2d 1241 (1973).

Notice to attorney general not necessary where constitutional question arises during trial. Section 13-51-115 and this rule, mandating notice to the attorney general when allegations of unconstitutionality are made, do not address the situation where the question of constitutionality arises for the first time during the course of trial. Howell v. Woodlin Sch. Dist. R-104, 198 Colo. 40, 596 P.2d 56 (1979).

It is error to deny petitions of intervention of junior colleges whose rights would be directly affected by a declaration of unconstitutionality depriving them of funds. Mesa County Junior College Dist. v. Donner, 150 Colo. 156, 371 P.2d 442 (1962).

Where by stipulation all persons having any interest regarding the interpretation of liability insurance policies place themselves before the court, all the possible tort-feasors, in essence, challenge the respective insurance companies to defend the various named insureds pursuant to the terms of their contracts, and the insurance companies deny any liability, a controversy of sufficient immediacy and reality to warrant the issue of a declaratory judgment is raised. Beeson v. State Auto. & Cas. Underwriters, 32 Colo. App. 62, 508 P.2d 402, aff'd, 183 Colo. 284, 516 P.2d 623 (1973).

Where the city was not made a party, and the attorney general of the state of Colorado has not been served with a copy of the proceeding and has had no opportunity to be heard, the essential conditions required by the rule are not present, and under such circumstances a determination of the questions argued by counsel cannot be had in this proceeding. Meier v. Schooley, 147 Colo. 244, 363 P.2d 653 (1961).

For discussion of member municipalities in sewage disposal district being found to be indispensable parties, see Bancroft-Clover Water & San. Dist. v. Metro. Denver Sewage Disposal Dist. No. 1, 670 P.2d 428 (Colo. App. 1983).

Membership policyholders of a mutual insurance company had a substantial interest in the declaratory judgment sought by the company and should have been made parties thereto, because in their absence the declaratory judgment would not have terminated the uncertainty or controversy. Continental Mut. Ins. Co. v. Cochrane, 89 Colo. 462, 4 P.2d 308 (1931).

Where plaintiffs seek a judicial declaration not as to their own rights and status but attempt to have others not named or served declared to be in some "unlawful" status, no error was committed by the trial court in holding that declaratory judgment was not a proper remedy. Ahern v. Baker, 148 Colo. 408, 366 P.2d 366 (1961).

XI. RULE IS REMEDIAL - PURPOSE.

The general or primary purpose of a declaratory judgments statute and rule is to provide a ready and speedy remedy, in cases of actual controversy, for determining issues and adjudicating the legal rights, duties, or status of the respective parties, before controversies with regard thereto lead to the repudiation of obligations, the invasion of rights, and the commission of wrongs. People ex rel. Inter-Church Temperance Movement v. Baker, 133 Colo. 398, 297 P.2d 273 (1956); Ahern v. Baker, 148 Colo. 408, 366 P.2d 366 (1961).

Primary purpose of declaratory judgment procedure is to provide a speedy, inexpensive, and readily accessible means of determining actual controversies which depend on the validity or interpretation of some written instrument of law. Toncray v. Dolan, 197 Colo. 382, 593 P.2d 956 (1979).

The purpose of the statute and the rule is to be remedial and to afford relief from uncertainty and insecurity, and the statute and rule expressly provide that they be liberally construed and administered. Colo. State Bd. of Optometric Exam'rs v. Dixon, 165 Colo. 488, 440 P.2d 287 (1968).

A liberal construction of the statute and the rule rejects the proposition that a person adversely affected by a statute and seeking relief from uncertainty and insecurity with respect to his rights by reason of a statute or a rule of a board or commission must take the risk of prosecutions, fines, imprisonment, loss of property, or loss of profession in order to secure adjudication of his rights. Colo. State Bd. of Optometric Exam'rs v. Dixon, 165 Colo. 488, 440 P.2d 287 (1968).

XII. TRIAL BY JURY.

It is clear that in a proper case a jury trial may be had in an action brought under a

declaratory judgments rule. Baumgartner v. Schey, 143 Colo. 373, 353 P.2d 375 (1960).

The fact that an action is for a declaratory judgment is not, in and of itself, determinative of the type of action brought for purposes of determining whether there is a right to trial by jury. Zick v. Krob, 872 P.2d 1290 (Colo. App. 1993).

The historical test to be applied to determine whether a right to a jury trial exists in a declaratory judgments action is that if any of the parties would have a constitutional right to a jury trial on any issue involved prior to the adoption of the declaratory judgments rule, such right remains. Baumgartner v. Schey, 143 Colo. 373, 353 P.2d 375 (1960).

If the action in which declaratory relief is sought would have been an action at law had it been permitted to mature without the intervention of declaratory procedure, the right to trial by jury of disputed questions of fact is not affected, and this has the salutary effect of permitting the defendant a trial by jury whether the action is brought under the common law or under the declaratory judgments rule. Baumgartner v. Schey, 143 Colo. 373, 353 P.2d 375 (1960).

Rule 58. Entry of Judgment

(a) Entry. Subject to the provisions of C.R.C.P. 54(b), upon a general or special verdict of a jury, or upon a decision by the court, the court shall promptly prepare, date, and sign a written judgment and the clerk shall enter it on the register of actions as provided in C.R.C.P. 79(a). The term "judgment" includes an appealable decree or order as set forth in C.R.C.P. 54(a). The effective date of entry of judgment shall be the actual date of the signing of the written judgment. The notation in the register of actions shall show the effective date of the judgment. Entry of the judgment shall not be delayed for the taxing of costs. Whenever the court signs a judgment and a party is not present when it is signed, a copy of the signed judgment shall be immediately mailed or e-served by the court, pursuant to C.R.C.P. 5, to each absent party who has previously appeared.

(b) Satisfaction. Satisfaction in whole or in part of a money judgment may be entered in the judgment record (Rule 79(d)) upon an execution returned satisfied in whole or in part, or upon the filing of a satisfaction with the clerk, signed by the judgment creditor's attorney of record unless a revocation of authority is previously filed, or by the signing of such satisfaction by the judgment creditor, attested by the clerk, or notary public, or by the signing of the judgment record (Rule 79(d)) by one herein authorized to execute satisfaction. Whenever a judgment shall be so satisfied in fact otherwise than upon execution, it shall be the duty of the judgment creditor or the judgment creditor's attorney to give such satisfaction, and upon motion the court may compel it or may order the entry of such satisfaction to be made without it.

Source: (a) amended February 7, 1991, effective June 1, 1991; (a) amended March 17, 1994, effective July 1, 1994; (b) amended and adopted February 27, 1997, effective July 1, 1997; (a) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Cross references: For judgment upon multiple claims or involving multiple parties, see C.R.C.P. 54(b); for judgment record, see C.R.C.P. 79(d); for attachments, see C.R.C.P. 102; for garnishment, see C.R.C.P. 103; for replevin, see C.R.C.P. 104.

ANNOTATION

I. General Consideration.
II. Entry.
III. Satisfaction.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Notes on Proposed Amendments to Colorado Rules of Civil Procedure", see 27 Dicta 165 (1950). For article, "Amendments to the Colorado Rules of Civil Procedure", see 28 Dicta 242 (1951). For article, "Judgment: Rules 54-63", see 23 Rocky Mt. L. Rev. 581 (1951).

Applied in Dill v. County Court, 37 Colo. App. 45, 541 P.2d 1272 (1975); Ayala v. Colo. Dept. of Rev., 43 Colo. App. 357, 603 P.2d 979 (1979); Hawkins v. Powers, 635 P.2d 915 (Colo. App. 1981); Marks v. District Court, 643 P.2d 741 (Colo. 1982); Henley v. Wendt, 640 P.2d 271 (Colo. App. 1982); Davis Mfg. & Supply Co. v. Coonskin Props., Inc., 646 P.2d 940 (Colo. App. 1982); Pasbrig v. Walton, 651

P.2d 459 (Colo. App. 1982); In re Chambers, 657 P.2d 458 (Colo. App. 1982); Moore & Co. v. Williams, 657 P.2d 984 (Colo. App. 1982); People in Interest of C.A.W., 660 P.2d 10 (Colo. App. 1982); Bassett v. Eagle Telecommunications, 750 P.2d 73 (Colo. App. 1987); In re Hoffner, 778 P.2d 702 (Colo. App. 1989).

II. ENTRY.

The entry of judgment is a purely ministerial act. Joslin Dry Goods Co. v. Villa Italia, Ltd., 35 Colo. App. 252, 539 P.2d 137 (1975); Joslin Dry Goods Co. v. Villa Italia, Ltd., 541 P.2d 118 (Colo. App. 1975).

Relief sought, and therefore time limitations, for judgment entered pursuant to this rule is pursuant to C.R.C.P. 59 (a)(4) even though relief sought was from costs taxed by clerk pursuant to C.R.C.P. 54. Davis v. Bruton, 797 P.2d 830 (Colo. App. 1990).

Section (a) indicates a sequence of events in which the entry of judgment follows, in point of time, the preparation of the written form of judgment. Joslin Dry Goods Co. v. Villa Italia, Ltd., 35 Colo. App. 252, 539 P.2d 137 (1975); Joslin Dry Goods Co. v. Villa Italia, Ltd., 541 P.2d 118 (Colo. App. 1975).

This rule provides that upon a special verdict the court shall direct the appropriate judgment, and other provisions indicate that the court shall direct the entry of a judgment. City of Aurora v. Powell, 153 Colo. 4, 383 P.2d 798 (1963).

This rule requires that a court's preparation of the written form of the judgment precede the clerk's entry of judgment. Joslin Dry Goods Co. v. Villa Italia, Ltd., 35 Colo. App. 252, 539 P.2d 137 (1975); Joslin Dry Goods Co. v. Villa Italia, Ltd., 541 P.2d 118 (Colo. App. 1975).

The clerk's entries are administrative, not judicial. City of Aurora v. Powell, 153 Colo. 4, 383 P.2d 798 (1963).

Court's "findings, conclusions, and order" is sufficient to function as the written form of the judgment required by section (a). Joslin Dry Goods Co. v. Villa Italia, Ltd., 35 Colo. App. 252, 539 P.2d 137 (1975); Joslin Dry Goods Co. v. Villa Italia, Ltd., 541 P.2d 118 (Colo. App. 1975).

Where the record does not contain any document executed before the clerk's notation of judgment in the register of actions, the notation cannot function as an entry of judgment. Joslin Dry Goods Co. v. Villa Italia, Ltd., 35 Colo. App. 252, 539 P.2d 137 (1975); Joslin Dry Goods Co. v. Villa Italia, Ltd., 541 P.2d 118 (Colo. App. 1975).

Lack of a proper order determining a C.R.C.P. 59 motion was not fatal to appeal where party appealed from underlying order of dissolution of marriage, not from denial of the rule 59 motion. In re Christen, 899 P.2d 339 (Colo. App. 1995).

Section (a) of this rule applies in dissolution of marriage cases with multiple issues. Poor v. District Court, 190 Colo. 433, 549 P.2d 756 (1976).

Until the written form of a dissolution decree, together with the written permanent orders were prepared, signed by the judge, and then entered on the register of actions, there was no entry of judgment. Poor v. District Court, 190 Colo. 433, 549 P.2d 756 (1976).

Likewise, a magistrate's order shall be signed and in writing in accordance with section (a). A magistrate's order modifying child support decree becomes effective, for the purposes of appeal, when the magistrate's order is signed. A nunc pro tunc order shall not affect a party's right to review. In re Spector, 867 P.2d 181 (Colo. App. 1993).

Written decree terminating a parental relationship constitutes "a written form of the judgment" within the intent of section (a). People in Interest of A.M.D., 648 P.2d 625 (Colo. 1982).

In dissolution proceeding, where trial court incorporated partial separation agreement as well as oral supplemental agreement into the degree of dissolution, there was a final, appealable order notwithstanding the fact that wife's counsel failed to prepare and file a written form of the supplemental agreement. The decree was dated and signed by the trial court and, by expressly incorporating both the partial separation agreement and the supplemental agreement, it left nothing further for the court to do in order to completely determine the rights of the parties. In re Sorensen, 166 P.3d 254 (Colo. App. 2007).

Judgment is not entered until there is a signed written order. Sayat Nova, Inc. v. District Court, 619 P.2d 764 (Colo. 1980); Neoplan USA Corp. v. Indus. Comm'n, 721 P.2d 157 (Colo. App. 1986); Church v. Amer. Standard Ins. Co. of Wis., 742 P.2d 971 (Colo. App. 1987); In re Estate of Royal, 813 P.2d 790 (Colo. App. 1991).

Where court entered its "Findings of Fact, Conclusions of Law and Judgment" and ordered separate decree quieting title to be prepared, there was no final judgment until the quiet title decree was signed. Reser v. Aspen Park Ass'n, 727 P.2d 378 (Colo. App. 1986).

Judgment may be entered without the court's signature when that judgment is not prepared by counsel. Moore & Co. v. Williams, 672 P.2d 999 (Colo. 1983).

For purposes of timely filing of a motion for new trial under C.R.C.P. 59 (a)(1), a judgment is "entered" only upon notation in the judgment docket pursuant to section (a) of this rule and C.R.C.P. 79 (d). City & County of

Denver v. Just, 175 Colo. 260, 487 P.2d 367 (1971).

The timeliness of a civil appeal is governed by C.A.R. 4(a) (appeals as of right), not section (a) of this rule. Section (a) of this rule, however, does control the date of entry of judgment for the purposes of a C.R.C.P. 59, new trial motion. Moore & Co. v. Williams, 672 P.2d 999 (Colo. 1983); Luna v. Fisher, 690 P.2d 264 (Colo. App. 1984).

Final entry of judgment for purposes of timely notice of appeal under C.A.R. 4(a) based on denial of new trial motion is date on which court filed written judgment in fixed amount on special verdict since this written ruling adjudicated all claims, rights, and liabilities of parties. Vallejo v. Eldridge, 764 P.2d 417 (Colo. App. 1988).

Order entered on minutes is effective as "written order" under section (a) of this rule. Wesson v. Bowling, 199 Colo. 30, 604 P.2d 23 (1979).

A minute order was sufficiently clear and precise and may be entered on the register pursuant to section (a) of this rule where the order detailed the amount of the judgment and setoffs and assessed costs, gave the plaintiff the right to possession, provided that the plaintiff apply the defendant's security deposit to the judgment, allowed the plaintiff interest to the date of the judgment on the amount due on a note, and, finally, gave both parties 20 days to file motions. Hebron v. District Court, 192 Colo. 346, 558 P.2d 997 (1977).

Entry of judgment effective upon notation in register. Both section (a) of this rule and C.R.C.P. 79 (a) clearly state that entry of a judgment is effective upon notation in the register of actions. Hebron v. District Court, 192 Colo. 346, 558 P.2d 997 (1977).

Written order denying motion for reconsideration of dismissal without prejudice complied with subsection (a) of this rule. The prior order dismissing the case without prejudice was not reduced to writing and did not comply with the requirements of this rule. SMLL, L.L.C. v. Daly, 128 P.3d 266 (Colo. App. 2005).

Judgment becomes final upon notation, though not recorded in judgment record. Hebron v. District Court, 192 Colo. 346, 558 P.2d 997 (1977).

A judgment is final when it disposes of the entire litigation on the merits and a motion for costs does not stay the finality of that judgment. Driscoll v. District Court, 870 P.2d 1250 (Colo. 1994).

The court has the authority to supplement and modify the opinions it expresses in its oral remarks until the judgment has been reduced to writing, dated, and signed. In re West, 94 P.3d 1248 (Colo. App. 2004).

Conclusion of juvenile hearing does not occur until filing in clerk's office. For purposes of § 19-1-110 (now § 19-1-108) (5), the "conclusion of the [juvenile] hearing" does not occur until the juvenile commissioner signs the written findings and recommendations and transmits them to the juvenile judge by filing in the office of the clerk. The five-day period within which to file a request for review does not commence running until the filing date. People in Interest of M.C.L., 671 P.2d 1339 (Colo. App. 1983).

C.R.C.P. 6(e) does apply to extend time under this rule. Bonanza Corp. v. Durbin, 696 P.2d 818 (Colo. 1985).

No reviewable judgment presented. An appellate court must see that the actual judgment has been pronounced by the court and then entered by the clerk and that it appears in the record; otherwise no reviewable judgment is presented. Joslin Dry Goods Co. v. Villa Italia, Ltd., 35 Colo. App. 252, 539 P.2d 137 (1975); Joslin Dry Goods Co. v. Villa Italia, Ltd., 541 P.2d 118 (Colo. App. 1975).

Relation back of judgment so as to extinguish appeal right unconstitutional. Trial court's action in relating back matters decided on May 28 to the May 15 entry on the judgment docket had the effect of extinguishing the petitioner's right to appeal from the determination made on May 28. Under these circumstances, the 10-day period of C.R.C.P. 59 (b), expired before the remaining issues in the case had even been determined by the trial court. This result contravenes the right of appeal granted by the Colorado constitution. In re Gardella, 190 Colo. 402, 547 P.2d 928 (1976) (decided prior to amendments made in 1977, 1984, and 1987).

Read together, the rules provide that a motion for a new trial must be filed not later than 10 days following the notation of judgment in the trial court's register of actions (or judgment docket). In re Gardella, 190 Colo. 402, 547 P.2d 928 (1976) (decided prior to amendments made in 1977, 1984, and 1987).

Time for motion after entry of order not issuance. Where the trial court issued its order nunc pro tunc on April 22, 1974, but the order was not noted in the registry of actions until May 31, 1974, the motion for new trial filed within 10 days from that date was timely filed. In re Talarico, 36 Colo. App. 389, 540 P.2d 1147 (1975) (decided prior to amendments made in 1977, 1984, and 1987).

Even though a nunc pro tunc order generally is fully operative on the litigants' rights as of the prescribed effective date, a nunc pro tunc order cannot be used to reduce the time nor to defeat the right to take an appeal. Joslin Dry Goods Co. v. Villa Italia, Ltd., 35 Colo. App. 252, 539 P.2d 137 (1975); Joslin Dry Goods Co. v. Villa Italia, Ltd., 541 P.2d 118 (Colo. App. 1975).

The filing on September 26 of an order nunc pro tunc as of September 25 cannot give effect to a clerk's September 25 entry of judgment, especially where the record does not indicate that the September 26 order was subsequently entered in the register of actions. Joslin Dry Goods Co. v. Villa Italia, Ltd., 35 Colo. App. 252, 539 P.2d 137 (1975); Joslin Dry Goods Co. v. Villa Italia, Ltd., 541 P.2d 118 (Colo. App. 1975).

Where notice of entry of judgment is mailed to only one party in contravention of subsection (a) of this rule, the time provided by C.R.C.P. 59(a) for filing a post-trial motion commences from the date that the notice is mailed by that party to the party subsequently moving for post-trial relief. Padilla v. D.E. Frey & Co., Inc., 939 P.2d 475 (Colo. App. 1997).

Trial judge's failure to sign minute order does not prevent the court of appeals from considering the appeal. Furlong v. Gardner, 956 P.2d 545 (Colo. 1998).

Applied in Lewis v. Buckskin Joe's, Inc., 156 Colo. 46, 396 P.2d 933 (1964).

III. SATISFACTION.

Court has authority to order satisfaction apart from acknowledgment. A court has the authority to order a satisfaction of judgment even though there had not been an acknowledgment by the judgment creditor and without the filing of a motion by the debtor to compel such an acknowledgment. Osborn Hdwe. Co. v. Colo. Corp., 32 Colo. App. 254, 510 P.2d 461 (1973).

Execution sale constitutes satisfaction to extent of proceeds. In the absence of a defect justifying setting an execution sale aside, a levy and sale under an execution constitutes a satisfaction only to the extent of the proceeds of the sale. Gale v. Rice, 636 P.2d 1280 (Colo. App. 1981).

Rule authorizes a court to enter satisfaction of judgment on behalf of a judgment debtor, even though a judgment creditor refuses to acknowledge payment, so long as the judgment debtor has paid the judgment amount into the court registry. Vento v. Colo. Nat'l Bank, 985 P.2d 48 (Colo. App. 1999).

Applied in Chateau Chaumont Condo. v. Aspen Title Co., 676 P.2d 1246 (Colo. App. 1983).

Rule 59. Motions for Post-Trial Relief

(a) Post-Trial Motions. Within 14 days of entry of judgment as provided in C.R.C.P. 58 or such greater time as the court may allow, a party may move for post-trial relief including:

(1) A new trial of all or part of the issues;

(2) Judgment notwithstanding the verdict;

(3) Amendment of findings; or

(4) Amendment of judgment.

Motions for post-trial relief may be combined or asserted in the alternative. The motion shall state the ground asserted and the relief sought.

(b) No Post-Trial Motion Required. Filing of a motion for post-trial relief shall not be a condition precedent to appeal or cross-appeal, nor shall filing of such motion limit the issues that may be raised on appeal.

(c) On Initiative of Court. Within the time allowed the parties and upon any ground available to a party, the court on its own initiative, may:

(1) Order a new trial of all or part of the issues;

(2) Order judgment notwithstanding the verdict;

(3) Order an amendment of its findings; or

(4) Order an amendment of its judgment.

The court's order shall specify the grounds for such action.

(d) Grounds for New Trial. Subject to provisions of Rule 61, a new trial may be granted for any of the following causes:

(1) Any irregularity in the proceedings by which any party was prevented from having a fair trial;

(2) Misconduct of the jury;

(3) Accident or surprise, which ordinary prudence could not have guarded against;

(4) Newly discovered evidence, material for the party making the application which that party could not, with reasonable diligence, have discovered and produced at the trial;

(5) Excessive or inadequate damages; or

(6) Error in law.

When application is made under grounds (1), (2), (3), or (4), it shall be supported by affidavit filed with the motion. The opposing party shall have 21 days after service of an affidavit within which to file opposing affidavits, which period may be extended by the court or by written stipulation between the parties. The court may permit reply affidavits.

(e) Grounds for Judgment Notwithstanding Verdict. A judgment notwithstanding verdict may be granted for either of the following grounds:

(1) Insufficiency of evidence as a matter of law; or

(2) No genuine issue as to any material fact and the moving party being entitled to judgment as a matter of law.

A motion for directed verdict shall not be a prerequisite to any form of post-trial relief, including judgment notwithstanding verdict.

(f) Scope of Relief in Trials to Court. On motion for post-trial relief in an action tried without a jury, the court may, if a ground exists, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct entry of a new judgment.

(g) Scope of Relief in Trials to a Jury. On motion for post-trial relief in a jury trial, the court may, if a ground exists, order a new trial or direct entry of judgment. If no verdict was returned, the court may, if a ground exists, direct entry of judgment or order a new trial.

(h) Effect of Granting New Trial. The granting of a new trial shall not be an appealable order, but a party by participating in the new trial shall not be deemed to have waived any objection to the granting of the new trial, and the validity of the order granting new trial may be raised by appeal after final judgment has been entered in the case.

(i) Effect of Granting Judgment Notwithstanding Verdict, Amendment of Findings or Amendment of Judgment. Subject to C.R.C.P. 54(b), granting of judgment notwithstanding the verdict, amendment of findings or amendment of judgment shall be an appealable order.

(j) Time for Determination of Post-Trial Motions. The court shall determine any post-trial motion within 63 days (9 weeks) of the date of the filing of the motion. Where there are multiple motions for post-trial relief, the time for determination shall commence on the date of filing of the last of such motions. Any post-trial motion that has not been decided within the 63-day determination period shall, without further action by the court, be deemed denied for all purposes including Rule 4(a) of the Colorado Appellate Rules and time for appeal shall commence as of that date.

(k) When Judgment Becomes Final. For purposes of this Rule 59, judgment shall be final and time for filing of notice of appeal shall commence as set forth in Rule 4(a) of the Colorado Appellate Rules.

Source: (a) amended March 17, 1994, effective July 1, 1994; entire rule amended and effective October 11, 2001; IP(a), (a) last paragraph, (d) last paragraph, and (j) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, "Misconduct of Jury — Ground for New Trial", see 16 Dicta 317 (1939). For article, "Notes on Proposed Amendments to Colorado Rules of Civil Procedure", see 27 Dicta 165 (1950). For article, "Amendments to the Colorado Rules of Civil Procedure", see 28 Dicta 242 (1951). For article, "Judgment: Rules 54-63", see 23 Rocky Mt. L. Rev. 581 (1951). For article, "Appellate Procedure and the New Supreme Court Rules", see 30 Dicta 1 (1953). For article, "Civil Remedies and Civil Procedure", see 30 Dicta 465 (1953). For article, "One Year Review of Civil Procedure", see 34 Dicta 69 (1957). For article, "One Year Review of Civil Procedure and Appeals", see 36 Dicta 5 (1959). For article, "One Year Review of Civil Procedure and Appeals", see 37 Dicta 21 (1960). For article, "One Year Review of Civil Procedure and Appeals", see 38 Dicta 133 (1961). For article, "One Year Review of Civil Procedure and Appeals", see 39 Dicta 133 (1962). For article, "One Year Review of Civil Procedure and Appeals", see 40 Den. L. Ctr. J. 66 (1963). For note, "One Year Review of Civil Procedure", see 41 Den. L. Ctr. J. 67 (1964). For note, "New Trial Motion in Colorado — Some Significant Changes", see 37 U. Colo. L. Rev. 379 (1965). For a discussion of federal jurisdiction arising under this rule, see survey of Tenth Circuit decisions on federal practice and procedure, 53 Den. L.J. 153 (1976). For article, "The One Percent Solution", see 11 Colo. Law. 86 (1982). For article, "Federal Practice and Procedure", which discusses a recent Tenth Circuit decision dealing with post-trial motions, see 62 Den. U. L. Rev. 232 (1985). For article, "Post-Trial Motions in the Civil Case: An Appellate Perspective", see 32 Colo. Law. 71 (November 2003).

Annotator's note. Since this rule, as it existed prior to January 1, 1985, was similar to §§ 237 and 238 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, and, since present provisions of sections (e) and (i) of this rule are similar to C.R.C.P. 50(b) and (c), as they existed prior to January 1, 1985, relevant cases construing §§ 237 and 238 of the former code and former C.R.C.P. 50(b) and (c) have been included in the annotations to this rule.

Purpose of a motion for a new trial is to give the trial court an opportunity to correct alleged errors. Danielson v. Kerbs AG., Inc., 646 P.2d 363 (Colo. 1982).

The primary purpose of a motion to amend judgment or for new trial is to give the court an opportunity to correct any errors that it may have made. In re Jones, 668 P.2d 980 (Colo. App. 1983).

Relief sought, and therefore time limitations, for judgment entered pursuant to C.R.C.P. 58 is pursuant to subsection (a)(4) of this rule even though relief sought was from costs taxed by clerk pursuant to C.R.C.P. 54. Davis v. Bruton, 797 P.2d 830 (Colo. App. 1990).

This rule authorizes the filing of a motion for new trial and empowers the court under certain conditions to grant a new trial on all or part of the issues. Dale v. Safeway Stores, Inc., 152 Colo. 581, 383 P.2d 795 (1963).

A motion for reconsideration of an order granting a new trial is not governed by this section because such order is not a final judgment. Bowman v. Songer, 820 P.2d 1110 (Colo. 1991).

A motion to reconsider is not specifically delineated in this rule, and no other rule or statute establishes a party's right to file such a motion, except under the Administrative Procedure Act and the Colorado appellate rules. Stone v. People, 895 P.2d 1154 (Colo. App. 1995).

A motion to reconsider in light of new circumstances or newly discovered evidence is not subject to the limitations in section (d) of this rule. UIH-SFCC Holdings, L.P. v. Brigato, 51 P.3d 1076 (Colo. App. 2002).

New trial is the only means for trial court to change judgment. Once a valid judgment is entered the only means by which the trial court may thereafter alter, amend, or vacate the judgment is by appropriate motion under either this rule or C.R.C.P. 60. Cortvriendt v. Cortvriendt, 146 Colo. 387, 361 P.2d 767 (1961); In re Warner, 719 P.2d 363 (Colo. App. 1986).

Plaintiff's motion to reconsider the summary judgment determination must be characterized as a motion for new trial under subsection (d)(4). The primary purpose of a motion for a new trial is to give the trial court an opportunity to correct any errors it may have made. Graven v. Vail Assocs., Inc., 888 P.2d 310 (Colo. App. 1994); Zolman v. Pinnacol Assurance, 261 P.3d 490 (Colo. App. 2011).

Retired judge may not entertain a motion for a new trial. After the expiration of his term of office, a judge may not entertain a motion under this rule, even though such motion is filed in a proceeding wherein the "former" judge had himself entered the final judgment at a time when he was actually serving as a judge. Olmstead v. District Court, 157 Colo. 326, 403 P.2d 442 (1965).

An appellate court does not grant or deny motions filed subsequent to entry of judgment under this rule since this is a function of the trial court; once a trial court has acted, however, an appellate court may in appropriate proceedings be called upon to review the propriety of the action thus taken by it. Olmstead v. District Court, 157 Colo. 326, 403 P.2d 442 (1965).

Court of appeals had subject matter jurisdiction to rule on issue to setoff two judgments and to enter single judgment despite fact that second notice of appeal to amended judgment was untimely where plaintiff raised issue of lack of setoff in trial court. Husband v. Colo. Mountain Cellars, 867 P.2d 57 (Colo. App. 1993).

Motion for new trial is analogous to motion for reconsideration, reargument, or rehearing in a proceeding before the public utilities commission. Peoples Natural Gas Div. v. Pub. Utils. Comm'n, 626 P.2d 159 (Colo. 1981).

An order denying a motion for a new trial does not deprive the court of jurisdiction to reconsider. Zehnder v. Thirteenth Judicial Dist. Court, 193 Colo. 502, 568 P.2d 457 (1977).

Lack of a proper order, entered in accordance with C.R.C.P. 58, determining a motion under this rule was not fatal to appeal where party appealed from underlying order of dissolution of marriage, not from denial of the motion. In re Christen, 899 P.2d 339 (Colo. App. 1995).

After reconsideration of the motion to set aside, the court can adhere to its order which has the effect of striking the motion for a new trial. Zehnder v. Thirteenth Judicial Dist. Court, 193 Colo. 502, 568 P.2d 457 (1977).

Court has duties upon timely filing of motion. Where a timely motion for a new trial is filed, it is then incumbent upon the district court to either set the motion for hearing or to dispense with oral argument and decide the motion on the basis of the written briefs alone. Danielson v. Kerbs AG., Inc., 646 P.2d 363 (Colo. 1982).

A trial court has great discretion in granting of motions for new trials. DeMott v. Smith, 29 Colo. App. 531, 486 P.2d 451 (1971).

In determining whether a new trial should be granted, the trial court has broad discretionary powers. Park Stations, Inc., v. Hamilton, 38 Colo. App. 216, 554 P.2d 311 (1976).

Whether or not a new trial is granted is usually a matter for the sound discretion of the trial judge whose presence and observation at the trial better equip him for making this decision. First Nat'l Bank v. Campbell, 198 Colo. 344, 599 P.2d 915 (1979).

The trial court properly exercised discretion when granting a motion for reconsideration in order to correct a previous erroneous ruling on a motion to reconsider if done within 60 days of the prior ruling. In re Nixon, 785 P.2d 151 (Colo. App. 1989).

Where the record indicated that no further issues of material fact remained to be addressed, summary judgment was a final judgment despite trial court order indicating that genuine issues of material fact remained to be addressed, and district court lacked jurisdiction for further orders. Driscoll v. District Court, 870 P.2d 1250 (Colo. 1994).

Order reversed where court substitutes opinion on disputed facts. Orders granting new trials are subject to reversal where it appears from the record that the trial court has merely substituted its opinion on disputed questions of fact for that of the jury. DeMott v. Smith, 29 Colo. App. 531, 486 P.2d 451 (1971); Roth v. Stark Lumber Co., 31 Colo. App. 121, 500 P.2d 145 (1972).

Where the court failed to rule on a motion for reconsideration within 60 days, the court effectively denied the motion, the judgment became final, and the court lost jurisdiction for any further action. Driscoll v. District Court, 870 P.2d 1250 (Colo. 1994).

Automatic denial after the 60-day determination period described in section (j) of this rule is mandatory. Actions taken by the court under this rule after the 60-day period are outside the court's jurisdiction and void. De Avila v. Estate of DeHerrera, 75 P.3d 1144 (Colo. App. 2003).

But divestiture of jurisdiction under this rule does not preclude the court from considering proper motions made under C.R.C.P. 60. De Avila v. Estate of DeHerrera, 75 P.3d 1144 (Colo. App. 2003).

A trial judge may not change the substance of a jury's verdict upon his own motion. Leo Payne Pontiac, Inc. v. Ratliff, 178 Colo. 361, 497 P.2d 997 (1972).

The granting of a new trial by the trial court should be reversed if the reasons for granting a new trial do not constitute legal grounds, or do not in fact exist. DeMott v. Smith, 29 Colo. App. 531, 486 P.2d 451 (1971).

In trial by court, judge retains jurisdiction after motion filed. Upon the filing of the motion for new trial within the time provided by rule, the trial court retained full power to correct any and all errors theretofore committed in the trial to the court. Goodwin v. Eller, 127 Colo. 529, 258 P.2d 493 (1953).

Filing of motion operates to continue jurisdiction of court. Where a trial was to the court, and its findings were announced, and counsel gave notice of a motion for a new trial, and subsequently at the same term filed his motion, but the motion was not disposed of until the subsequent term, held that the proceedings at the first term, subsequent to the findings, operated to reserve the case and to continue the jurisdiction beyond that term, for the purpose of disposing of the motion and the settling of the bill of exceptions. Gomer v. Chaffe, 5 Colo. 383 (1880).

The trial court may reverse judgment. Where an action has been tried to the court without a jury, and a motion for new trial has been filed after entry of findings and judgment, the trial court has the power, upon consideration of such motion, to vacate the original findings

and judgment, reverse itself, and enter a judgment in favor of the opposite party. Goodwin v. Eller, 127 Colo. 529, 258 P.2d 493 (1953); Smith v. Whitlow, 129 Colo. 239, 268 P.2d 1031 (1954).

Trial court properly refused to consider the issues raised in affidavits and did not abuse its discretion in denying plaintiff's motion to reconsider since affidavits filed after the granting of a motion for summary judgment cannot be considered on a motion to reconsider and a court need not entertain new theories on a motion to reconsider following the grant of summary judgment. Graven v. Vail Assocs., Inc., 888 P.2d 310 (Colo. App. 1994).

The court will not address issues raised for the first time in a reply brief on a post-trial motion for the same reason that issues will not be considered when raised for the first time in reply briefs on appeal. Flagstaff Enters. Constr. Inc. v. Snow, 908 P.2d 1183 (Colo. App. 1995).

Court may limit issues to be retried. When error exists as to only one or more issues and the judgment is in other respects free from error, a reviewing court may, when remanding the cause for a new trial, whether by the court or a jury, limit the new trial to the issues affected by the error whenever these issues are entirely distant and separable from the matters involved in other issues and the trial can be had without danger of complication with other matters. Murrow v. Whitely, 125 Colo. 392, 244 P.2d 657 (1952).

Where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice to either party. Murrow v. Whiteley, 125 Colo. 392, 244 P.2d 657 (1952).

Where the issues of damages and of liability in the action are closely intertwined, it would be error to confine the new trial solely to the liability issue. Where the issues at trial are interrelated and depend upon one another for determination, then error which requires a new trial on one issue will, of necessity, require a new trial as to all issues. Bassett v. O'Dell, 30 Colo. App. 215, 491 P.2d 604 (1971), aff'd, 178 Colo. 425, 498 P.2d 1134 (1972).

Under this rule, the court may, on review, subject dependency proceedings to a complete review, in furtherance of which he is empowered, inter alia, to reconsider the petition, take additional testimony, amend findings of fact and conclusions of law, or make new findings and conclusions, and direct the entry of a new order. People in Interest of S.S.T., 38 Colo. App. 110, 553 P.2d 418 (1976).

The motion for a new trial set forth numerous alleged errors of the trial court relating to the admission of evidence, exhibits, the giving and refusal of instructions, and other matters bearing directly upon the issue of liability and which, if overruled, defendants would be entitled to have reviewed upon writ of error. To limit the retrial to the issue of damages alone would deprive them of the full review covering all elements of the case to which they are unquestionably entitled. The trial court acted within its discretion and authority in declining to limit the issues upon retrial. Piper v. District Court, 147 Colo. 87, 364 P.2d 213 (1961).

Original judgment retains force until modified. Irregular and erroneous judgments necessarily retain their force and have effect until modified by a trial court in consequence of its authority in certain circumstances, or until vacated pursuant to new trial procedures under this rule, or until reversed by an appellate court in review proceedings. Such judgments are subject only to direct attack; they are not vulnerable to collateral assault. Davidson Chevrolet, Inc. v. City & County of Denver, 138 Colo. 171, 330 P.2d 1116 (1958), cert. denied, 359 U.S. 926, 79 S. Ct. 609, 3 L. Ed. 2d 629 (1959).

Interest runs from original judgment when motion for new trial is denied. Where a motion for a new trial is overruled and thereafter a trial court computes interest on the verdict and orders judgment in the amount of the verdict and interest, this concludes the trial court's action relative to the judgment and becomes the final judgment. Green v. Jones, 134 Colo. 208, 304 P.2d 901 (1956).

A memorandum in support of a motion for new trial is not mandatory but it is within the discretion of the trial judge to consider a motion for new trial without a memorandum. West-Fir Studs, Inc. v. Anlauf Lumber Co., 190 Colo. 298, 546 P.2d 487 (1976).

Memorandum brief is for benefit of trial court. Although section (a) (now section (d)) formerly required a memorandum brief and it was within the discretion of the trial court to strike a motion for new trial unaccompanied by such a brief, this requirement was for the benefit of the trial court in its own review and evaluation of its determination of the case, and where the trial court ruled on a motion for new trial without requiring a brief, the brief requirement was waived. L.C. Fulenwider, Inc. v. Ginsberg, 36 Colo. App. 246, 539 P.2d 1320 (1975) (decided prior to 1985 amendment).

The requirement of a memorandum brief in support of a motion for new trial is for the benefit of the trial court in its review of its determination of the case. Where the trial court considers the brief to be sufficient and considers the brief in its ruling on the motion, the brief has fulfilled its purpose as intended by the rules of procedure. In re Flohr, 672 P.2d 1024 (Colo. App. 1983).

Counsel is not entitled to free transcript to aid in preparation of motion. In absence of statute authorizing furnishing of free transcript

of proceedings to aid in preparation of motion for new trial, counsel is not entitled to copy for preparation of such motion. People in Interest of A.R.S., 31 Colo. App. 268, 502 P.2d 92 (1972).

A motion for new trial filed in apt time suspends the judgment so that it becomes final only when the motion is overruled. Bates v. Woodward, 66 Colo. 555, 185 P. 351 (1919); Kinney v. Yoelin Bros. Mercantile Co., 74 Colo. 295, 220 P. 998 (1923).

This rule does not apply to appeals in a district court from judgments of a county court. Such appeals are pure creatures of statute, and no motion for a new trial is provided for in such cases. Erbaugh v. Jacobson, 140 Colo. 182, 342 P.2d 1026 (1959).

After an appeal of a final judgment has been perfected, the trial court is without jurisdiction to entertain any motion or any order affecting the judgment. People in Interest of J.L.P., 870 P.2d 1252 (Colo. App. 1994).

Requirement of supporting affidavit serves to demonstrate that one, who moves for a new trial alleging irregularities in prior proceedings that denied him a fair trial, is acting upon a basis of knowledge, not upon a suspicion or mere hope. Peoples Natural Gas Div. v. Pub. Utils. Comm'n, 626 P.2d 159 (Colo. 1981).

Affidavit of losing counsel allowed to support motion for new trial where the affidavit contains factual allegations and a basis of knowledge upon which the motion for a new trial rests. Aldrich v. District Court, 714 P.2d 1321 (Colo. 1986).

Successor judge has discretion to rule on a motion for a new trial which challenges the sufficiency of the evidence. Faris v. Rothenberg, 648 P.2d 1089 (Colo. 1982).

There is nothing in the rules prohibiting early filing of a motion for new trial; they only proscribe motions filed too late. Haynes v. Troxel, 670 P.2d 812 (Colo. App. 1983).

A judgment is final when it disposes of the entire litigation on the merits and a motion for costs does not stay the finality of that judgment. Driscoll v. District Court, 870 P.2d 1250 (Colo. 1994).

The provisions of C.R.C.P. 6(e) authorize the addition of three days to the prescribed period for taking certain actions following service by mail. However, the time for filing a rule 59 motion is specifically triggered either by entry of judgment in the presence of the parties or by mailing of notice of the court's entry of judgment if all parties were not present when judgment was entered. As a result, C.R.C.P. 6(e) is not applicable to the filing of rule 59 motions. Wilson v. Fireman's Fund Ins. Co., 931 P.2d 523 (Colo. App. 1996).

Attorney fee issues. Trial court retains jurisdiction to determine motions on attorney fee issues even though the merits of the judgment are pending appeal. Koontz v. Rosener, 787 P.2d 192 (Colo. App. 1989).

Where each party prevails in part an award of costs is committed to sole discretion of trial court and court's discretion remains unaffected by fact that judgment awarded to one party is larger than judgment awarded to the other. Husband v. Colo. Mountain Cellars, 867 P.2d 57 (Colo. App. 1993).

A request for costs is outside the purview of this section because a decision concerning a request for costs does not amend or otherwise affect the finality of the judgment on the merits. Because a request for costs is not subject to the 60-day limitation, the trial court had jurisdiction to consider the defendant's bill of costs following the expiration of that period. Hierath-Prout v. Bradley, 982 P.2d 329 (Colo. App. 1999).

Rule not applicable. Motions filed following a jury trial that pertained to unresolved, substantive claims raised in the complaint are not directed at post-judgment relief and, therefore, this rule is not applicable. Church v. Amer. Standard Ins. Co. of Wis., 742 P.2d 971 (Colo. App. 1987).

No error by trial court in denying appellant's motion for leave to file a motion for reconsideration of motion to dismiss and in rejecting arguments to clarify trial court's original order. Failure to file motion within time allowed by section (a), absent extension, deprives court of jurisdiction to act under rule. Here, time to file motion for post-trial relief ended before appellant filed motion for leave to file motion for reconsideration of motion to dismiss. As such, motion for leave was untimely, and trial court did not err in denying it. Titan Indem. Co. v. Travelers Prop. Cas. Co. of Am., 181 P.3d 303 (Colo. App. 2007).

Applied in Miller v. Carnation Co., 33 Colo. App. 62, 516 P.2d 661 (1973); City of Englewood v. Reffel, 34 Colo. App. 103, 522 P.2d 1241 (1974); Bd. of County Comm'rs v. Evergreen, Inc., 35 Colo. App. 171, 532 P.2d 777 (1974); Cline v. City of Boulder, 35 Colo. App. 349, 532 P.2d 770 (1975); Lehman v. Williamson, 35 Colo. App. 372, 533 P.2d 63 (1975); Joslin Dry Goods Co. v. Villa Italia, Ltd., 35 Colo. App. 252, 539 P.2d 137 (1975), 541 P.2d 118 (Colo. App. 1975); Dill v. County Court, 37 Colo. App. 75, 541 P.2d 1272 (1975); In re Franks, 189 Colo. 499, 542 P.2d 845 (1975); Lewis v. People in Interest of C.K.L., 189 Colo. 552, 543 P.2d 722 (1975); Poor v. District Court, 190 Colo. 433, 549 P.2d 756 (1976); Miller v. Carnation Co., 39 Colo. App. 1, 564 P.2d 127 (1977); Allred v. City of Lakewood, 40 Colo. App. 238, 576 P.2d 186 (1977); Catron v. Catron, 40 Colo. App. 476, 577 P.2d 322 (1978); Bd. of Water Works v. Pueblo Water Works Employees Local 1045, 196 Colo. 308, 586 P.2d 18 (1978); Taylor v. Barnes, 41 Colo. App. 246, 586 P.2d 238 (1978); State

Dept. Natural Res. v. Benjamin, 41 Colo. App. 520, 587 P.2d 1207 (1978); First Nat'l Bank v. Campbell, 41 Colo. App. 406, 589 P.2d 501 (1978); Matthews v. Tri-County Water Conservancy Dist., 42 Colo. App. 80, 594 P.2d 586 (1979); O'Hara Group Denver, Ltd. v. Marcor Hous. Sys., 197 Colo. 530, 595 P.2d 679 (1979); City of Colo. Springs v. Gladin, 198 Colo. 333, 599 P.2d 907 (1979); Hitti v. Montezuma Valley Irrigation Co., 42 Colo. App. 194, 599 P.2d 918 (1979); Ayala v. Colo. Dept. of Rev., 43 Colo. App. 357, 603 P.2d 979 (1979); In re Stroud, 657 P.2d 960 (Colo. App. 1979); People in Interest of J.B.P., 44 Colo. App. 95, 608 P.2d 847 (1980); Matthews v. Tri-County Water Conservancy Dist., 200 Colo. 202, 613 P.2d 889 (1980); Prof'l Group, Ltd. v. Great Falls Props., Inc., 44 Colo. App. 370, 622 P.2d 76 (1980); D.E.B. Adjustment Co. v. Cawthorne, 623 P.2d 82 (Colo. App. 1981); Fitzgerald v. Edelen, 623 P.2d 418 (Colo. App. 1981); Fort Lupton State Bank v. Murata, 626 P.2d 757 (Colo. App. 1981); Craig v. Rider, 628 P.2d 623 (Colo. App. 1980); In re Stroud, 631 P.2d 168 (Colo. 1981); Maltby v. J.F. Images, Inc., 632 P.2d 646 (Colo. App. 1981); In re Stedman, 632 P.2d 1048 (Colo. App. 1981); Young v. Golden State Bank, 632 P.2d 1053 (Colo. App. 1981); In re Van Camp, 632 P.2d 1062 (Colo. App. 1981); People in Interest of E.A., 638 P.2d 278 (Colo. 1981); In re Smith, 641 P.2d 301 (Colo. App. 1981); Duran v. Lamm, 644 P.2d 66 (Colo. App. 1981); Cavanaugh v. State Dept. of Soc. Servs., 644 P.2d 1 (Colo. 1982); Baum v. S.S. Kresge Co., 646 P.2d 400 (Colo. App. 1982); Davis Mfg. & Supply Co. v. Coonskin Props., Inc., 646 P.2d 940 (Colo. App. 1982); Jameson v. Foster, 646 P.2d 955 (Colo. App. 1982); Kennedy v. Leo Payne Broadcasting, 648 P.2d 673 (Colo. App. 1982); State Dept. of Highways v. Pigg, 656 P.2d 46 (Colo. App. 1982); In re Chambers, 657 P.2d 458 (Colo. App. 1982); Parry v. Walker, 657 P.2d 1000 (Colo. App. 1982); Ackmann v. Merchants Mtg. & Trust Corp., 659 P.2d 697 (Colo. App. 1982); Moore v. Wilson, 662 P.2d 160 (Colo. 1983); Acme Delivery Serv., Inc., v. Samsonite Corp., 663 P.2d 621 (Colo. 1983); Blecker v. Kofoed, 714 P.2d 909 (Colo. 1986); Blue Cross of W. New York v. Bulkumez, 736 P.2d 834 (Colo. 1987).

II. POST-TRIAL MOTIONS.

A. New Trial.

The purpose of filing a post-trial motion is to give a trial court an opportunity to correct any errors. Walter v. Walter, 136 Colo. 405, 318 P.2d 221 (1957); Minshall v. Pettit, 151 Colo. 501, 379 P.2d 394 (1963); Rowe v. Watered Down Farms, 195 Colo. 152, 576 P.2d 172 (1978).

A motion for a new trial is not to be regarded as a routine or perfunctory matter. Its obvious purpose is to direct the attention of the trial court with at least some degree of specificity to that which the losing litigant asserts to be error, all to the end that the trial court will be afforded a last look, and an intelligent last look, at the controversy still before it. General allegations of error do not comply. Martin v. Opdyke Agency, Inc., 156 Colo. 316, 398 P.2d 971 (1965); Hamilton v. Gravinsky, 28 Colo. App. 408, 474 P.2d 185 (1970).

Order granting new trial is an interlocutory order, and the trial court retains jurisdiction to modify or rescind the order prior to the entry of any final judgment thereafter. A motion for reconsideration of such an order does not challenge the entry of the judgment and is not subject to the limitations of this rule. Songer v. Bowman, 804 P.2d 261 (Colo. App. 1990).

Section (f) of this rule, through the language "if a ground exists", incorporates the six specific grounds upon which post-trial relief may be granted, which are found in section (d) of the rule. Kincaid v. Western Oper. Co., 890 P.2d 249 (Colo. App. 1994).

Section (b) (now (a)) permits a motion for new trial to be filed within 10 (now 15) days after entry of judgment, which means after entry of an adverse judgment. Bushner v. Bushner, 141 Colo. 283, 348 P.2d 153 (1959).

Where the trial court issued its order nunc pro tunc on April 22, 1974, but the order was not noted in the registry of actions until May 31, 1974, the motion for new trial filed within 10 (now 15) days from that date was timely filed. In re Talarico, 36 Colo. App. 389, 540 P.2d 1147 (1975).

When 10-day rule not applicable. Where the court was granting plaintiff's motion for a new trial and not acting on its own motion, the 10-day rule set forth in section (b) (now (a)) of this rule was not applicable. Park Stations, Inc. v. Hamilton, 38 Colo. App. 216, 554 P.2d 311 (1976) (decided prior to 1977 and 1985 amendments).

Provision of section (b) (now (a)) is mandatory. Austin v. Coll./Univ. Ins. Co. of Am., 30 Colo. App. 502, 495 P.2d 1162 (1972).

Section (b) (now (a)) is mandatory, and failure to comply with it requires a dismissal of the appeal. SCA Servs., Inc. v. Gerlach, 37 Colo. App. 20, 543 P.2d 538 (1975); Henley v. Wendt, 640 P.2d 271 (Colo. App. 1982).

Timely filing is jurisdictional. Timely filing of a motion for a new trial is jurisdictional. SCA Servs., Inc. v. Gerlach, 37 Colo. App. 20, 543 P.2d 538 (1975).

The failure to file a motion for a new trial within the time prescribed by section (b) (now (a)), as extended by any orders of court pursuant to motions timely made, deprives the court of jurisdiction and requires dismissal of the ap-

peal. Nat'l Account Sys. v. District Court, 634 P.2d 48 (Colo. 1981); Schuster v. Zwicker, 659 P.2d 687 (Colo. 1983); Liberty Mutual Ins. Co. v. Safeco Ins. Co., 679 P.2d 1115 (Colo. App. 1984); In re McSoud, 131 P.3d 1208 (Colo. App. 2006).

A timely motion for a new trial, or to alter or amend the judgment, is a jurisdictional prerequisite to appellate review of such judgment. Watered Down Farms v. Rowe, 39 Colo. App. 169, 566 P.2d 710 (1977), rev'd on other grounds, 195 Colo. 152, 576 P.2d 172 (1978).

Period for filing a motion for a new trial begins when notice of entry of judgment is mailed to the parties, but C.R.C.P. 6(e) extends that period when a judgment is mailed. Because C.R.C.P. 6(e) does not specifically exclude C.R.C.P. 59 motions from its provisions, C.R.C.P. 6(e) extends the time for filing a C.R.C.P. 59 motion when the parties were not present when the judgment was signed and the notice of entry of judgment was mailed to the parties. Littlefield v. Bamberger, 10 P.3d 710 (Colo. App. 2000).

Extension of time is discretionary. Trial judge's extension of the time for filing the motion for new trial, from 10 (now 15) to 20 days, is within his discretion. City & County of Denver v. Bd. of Adjustment, 31 Colo. App. 324, 505 P.2d 44 (1972).

Discretion to grant or deny belated request. Where party did not file motion for fees until 24 days after expiration of 15-day period and did not request extension of time nor offer excuse for delay, court did not abuse its discretion by denying the motion. Major v. Chons Bros., Inc., 53 P.3d 781 (Colo. App. 2002).

Extension of time for filing post-trial motions. Where the trial court, following judgment, grants a "stay" in order for counsel to have an "opportunity to pursue the matter further", it intends to extend the permissible time for filing post-trial motions. Blecker v. Kofoed, 672 P.2d 526 (Colo. 1983).

Court of review will assume extension was properly made. Where the time for filing a motion for new trial was extended to 15 (now regular time limit) days after the entry of judgment, the court of review will assume that the extension was properly made, in the absence of proper objections to the order of the county court. Niles v. Shinkle, 119 Colo. 458, 204 P.2d 1077 (1949).

Failure to file motion in time is fatal. The failure to file a motion for a new trial within the time provided by this rule, or within the extended period fixed by the court for so doing, is fatal to the right of review. Therefore, the county court was without jurisdiction to entertain a motion for a new trial after the time allowed by the court; and such motion should have been stricken from the files. Niles v. Shinkle, 119 Colo. 458, 204 P.2d 1077 (1949); City & County of Denver v. Just, 175 Colo. 260, 487 P.2d 367 (1971).

Trial court proceeded in excess of its jurisdiction when it vacated the jury verdict and ordered a new trial outside of the time limits provided by this rule. The trial court had jurisdiction to order a new trial within the time limit only. Beavers v. Archstone Comtys. Ltd., 64 P.3d 855 (Colo. 2003).

For permissibility of filing motion with judge or clerk, see Sprott v. Roberts, 154 Colo. 252, 390 P.2d 465 (1964).

Defendant must file for new trial after his case is dismissed, not after conclusion of entire case. Where a complaint is dismissed as to certain defendants and judgment of dismissal entered under C.R.C.P. 41(b)(1), a court has no power after the time to file a motion for a new trial has expired as to such defendants, to grant a motion for a new trial as to all defendants, such dismissal constituting a judgment on the merits under C.R.C.P. 41. Graham v. District Court, 137 Colo. 233, 323 P.2d 635 (1958).

A judgment is entered only when noted in judgment docket. For purposes of timely filing of a motion for new trial under section (b) (now (a)) of this rule, a judgment is "entered" only upon notation in the judgment docket pursuant to C.R.C.P. 58(a)(3) (now (a)) and C.R.C.P. 79(d). City & County of Denver v. Just, 175 Colo. 260, 487 P.2d 367 (1971).

If this section is not complied with, supreme court cannot review. Where a record on error fails to show compliance with this section requiring the filing of a motion for a new trial, or that a trial court otherwise ordered under section (f), the supreme court will not consider the merits on review. Sullivan v. Modern Music Co., 137 Colo. 292, 324 P.2d 374 (1958) (decided prior to 1985 amendment).

C.R.C.P. 6(a) does apply to extend time under this rule. Bonanza Corp. v. Durbin, 696 P.2d 818 (Colo. 1985).

Court did not forestall 60-day deadline by taking inconclusive action within said period, i.e. scheduling hearing on motion. Canton Oil v. District Court, 731 P.2d 687 (Colo. 1987).

Motion may be filed prior to entry of judgment. A motion for new trial may properly be filed prior to the execution of the written order entering the judgment. In re Jones, 668 P.2d 980 (Colo. App. 1983).

Date of entry of judgment on jury verdict is effective date. The date that judgment on a jury verdict is entered in open court is the effective date of entry of judgment which governs the filing of a motion for new trial under section (b) (now (a)). Henley v. Wendt, 640 P.2d 271 (Colo. App. 1982).

C.R.C.P. 58(a) controls date of entry of judgment. The timeliness of a civil appeal is governed by C.A.R. 4(a) (appeal as of right), not C.R.C.P. 58(a); C.R.C.P. 58(a), however,

does control the date of entry of judgment for the purposes of this rule. Moore & Co. v. Williams, 672 P.2d 999 (Colo. 1983).

When post-trial motion is filed prior to entry of judgment, it is deemed to have been filed on the date of entry of judgment, and the 60-day period within which to rule on motion commences to run from said date. People in Interest of T.R.W., 759 P.2d 768 (Colo. App. 1988).

Post-trial motions for attorney fees are subject to the provisions of this rule, and the effect of such motions upon the time limitations of C.A.R. 4(a) are as specified in this rule. Torrez v. Day, 725 P.2d 1184 (Colo. App. 1986).

Evidence was not "newly discovered" when the party seeking a new trial had the evidence in its possession two months prior to the trial court's judgment, but did not file the evidence with the trial court. Mortgage Invs. Corp. v. Battle Mountain Corp., 70 P.3d 1176 (Colo. App. 2003).

Where there has never been a trial, this section cannot be violated. In a proceeding under the Colorado Children's Code, title 19, where it was argued that the petition for new trial and demand for jury trial were filed too late, and thus were not in accordance with section (b) (now (a)) of this rule, this argument was rejected since according to the record there had never been any trial held or evidence presented in support of the dependency petition and, hence, no violation of said section could have occurred. C. B. v. People in Interest of J. T. B., 30 Colo. App. 269, 493 P.2d 691 (1971).

The running of the time for filing a notice of appeal is terminated upon the timely filing of a motion for new trial, and the time begins to run anew when that motion is denied. A subsequent motion for new trial that raises issues that either were or could have been raised in the movant's prior motion does not affect the running of the time for filing the notice of appeal. Wright Farms, Inc. v. Weninger, 669 P.2d 1054 (Colo. App. 1983).

Trial court erred in failing to consider a motion for new trial and motion to amend judgment which were filed after court entered judgment from bench but before judgment was signed as written order and filed. Haynes v. Troxel, 670 P.2d 812 (Colo. App. 1983).

For distinction between considerations governing determination of effect of time limitations in criminal cases and in civil cases, see People v. Moore, 193 Colo. 81, 562 P.2d 749 (1977).

Where defendant did not seek to reopen the divorce proceeding until approximately five years after entry of judgment, none of the grounds of this rule or C.R.C.P. 60 were available to him to reopen the divorce proceeding. McNeece v. McNeece, 39 Colo. App. 160, 562 P.2d 767 (1977).

Extinguishing right of appeal by relating action back to date of judgment. Trial court's action in relating back matters decided on May 28 to the May 15 entry on the judgment docket had the effect of extinguishing the petitioner's right to appeal from the determinations made on May 28. Under these circumstances, the 10-day period of section (b) (now (a)) of this rule expired before the remaining issues in the case had even been determined by the trial court. This result contravenes the right of appeal granted by the Colorado constitution. In re Gardella, 190 Colo. 402, 547 P.2d 928 (1976) (decided prior to the 1977 and 1985 amendments).

Motion for judgment "non abstante" is wholly separate and distinct from motion for new trial and does not take the place of one. Ross v. Arrow Mfg. Co., 134 Colo. 530, 307 P.2d 196 (1957).

A motion for a new trial may be joined with a motion for judgment "non abstante" or a new trial may be prayed in the alternative. Ross v. Arrow Mfg. Co., 134 Colo. 530, 307 P.2d 196 (1957).

Granting a motion for judgment n.o.v. does not effect an automatic denial of an alternative motion for a new trial. Grange Mut. Fire Ins. Co. v. Golden Gas Co., 133 Colo. 537, 298 P.2d 950 (1956).

Ruling on both should be made at same time. Where a motion for judgment notwithstanding the verdict or in the alternative for a new trial is filed under this rule, a trial court should make a ruling on both phases of the motion at the same time. Grange Mut. Fire Ins. Co. v. Golden Gas Co., 133 Colo. 537, 298 P.2d 950 (1956).

This rule contemplates that either party to an action is entitled to the trial judge's decision on both motions, if both are presented. Ross v. Arrow Mfg. Co., 134 Colo. 530, 307 P.2d 196 (1957).

If a trial court errs in granting the motion n.o.v., the party against whom the verdict goes is entitled to have his motion for a new trial considered in respect of asserted substantial trial errors and matters appealing to the discretion of the judge. Ross v. Arrow Mfg. Co., 134 Colo. 530, 307 P.2d 196 (1957).

The cause will be remanded for a ruling on such motion. Where a motion for judgment notwithstanding the verdict or in the alternative for a new trial is filed, and the court erroneously grants the motion for judgment, leaving the motion for a new trial undecided, the cause will be remanded for a ruling on such motion. Ross v. Arrow Mfg. Co., 134 Colo. 530, 307 P.2d 196 (1957).

A decision in favor of the moving party upon the motion for judgment ends the litigation and often makes it possible for an appellate court to dispose of the case without re-

manding it for a new trial. Ross v. Arrow Mfg. Co., 134 Colo. 530, 307 P.2d 196 (1957).

Trial court may grant a motion for a new trial on all or part of the issues. Trione v. Mike Wallen Standard, Inc., 902 P.2d 454 (Colo. App. 1995).

Before granting a partial new trial, it should clearly appear that the issue to be retried is entirely distinct and separable from the other issues involved in the case and that a partial retrial can be had without injustice to any party. Bassett v. O'Dell, 178 Colo. 425, 498 P.2d 1134 (1972); Trione v. Mike Wallen Standard, Inc., 902 P.2d 454 (Colo. App. 1995).

If a trial court, in reviewing and examining the facts, is dissatisfied with the verdict because it is against the weight, sufficiency, or preponderance of the evidence, it may, under certain limitations, set the same aside and grant a new trial so that the issues of fact may ultimately be determined. Burenheide v. Wall, 131 Colo. 371, 281 P.2d 1000 (1955).

In passing upon such motions, a trial judge is necessarily required to weigh the evidence, so that he may determine whether the verdict was one which might reasonably have been reached. Singer v. Chitwood, 126 Colo. 173, 247 P.2d 905 (1952).

The trial judge has discretion to grant a new trial before another jury if he thinks the verdict is wrong, though there be some evidence to support it, and his action is generally not subject to review on appeal. Burenheide v. Wall, 131 Colo. 371, 281 P.2d 1000 (1955).

Applied in Thorpe v. Durango Sch. Dist. No. 9-R, 41 Colo. App. 473, 591 P.2d 1329 (1978); Luna v. Fisher, 690 P.2d 264 (Colo. App. 1984).

B. Judgment Notwithstanding the Verdict.

Law reviews. For article, "Colorado Criminal Procedure — Does It Meet Minimum Standards?", see 28 Dicta 14 (1951).

This rule provides the method for securing a judgment "non obstante veredicto" when a motion for a directed verdict has been properly requested. Grange Mut. Fire Ins. Co. v. Golden Gas Co., 133 Colo. 537, 298 P.2d 950 (1956).

This rule adds nothing of substance to the rights of litigants previously available through a more cumbersome procedure. Burenheide v. Wall, 131 Colo. 371, 281 P.2d 1000 (1955).

The reason underlying this rule is that an opportunity should be given a trial court to reexamine, as a matter of law, the facts which have been considered and resolved by a jury. Ross v. Arrow Mfg. Co., 134 Colo. 530, 307 P.2d 196 (1957).

Motion for directed verdict must be made at conclusion of evidence. In actions where the issues are submitted to a jury for determination, it is an essential prerequisite to the right of either party to file a motion for judgment notwithstanding the verdict that a motion for directed verdict shall have been made at the conclusion of all the evidence. Ross v. Arrow Mfg. Co., 134 Colo. 530, 307 P.2d 196 (1957).

This rule does not compel a party against whom a verdict is directed to make a motion for a directed verdict in his favor as a condition to the right to file a motion for judgment notwithstanding the verdict, since a verdict having been directed by the court, the reason for the requirement no longer exists. Ross v. Arrow Mfg. Co., 134 Colo. 530, 307 P.2d 196 (1957).

Where a motion to dismiss is interposed at the conclusion of all the evidence and after verdict and judgment a motion for a new trial is filed, one of the grounds thereof being that a court erred in denying the motion to dismiss made at the conclusion of all the evidence, such motion is sufficient to authorize a trial court to enter judgment for a defendant notwithstanding the verdict. Mountain States Mixed Feed Co. v. Ford, 140 Colo. 224, 343 P.2d 828 (1959).

For a court to set aside a verdict as against the weight of evidence, the evidence may be merely insufficient in fact and it may be either insufficient in law or it may have more weight and not enough to justify the court in exercising the control which the law gives it to prevent unjust verdicts to allow a verdict to stand. Gossard v. Watson, 122 Colo. 271, 221 P.2d 353 (1950); Singer v. Chitwood, 126 Colo. 173, 247 P.2d 905 (1952).

This rule does not allow for a belated disturbance of a jury's finding on the facts when a reservation has been made to determine law questions only. Wallower v. Elder, 126 Colo. 109, 247 P.2d 682 (1952).

Filing a motion for judgment notwithstanding the verdict within 10 days after receipt of the verdict is mandatory. Ross v. Arrow Mfg. Co., 134 Colo. 530, 307 P.2d 196 (1957).

Unless such motion is filed within that time, a court has no power to pass on it. Ross v. Arrow Mfg. Co., 134 Colo. 530, 307 P.2d 196 (1957); Arrow Mfg. Co. v. Ross, 141 Colo. 1, 346 P.2d 305 (1959).

Appellate court forbidden to enter judgment. In the absence of a motion for judgment notwithstanding the verdict made in the trial court within 10 days after reception of a verdict, the rule forbids the trial judge or an appellate court to enter such a judgment. Mero v. Holly Hudson Motor Co., 129 Colo. 282, 269 P.2d 698 (1954).

Standard for granting judgment n.o.v. A jury's verdict can be set aside and judgment notwithstanding the verdict entered only if the evidence is such that reasonable men could not reach the same conclusion as the jury. Thorpe v. Durango Sch. Dist. No. 9-R, 41 Colo. App. 473, 591 P.2d 1329 (1978), aff'd, 200 Colo. 268, 614

P.2d 880 (1980); Wesley v. United Servs. Auto Ass'n, 694 P.2d 855 (Colo. App. 1984); Smith v. Denver, 726 P.2d 1125 (Colo. 1986); Alzado v. Blinder, Robinson & Co., Inc., 752 P.2d 544 (Colo. 1988); Nelson v. Hammond, 802 P.2d 452 (Colo. 1990); McCafferty v. Musat, 817 P.2d 1039 (Colo. App. 1990).

When order enlarging time to file motion for judgment n.o.v. permissible. Although C.R.C.P. 6(b) expressly limits a trial court's ability to extend a time for acting under section (b) of this rule, there is an exception to that limitation where a party reasonably relies and acts upon an erroneous or misleading statement of ruling by a trial court regarding the time for filing post-trial motions. Converse v. Zinke, 635 P.2d 882 (Colo. 1981).

Motion for judgment "non abstante" is wholly separate and distinct from motion for new trial and does not take the place of one. Ross v. Arrow Mfg. Co., 134 Colo. 530, 307 P.2d 196 (1957).

A motion for a new trial may be joined with a motion for judgment "non abstante" or a new trial may be prayed in the alternative. Ross v. Arrow Mfg. Co., 134 Colo. 530, 307 P.2d 196 (1957).

Granting a motion for judgment n.o.v. does not effect an automatic denial of an alternative motion for a new trial. Grange Mut. Fire Ins. Co. v. Golden Gas Co., 133 Colo. 537, 298 P.2d 950 (1956).

The standard for granting a motion for judgment notwithstanding the verdict is complicated when statutory presumptions exist. Such presumptions may be rebutted only by clear and convincing evidence that persuades the finder of fact that the truth of the contention is highly probable and free from serious and substantial doubt. People in Interest of M.C., 844 P.2d 1313 (Colo. App. 1992).

This rule contemplates that either party to an action is entitled to the trial judge's decision on both motions, if both are presented. Ross v. Arrow Mfg. Co., 134 Colo. 530, 307 P.2d 196 (1957).

Ruling on both should be made at same time. Where a motion for judgment notwithstanding the verdict or in the alternative for a new trial is filed under this rule, a trial court should make a ruling on both phases of the motion at the same time. Grange Mut. Fire Ins. Co. v. Golden Gas Co., 133 Colo. 537, 298 P.2d 950 (1956).

If a trial court errs in granting the motion n.o.v., the party against whom the verdict goes is entitled to have his motion for a new trial considered in respect of asserted substantial trial errors and matters appealing to the discretion of the judge. Ross v. Arrow Mfg. Co., 134 Colo. 530, 307 P.2d 196 (1957).

The cause will be remanded for a ruling on such motion. Where a motion for judgment notwithstanding the verdict or in the alternative for a new trial is filed, and the court erroneously grants the motion for judgment, leaving the motion for a new trial undecided, the cause will be remanded for a ruling on such motion. Ross v. Arrow Mfg. Co., 134 Colo. 530, 307 P.2d 196 (1957).

A decision in favor of the moving party upon the motion for judgment ends the litigation and often makes it possible for an appellate court to dispose of the case without remanding it for a new trial. Ross v. Arrow Mfg. Co., 134 Colo. 530, 307 P.2d 196 (1957).

If a trial court, in reviewing and examining the facts, is dissatisfied with the verdict because it is against the weight, sufficiency, or preponderance of the evidence, it may, under certain limitations, set the same aside and grant a new trial so that the issues of fact may ultimately be determined. Burenheide v. Wall, 131 Colo. 371, 281 P.2d 1000 (1955).

In ruling on motion for judgment notwithstanding the verdict, the court must determine whether a reasonable person could not have reached the same conclusion as did the jury and, in making such determination, the court cannot consider the weight of the evidence or the credibility of the witnesses and must consider the evidence in the light most favorable to the verdict. People in Interest of T.R.W., 759 P.2d 768 (Colo. App. 1988); Tuttle v. ANR Freight Sys., Inc., 797 P.2d 825 (Colo. App. 1990); Durdin v. Cheyenne Mountain Bank, 98 P.3d 899 (Colo. App. 2004).

A judgment notwithstanding the verdict may be entered only if a reasonable person could not reach the same conclusion as the jury, when viewing the evidence in the light most favorable to the party against whom the motion is directed. Every reasonable inference that may be drawn from the evidence must be drawn in favor of the non-moving party. Boulder Valley Sch. Dist. R-2 v. Price, 805 P.2d 1085 (Colo. 1991).

In passing upon such motions, a trial judge is necessarily required to weigh the evidence, so that he may determine whether the verdict was one which might reasonably have been reached. Singer v. Chitwood, 126 Colo. 173, 247 P.2d 905 (1952).

The trial judge has discretion to grant a new trial before another jury if he thinks the verdict is wrong, though there be some evidence to support it, and his action is generally not subject to review on appeal. Burenheide v. Wall, 131 Colo. 371, 281 P.2d 1000 (1955).

The trial court did not view the evidence presented in appellant's favor and thereby misapplied the standard for granting a judgment notwithstanding the verdict. People in Interest of M.C., 844 P.2d 1313 (Colo. App. 1992).

Applied in Alden Sign Co. v. Roblee, 121 Colo. 432, 217 P.2d 867 (1950); Farmer v.

Norm "Fair Trade" Stamp, Inc., 164 Colo. 156, 433 P.2d 490, 36 A.L.R.3d 232 (1967); DeCaire v. Pub. Serv. Co., 173 Colo. 402, 479 P.2d 964 (1971); Wheller & Lewis v. Slifer, 195 Colo. 291, 577 P.2d 1092 (1978); Thorpe v. Durango Sch. Dist. No. 9-R, 41 Colo. App. 473, 591 P.2d 1329 (1978).

C. Amendment of Judgment.

Section (e) (now (a)) requires that a motion to alter or amend must be filed within 10 (now 15) days after entry of judgment. Vanadium Corp. of Am. v. Wesco Stores Co., 135 Colo. 77, 308 P.2d 1011 (1957).

(Former) section (e) of this rule provides for the filing of a motion to alter or amend a judgment, which is the motion that is referred to in (former) section (f) of this rule, and it is not to be confused with a (former) C.R.C.P. 52(b) motion to amend the findings. Austin v. Coll./Univ. Ins. Co. of Am., 30 Colo. App. 502, 495 P.2d 1162 (1972).

When trial court amends pursuant to a motion, original judgment is not final. Section (e) (now (a)) of this rule specifies that a party may move to alter or amend a judgment by a motion filed not later than 10 (now 15) days after entry of judgment. Appellee filed such a motion within the allotted time, and the trial court subsequently did amend its judgment pursuant to such motion and the supplemental motion. Under these circumstances, the original trial court's judgment never became final. It was not enforceable by either divorced party with respect to his or her property rights. It did not create an enforceable right either in the husband or in his estate to take a divided share of the joint tenancy property. Sarno v. Sarno, 28 Colo. App. 598, 478 P.2d 711 (1970).

A judgment amended to comply with a motion therefor is the only judgment to which a writ of error will lie. Green v. Jones, 134 Colo. 208, 304 P.2d 901 (1956).

C.R.C.P. 6(b) divests the court of jurisdiction to extend the time for taking action under C.R.C.P. 6(b). Vanadium Corp. of Am. v. Wesco Stores Co., 135 Colo. 77, 308 P.2d 1011 (1957).

C.R.C.P. 6(b), gives trial court wide latitude in extending 10-day (now 15-day) period of section (e) (now (a)). Farmer v. Norm "Fair Trade" Stamp, Inc., 164 Colo. 156, 433 P.2d 490 (1967).

Memorandum brief must be filed with motion. The rule requiring a short memorandum brief to be filed with a motion for new trial applies equally to a motion to alter or amend the judgment. Zehnder v. Thirteenth Judicial Dist. Court, 193 Colo. 502, 568 P.2d 457 (1977) (decided before 1985 amendment).

Court loses jurisdiction to hear plaintiff's application for attorney's fees if the plaintiff fails to file a motion to amend the judgment within 15 days. Wesson v. Johnson, 622 P.2d 104 (Colo. App. 1980).

Omission of order for costs indicates no allowance of costs. As determined by the court entering judgment, the omission of an order relating to costs constitutes a direction by it that no costs, including attorney fees, are allowed. Wesson v. Johnson, 622 P.2d 104 (Colo. App. 1980).

Appellants barred on appeal from asserting error by trial court. Where, after two cases were tried and the parties' rights and obligations were determined by partial summary judgments which were not made final judgments under C.R.C.P. 54(b), appellants could have, and indeed should have, moved for a new trial or an altered or amended judgment under this rule and where they did not timely file such motions and allow the trial court an opportunity to review its possible errors, appellants were barred on appeal from asserting error by the trial court. Manka v. Martin, 200 Colo. 260, 614 P.2d 875 (1980), cert. denied, 450 U.S. 913, 101 S. Ct. 1354, 67 L. Ed. 2d 338 (1981).

Repeated assurances by the court clerk that the defendant's motion to alter and amend the judgment had been forwarded to the presiding judge when, in fact, no notification of said motion had been given to the judge did not constitute an "extreme situation" allowing relief under C.R.C.P. 60(b)(5). Sandoval v. Trinidad Area Health Ass'n, 752 P.2d 1062 (Colo. App. 1988).

Court properly denied motion to amend judgment in malpractice claim against attorney as defendant is not entitled to set-off fees which would otherwise have been collected from original action. McCafferty v. Musat, 817 P.2d 1039 (Colo. App. 1990).

Where notice of entry of judgment is mailed to only one party in contravention of C.R.C.P. 58(a), the time provided by section (a) of this rule for filing a post-trial motion commences from the date that the notice is mailed by that party to the party subsequently moving for post-trial relief. Padilla v. D.E. Frey & Co., Inc., 939 P.2d 475 (Colo. App. 1997).

Trial court's property division in dissolution of marriage action reflects no abuse of discretion based on husband's economic circumstances, the characterization of property as marital or separate, or wife's depletion of marital property, where trial court did its best in dividing marital property based only on wife's evidence since husband elected not to participate in the action. In re Eisenhuth, 976 P.2d 896 (Colo. App. 1999).

Applied in Hughes v. Worth, 162 Colo. 429, 427 P.2d 327 (1967).

III. ON INITIATIVE OF COURT.

The trial court has an immemorial right to grant a new trial whenever, in its opinion, the

justice of the particular case so requires. Brncic v. Metz, 28 Colo. App. 204, 471 P.2d 618 (1970).

New trials are not abridged or disfavored by the new rules. The judge may even grant one on his own initiative without a motion. Singer v. Chitwood, 126 Colo. 173, 247 P.2d 905 (1952).

Judge may grant new trial even if party's motion is insufficient. Where plaintiffs filed a motion for new trial in apt time on the ground of an erroneous instruction to the jury, the fact that the court granted a new trial on a portion of motion which correctly stated the law and hence was insufficient to justify granting the new trial did not support claim that the court erroneously acted upon its own initiative under this rule where the instruction was patently erroneous in other respects. Callaham v. Slavsky, 153 Colo. 291, 385 P.2d 674 (1963).

C.R.C.P. 51, does not apply to trial court when it sua sponte grants new trial. The purposes of the contemporaneous objection requirement of C.R.C.P. 51 are not violated when the trial court acts on its own initiative to order a new trial under this rule. First Nat'l Bank v. Campbell, 198 Colo. 344, 599 P.2d 915 (1979).

Where status of minor children at stake, court remanded for findings. While a motion may fail to comply strictly with the requirements of this rule when the status of minor children is at stake, a court of appeals will notice error in the trial court proceedings and remand for findings. In re Brown, 626 P.2d 755 (Colo. App. 1981).

An order enlarging the time within which to file a motion for judgment n.o.v. is without effect in view of the provisions of C.R.C.P. 6(b). Mumm v. Adam, 134 Colo. 493, 307 P.2d 797 (1957).

C.R.C.P. 6(b) provides that a court may not extend the time for taking any action under this rule. Ross v. Arrow Mfg. Co., 134 Colo. 530, 307 P.2d 196 (1957).

District court exceeded its jurisdiction by ordering, sua sponte, a new trial on all the issues of marriage dissolution proceeding because the district court acted outside its time limits mandated by section (c) of this rule to initiate such post-trial relief and failed to state adequate grounds for a new trial as required by said rule. Koch v. District Court, Jefferson County, 948 P.2d 4 (Colo. 1997).

IV. GROUNDS FOR NEW TRIAL.

A. In General.

Annotator's note. Since former subsection (a)(1) (now (d)(1)) of this rule is similar to § 237 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Use of "shall" in section (a). Prior to 1985, former section (a) of this rule specified that the memorandum brief "shall be filed with the motion". There is a presumption that the word "shall" when used in a statute or rule is mandatory. Anlauf Lumber Co. v. West-Fir Studs, Inc., 35 Colo. App. 119, 531 P.2d 980 (1974), aff'd, 190 Colo. 298, 546 P.2d 487 (1976) (decided prior to the 1985 amendment).

This rule specifies that an application for new trial, under certain circumstances, "shall be supported by affidavit", and there is a presumption that the word "shall" when used in a statute or rule is mandatory. Park Stations, Inc., v. Hamilton, 38 Colo. App. 216, 554 P.2d 311 (1976); In re Fleet, 701 P.2d 1245 (Colo. App. 1985).

Notwithstanding the affidavit requirement in section (d) of this rule, C.R.E. 606(b) acts to preclude juror affidavits as a basis for seeking post-trial relief, unless the exceptions in that rule apply. Stewart v. Rice, 47 P.3d 316 (Colo. 2002).

Issues must be preserved for consideration on appeal. Where a party fails to preserve issues for review in his motion for a new trial or in his motion to amend judgment, the court will not consider them on appeal. Hawkins v. Powers, 635 P.2d 915 (Colo. App. 1981).

Court not required to act in absence of affidavit. Upon receipt of a motion for a new trial on those grounds which, according to the rules, must be supported by affidavit, the court is not required to act in the absence of such affidavit. Park Stations, Inc., v. Hamilton, 38 Colo. App. 216, 554 P.2d 311 (1976).

A motion to alter or amend judgment, or for new trial, does not in itself amount to a memorandum brief. Zehnder v. Thirteenth Judicial Dist. Court, 193 Colo. 502, 568 P.2d 457 (1977) (decided prior to the 1985 amendment).

Where events forming the basis for the granting of a new trial occurred in the presence of the court and during the trial, the trial judge obviously had sufficient first hand knowledge to determine whether there was adequate ground for a new trial under this rule, and, under such circumstances, the absence of an affidavit does not deprive the court of the power to grant relief. Park Stations, Inc. v. Hamilton, 38 Colo. App. 216, 554 P.2d 311 (1976).

Where a motion for a new trial is based on misconduct of counsel which occurred in the presence of the court, the court may act upon and grant such motion even if no affidavit is submitted. Park Stations, Inc. v. Hamilton, 38 Colo. App. 216, 554 P.2d 311 (1976).

New trial may be granted upon misconduct of counsel. The granting of a new trial may be founded upon counsel's misstatements of fact, or on his statements of fact which have

not been introduced in or established by evidence, or on a finding that counsel has made a statement or argument appealing to the emotions and prejudices of the jury. Park Stations, Inc. v. Hamilton, 38 Colo. App. 216, 554 P.2d 311 (1976).

A new trial is not granted for misconduct of counsel as a disciplinary measure, but to prevent a miscarriage of justice. Park Stations, Inc. v. Hamilton, 38 Colo. App. 216, 554 P.2d 311 (1976).

Fact that the court found defendant's counsel to be guilty of misconduct during the course of the trial for more reasons than those alleged by plaintiff does not put the court in the position of acting on its own initiative in granting motion for new trial. Park Stations, Inc. v. Hamilton, 38 Colo. App. 216, 554 P.2d 311 (1976).

Filing of motion tolls time for filing notice of appeal. The filing of a motion to alter or amend a judgment tolls the running of the time for filing notice of appeal. Valenzuela v. Mercy Hosp., 34 Colo. App. 5, 521 P.2d 1287 (1974).

Affidavit filed after time allowed is not to be considered. An affidavit filed in support of a motion for a new trial without leave of the court, and after the time limited by a previous order, is not to be considered. Denver & R. G. R. R. v. Heckman, 45 Colo. 470, 101 P. 976 (1909).

Sufficiency of affidavit required. An affidavit merely stating what the opposing counsel had directed his client to do, but not showing that in fact anything was done pursuant to the direction, is insufficient to convict the party of misconduct. Denver & R. G. R. R. v. Heckman, 45 Colo. 470, 101 P. 976 (1909).

The requirement of an affidavit presupposes that the affiant has firsthand information rather than possessing only hearsay. Hansen v. Dillon, 156 Colo. 396, 400 P.2d 201 (1965).

The reception of oral testimony at the time the motion for new trial is under consideration is a matter within the discretion of the trial court. The record in the instant case does not suggest an abuse of this discretion. Burnham v. Grant, 24 Colo. App. 131, 134 P. 254 (1913).

Hearsay and conclusory allegations are insufficient under rule. Peoples Natural Gas Div. v. Pub. Utils. Comm'n, 626 P.2d 159 (Colo. 1981).

B. Irregularity in Proceedings.

Ruling on motion for new trial on ground of misconduct of witness is within discretion of trial court. Hicks v. Cramer, 85 Colo. 409, 277 P. 299 (1929); Simon v. Williams, 123 Colo. 505, 232 P.2d 181 (1951).

Ruling will not be disturbed in absence of showing that the court's discretion was abused. Hicks v. Cramer, 85 Colo. 409, 277 P. 299 (1929).

For when discretion is allowed, see Simon v. Williams, 123 Colo. 505, 232 P.2d 181 (1951).

The finding of the court cannot be disturbed unless it was manifestly against the weight of the testimony. Liutz v. Denver City Tramway Co., 54 Colo. 371, 131 P. 258 (1913).

Objection on ground of misconduct of witness must be made before verdict. A party to a trial who, although knowing of apparent misconduct on the part of a witness, remains silent until after the verdict has gone against him, may not then assign such misconduct as a ground for a new trial. Hicks v. Cramer, 85 Colo. 409, 277 P. 299 (1929).

Conduct of witness held insufficient to warrant reversal. The fact that a witness was seen in conversation with a juror during a recess of the court, is insufficient to warrant a reversal of the judgment, where there was nothing to indicate any attempt to influence the juror. Hicks v. Cramer, 85 Colo. 409, 277 P. 299 (1929).

Giving cigars to jurors after verdict is not grounds for new trial. The fact that the attorney of the successful party treated four of the jurors to cigars, after the verdict, merely in a way of civility, and without any design or forethought, held no ground to vacate the verdict, though the court suggested that, upon ethical grounds the act of the attorney was indiscreet. Liutz v. Denver City Tramway Co., 54 Colo. 371, 131 P. 258 (1913).

Improper remarks by employees of a party to jury may be grounds for new trial. If persons employed by a suitor hang about the purlieus of the court, mingle with those summoned as jurors, converse with them touching causes in which the suitor is concerned, and by flattery, ridicule, and like insidious means, endeavor to improperly influence them, a verdict shown to have been influenced by such practices should be unhesitatingly vacated. Liutz v. Denver City Tramway Co., 54 Colo. 371, 131 P. 258 (1913).

Improper remarks to jurors which manifestly had no effect upon their deliberations are not ground for a new trial. Liutz v. Denver City Tramway Co., 54 Colo. 371, 131 P. 258 (1913).

Seeing of excluded exhibit by jury may be grounds for new trial. A mistake or inadvertence whereby the jury was permitted to have access to an exhibit which had been excluded from consideration was an irregularity in the proceedings, and under the provisions of this rule, the proper method of presenting it in a motion for a new trial is to support and file an

affidavit with the motion. Maloy v. Griffith, 125 Colo. 85, 240 P.2d 923 (1952).

If trial court instructs jury on improper closing remarks, there are no grounds for new trial. Where remarks in closing argument are improper but the trial court immediately and subsequently properly instructs, the reviewing court must presume that the jury followed the trial court's instructions, such not constituting grounds for new trial. Candelaria v. People, 177 Colo. 136, 493 P.2d 355 (1972).

Denial of a motion for a continuance because of the unavoidable absence of a party during litigation is grounds for the granting of a new trial because the attendance of a litigant is necessary for a fair presentation of his case. Gonzales v. Harris, 189 Colo. 518, 542 P.2d 842 (1975).

For deficiency in trial record which requires reversal of judgment but not new trial, see Moore v. Fischer, 31 Colo. App. 425, 505 P.2d 383 (1972), aff'd, 183 Colo. 392, 517 P.2d 458 (1973).

No relief under this rule for malpractice of party's own attorney. In re Jaeger, 883 P.2d 577 (Colo. App. 1994).

Untimely filing of motion contending irregularity in proceedings fails because the court was deprived of jurisdiction after the time allowed by section (a) had run. When plaintiff did not argue that the trial court erred in ruling her motion under this rule was untimely, she was considered to have abandoned the issue of timeliness. In re McSoud, 131 P.3d 1208 (Colo. App. 2006).

C. Misconduct of Jury.

Annotator's note. Since subsection (a)(2) (now (d)(2)) of this rule is similar to § 237 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Disposition of motion is within discretion of trial court. Disposition of a motion for a new trial based on the ground of misconduct of jurors is within the sound discretion of the trial court. Denver Alfalfa Milling & Prods. Co. v. Erickson, 77 Colo. 583, 239 P. 17 (1925).

Verdict set aside where misconduct revealed. Jury verdict will be set aside when juror's affidavit revealed certain misconduct on the part of one or more of the jurors. Santilli v. Pueblo, 184 Colo. 432, 521 P.2d 170 (1974).

Ruling on motion will not be disturbed on review, unless the discretion has been abused or the ruling is manifestly against the weight of the evidence. Denver Alfalfa Milling & Prods. Co. v. Erickson, 77 Colo. 583, 239 P. 17 (1925).

Test of misconduct is capacity of influencing result. The test for determining whether a new trial will be granted because of the misconduct of jurors or the intrusion of irregular influences is whether such matters could have a tendency to influence the jury in arriving at its verdict in a manner inconsistent with the legal proofs and the court's charge. If the irregular matter has that tendency on the face of it, a new trial should be granted without further inquiry as to its actual effect. The test is not whether the irregular matter actually influenced the result, but whether it had the capacity of doing so. Butters v. Wann, 147 Colo. 352, 363 P.2d 494 (1961); T.S. v. G.G., 679 P.2d 118 (Colo. App. 1984); People v. Wadle, 77 P.3d 764 (Colo. App. 2003), aff'd, 97 P.3d 932 (Colo. 2004).

Sympathy for a plaintiff's injured condition is not tantamount to the passion or prejudice necessary to overturn a jury verdict. Whitlock v. Univ. of Denver, 712 P.2d 1072 (Colo. App. 1985), rev'd on other grounds, 744 P.2d 54 (Colo. 1987).

Test is determined as a matter of law. It is not the province of the court to speculate, conjecture or determine what or how much effect upon a verdict the gross misconduct of a juror or jurors may in fact have in a particular case. While a correct determination might be possible in some cases, the inquiry would be impractical and fruitless in many cases and in all cases contain an element of speculation. The proper function of the court is to hear the facts of the alleged misconduct and to determine as a matter of law the effect reasonably calculated to be produced upon the minds of the jury by such misconduct. Butters v. Wann, 147 Colo. 352, 363 P.2d 494 (1961); People v. Wadle, 77 P.3d 764 (Colo. App. 2003), aff'd, 97 P.3d 932 (Colo. 2004).

A new trial on all issues, not the granting of remittitur of the verdict, must be ordered when a trial court makes a finding that an excessive jury verdict resulted from bias, prejudice, or passion. Whitlock v. Univ. of Denver, 712 P.2d 1072 (Colo. App. 1985), rev'd on other grounds, 744 P.2d 54 (Colo. 1987).

Movant seeking to set aside verdict based upon jury misconduct must establish fact of improper communication and as a result thereof the movant was prejudiced. Ravin v. Gambrell by and through Eddy, 788 P.2d 817 (Colo. 1990).

A party seeking a new trial on the basis of a jury's improper exposure to extraneous information must establish that the information was revealed to the jury and that it had the capacity to influence the verdict. Destination Travel, Inc. v. McElhanon, 799 P.2d 454 (Colo. App. 1992); Stevens v. Humana of Delaware, Inc., 832 P.2d 1076 (Colo. App. 1992).

Misconduct of a juror, if known to counsel, should be made the ground of objection at the time, and before the cause is submitted. If first suggested in the motion for a new trial it is

within the discretion of the court to disregard it. Denver City Tramway Co. v. Armstrong, 21 Colo. App. 640, 123 P. 136 (1912).

The reason for a supporting affidavit where there is an accusation of juror misconduct is to require the movant to prove his good faith and, by particularizing, demonstrate that his serious allegation of juror misconduct is based on knowledge, not suspicion or mere hope. Cawthra v. City of Greeley, 154 Colo. 483, 391 P.2d 876 (1964).

Motion unsupported by affidavit denied summarily. A motion for new trial based on alleged juror misconduct unsupported by affidavit, and lacking any indication that the movant had a legal excuse for its failure to do so, should be summarily denied. Cawthra v. City of Greeley, 154 Colo. 485, 391 P.2d 876 (1964); Hansen v. Dillon, 156 Colo. 396, 400 P.2d 201 (1965).

Juror affidavit revealing that some jury members had stated that they had learned of codefendant's plea of guilty was insufficient to impeach jury verdict when it was determined from questioning jurors that they learned of plea only after completion of their deliberations. People v. Thornton, 712 P.2d 1095 (Colo. App. 1985).

Only the affidavit of losing counsel, and itself largely hearsay and conclusionary, is insufficient. Hansen v. Dillon, 156 Colo. 396, 400 P.2d 201 (1965).

A quotient verdict as such is invalid. A quotient verdict, as such, is invalid, but where there is no antecedent agreement, or if after the quotient is ascertained, the jury proceeds to discuss and consider the propriety of the rendition of a verdict for an amount equal to the quotient, the verdict is good. City of Colo. Springs v. Duff, 15 Colo. App. 437, 62 P. 959 (1900); City & County of Denver v. Talarico, 99 Colo. 178, 61 P.2d 1 (1936).

Quotient verdict will be permitted to stand if it is an expression of deliberation. Quotient verdict, shown to have been afterwards voted upon and accepted by the jury as a legitimate expression of their deliberations, will be permitted to stand upon a showing of very little proof in this direction. Pawnee Ditch & Imp. Co. v. Adams, 1 Colo. App. 250, 28 P. 662 (1891); Greeley Irrigation Co. v. Von Trotha, 48 Colo. 12, 108 P. 985 (1910).

Impeachment of a verdict on grounds which delve into the mental processes of the jury deliberation is not permitted. Santilli v. Pueblo, 184 Colo. 432, 521 P.2d 170 (1974); Rome v. Gaffrey, 654 P.2d 333 (Colo. App. 1982).

Extrajudicial investigation on inadmissible matters was manifestly improper. The question of the deceased's contributory negligence and his intoxication at the time of the accident was material. The extrajudicial investigation made during the course of the trial by the juror of the deceased's drinking habits, intoxication on other occasions, and the revocation of his driver's license, matters which had been specifically declared incompetent and inadmissible by the court, is misconduct as a matter of law the tendency of which is to influence the mind of the juror and for which a new trial should have been granted. In such cases the court should not consider whether the verdict was or was not influenced by the petitioner. The conduct complained of is so manifestly improper that there is but one course open. Butters v. Wann, 147 Colo. 352, 363 P.2d 494 (1961).

A new trial is not automatically required whenever a jury is exposed to extraneous information during trial or deliberations. Stevens v. Humana of Delaware, Inc., 832 P.2d 1076 (Colo. App. 1992).

Extraneous information concerning the symptoms of a disease listed on a grocery bag obtained by a juror did not require a new trial. Stevens v. Humana of Delaware, Inc., 832 P.2d 1076 (Colo. App. 1992).

D. Accident or Surprise.

Annotator's note. Since subsection (a)(3) (now (d)(3)) of this rule is similar to § 237 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Surprise must be called to attention of court at trial. A party cannot avail himself of a motion for a new trial on the ground of surprise unless he calls the attention of the court to the matter at the time when it occurs and asks for proper relief. It is too late for him to manifest his surprise for the first time after the cause has been submitted to the jury and a verdict rendered against him. Outcalt v. Johnston, 9 Colo. App. 519, 49 P. 1058 (1897); Agnew v. Mathieson, 26 Colo. App. 59, 140 P. 484 (1914).

Untimely filing of motion contending "accident or surprise" fails because the court was deprived of jurisdiction after the time allowed by section (a) had run. When plaintiff did not argue that the trial court erred in ruling her motion under this rule was untimely, she was considered to have abandoned the issue of timeliness. In re McSoud, 131 P.3d 1208 (Colo. App. 2006).

E. Newly Discovered Evidence.

Annotator's note. Since subsection (a)(4) (now (d)(4)) of this rule is similar to § 237 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Motions for new trial on ground of newly discovered evidence are viewed with suspicion. Sebold v. Rieger, 26 Colo. App. 209, 142 P. 201 (1914); Eachus v. People, 77 Colo. 445, 236 P. 1009 (1925); Gasper v. People, 83 Colo. 341, 265 P. 97 (1928).

Granting of new trial is a matter of trial court's discretion. Whether to grant a new trial because of newly discovered evidence is a matter that lies within the sound discretion of the trial court. Am. Nat'l Bank v. Christensen, 28 Colo. App. 501, 476 P.2d 281 (1970); Meyer v. Schwartz, 638 P.2d 821 (Colo. App. 1981).

In the absence of abuse of discretion the judge's decision on the merits of a motion for new trial will not be disturbed. Bushner v. Bushner, 141 Colo. 283, 348 P.2d 153 (1959); Hudson v. Am. Founders Life Ins. Co., 151 Colo. 54, 377 P.2d 391 (1962).

New trial is to be granted only if the newly discovered evidence, if received, would probably change the result. Crespin v. Largo Corp., 698 P.2d 826 (Colo. App. 1984), aff'd, 727 P.2d 1098 (Colo. 1986).

The following requirements are essential to sustain a motion for new trial on the grounds of newly discovered evidence: (1) The evidence could not have been discovered in the exercise of reasonable diligence and produced at the trial; (2) the evidence is material to some issue before the court under the pleadings; (3) if received, the evidence would probably change the result. Kennedy v. Bailey, 169 Colo. 43, 453 P.2d 808 (1969); Am. Nat'l Bank v. Christensen, 28 Colo. App. 501, 476 P.2d 281 (1970); C.K.A. v. M.S., 695 P.2d 785 (Colo. App. 1984), cert. denied, 705 P.2d 1391 (Colo. 1985); Durbin v. Bonanza Corp., 716 P.2d 1124 (Colo. App. 1986); People v. Distel, 759 P.2d 654 (Colo. 1988).

Three factors affecting decision under subsection (d)(4), as adopted in cases interpreting this rule, are not discrete items that lend themselves to mechanistic application, but rather are closely interrelated and require the exercise of a prudential judgment informed by considerations of fundamental fairness. Aspen Skiing Co. v. Peer, 804 P.2d 166 (Colo. 1991).

For necessity of evidence being sufficient to change result, see Colo. Springs & Interurban Ry. v. Fogelsong, 42 Colo. 341, 94 P. 356 (1908); Specie Payment Gold Mining Co. v. Kirk, 56 Colo. 275, 139 P. 21 (1914); Lanham v. Copeland, 66 Colo. 27, 178 P. 562 (1919); Wiley v. People, 71 Colo. 449, 207 P. 478 (1922); Eachus v. People, 77 Colo. 445, 236 P. 1009 (1925); Heishman v. Hope, 79 Colo. 1, 242 P. 782 (1925); Warshauer Sheep & Wool Co. v. Rio Grande State Bank, 81 Colo. 463, 256 P. 21 (1927); Trinidad Creamery Co. v. McDonald, 82 Colo. 328, 259 P. 1028 (1927); City of Ft. Collins v. Smith, 84 Colo. 511, 272 P. 6 (1928); Schlessman v. Brainard, 104 Colo. 514, 92 P.2d 749 (1939).

Party cannot reframe issues where facts were known at time of trial. No issue of mental competency was raised in the probate court during the trial of this action, despite the fact that counsel for plaintiffs were aware of the fact that an issue of competency had been raised in the federal court and could have been made in the probate court. In legal effect, the motions for new trial were insufficient and made no showing of the discovery of any new evidence which was pertinent to any issue tried in the probate court. Actually, the plaintiffs attempt to reframe the issues and inject into the proceedings a complete new theory upon which they elected not to rely at the time of the trial. Kennedy v. Bailey, 169 Colo. 43, 453 P.2d 808 (1969).

A motion for a new trial on the ground of newly discovered evidence will not be granted where counsel seeks to advance at a second trial a new theory based on different evidence which was available during the first trial. People in Interest of P.N., 663 P.2d 253 (Colo. 1983).

A new trial is not to be awarded for the discovery of evidence merely cumulative. Griffin v. Carrig, 23 Colo. App. 313, 128 P. 1126 (1913); Hudson v. Am. Founders Life Ins. Co., 151 Colo. 54, 377 P.2d 391 (1962).

It is error to grant a new trial on the ground of newly discovered evidence, when such evidence would be immaterial. Warshauer Sheep & Wool Co. v. Rio Grande State Bank, 81 Colo. 463, 256 P. 21 (1927).

Newly discovered evidence to justify the granting of a new trial must be relevant and material. Barton v. Laws, 4 Colo. App. 212, 35 P. 284 (1894).

New trial will not be granted for new evidence which is merely impeaching or discrediting. The general rule is that a new trial will not be granted for new evidence which is merely impeaching or discrediting. Hence, impeaching evidence which is merely cumulative of what might have been produced at the trial is not a sufficient ground for a new trial. Trinidad Creamery Co. v. McDonald, 82 Colo. 328, 259 P. 1028 (1927).

Denial of motion for new trial upheld where newly discovered evidence allegedly demonstrating that plaintiff perjured himself at trial could have been obtained through reasonable diligence more than two years prior to trial. Aspen Skiing Co. v. Peer, 804 P.2d 166 (Colo. 1991).

Denial of motion for new trial was proper where defendant was not denied access to her bank balance and account activity and could, therefore, have discovered the canceled checks showing payment of the disputed insurance premiums. CNA Ins. Co. v. Berndt, 839 P.2d 492 (Colo. App. 1992).

Application for new trial should be supported by affidavit. In an application for a new trial on the ground of newly discovered evidence, the application should be supported by an affidavit of the newly discovered witness, stating the facts to which he will testify, and if such affidavit is not attached to the application, there should be a showing that it was impossible or impracticable to secure the same. Wiley v. People, 71 Colo. 449, 207 P. 478 (1922).

Affidavit must show that by exercise of reasonable diligence such evidence could not have been produced. If it does not appear from the affidavits in support of a motion for new trial, on the ground of newly discovered evidence, that by the exercise of reasonable diligence such evidence could not have been produced at the trial, the showing is insufficient. Outcalt v. Johnston, 9 Colo. App. 519, 49 P. 1058 (1897).

The affidavits for a new trial on the ground of newly discovered evidence must show the efforts made by the applicant to locate the additional witnesses proposed to be examined, and must exclude all inference of delay or neglect on the part of the applicant. Evidence as to matters not controverted on the trial will not suffice. Sebold v. Rieger, 26 Colo. App. 209, 142 P. 201 (1914).

For denial of new trial because party made no effort to present evidence, see Sall v. Sall, 173 Colo. 464, 480 P.2d 576 (1971).

Where application is based upon the recent discovery of a document, a copy thereof should be set forth, or at least the substance of it shown; otherwise its pertinency as evidence does not appear. Colo. & S. Ry. v. Breniman, 22 Colo. App. 1, 125 P. 855 (1912).

The affidavit of counsel, based upon information and belief, of what a witness will testify is insufficient to secure a new trial on the ground of newly discovered evidence. Cole v. Thornburg, 4 Colo. App. 95, 34 P. 1013 (1893).

After reversal, initially successful party may move for new trial. After reversal by the supreme court the party originally successful in the trial court can file a motion for new trial on the ground of newly discovered evidence, and only on that ground. To hold otherwise would deprive a party of an absolute right he would have had if the trial judge had made no error. Bushner v. Bushner, 141 Colo. 283, 348 P.2d 153 (1959).

Where the contention is that perjury has been committed, the motion for a new trial must be grounded upon newly discovered evidence. Buchanan v. Burgess, 99 Colo. 307, 62 P.2d 465 (1936); Schlessman v. Brainard, 104 Colo. 514, 92 P.2d 749 (1939).

Motion for new trial held properly overruled. In an action for damages resulting from an automobile accident, the contention of defendant that a new trial should have been granted on the ground of newly discovered evidence was considered and overruled. Morgan v. Gore, 96 Colo. 508, 44 P.2d 918 (1935).

Newly discovered evidence must be credible. In order for newly discovered evidence to serve as a basis for granting a new trial, it must be credible. Crespin v. Largo Corp., 698 P.2d 826 (Colo. App. 1984), aff'd, 727 P.2d 1098 (Colo. 1986).

Although determining the credibility of a witness is normally the function of the trier of fact, when dealing with a motion for new trial based on newly discovered evidence, the trial court necessarily must include a determination of credibility in its evaluation of whether the new evidence would, if received, change the result already reached. Crespin v. Largo Corp., 698 P.2d 826 (Colo. App. 1984), aff'd, 727 P.2d 1098 (Colo. 1986).

Denial of motion for new trial upheld. Phillips v. Monarch Recreation Corp., 668 P.2d 982 (Colo. App. 1983); Gilmore v. Rubeck, 708 P.2d 486 (Colo. App. 1985).

Standards set forth in subsection (a)(4) (now (d)(4)) are not unduly rigorous when applied to evidence discovered after an order for summary judgment has been entered. DuBois v. Myers, 684 P.2d 940 (Colo. App. 1984).

F. Excessive or Inadequate Damages.

Annotator's note. Since subsection (a)(5) (now (d)(5)) of this rule is similar to § 237 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Excessive damages are legitimate grounds for granting a motion for new trial. Leo Payne Pontiac, Inc. v. Ratliff, 29 Colo. App. 386, 486 P.2d 477 (1971), modified, 178 Colo. 361, 497 P.2d 997 (1972).

Award of inadequate damages is a proper ground for the granting of a new trial. Roth v. Stark Lumber Co., 31 Colo. App. 121, 500 P.2d 145 (1972).

New trial may be had as to single issue of damages. Where damages assessed by verdict were grossly inadequate and there was no need of another trial on other issues raised in a negligence action, new trial would be granted as to damages only. Whiteside v. Harvey, 124 Colo. 561, 239 P.2d 989 (1951).

When an award of damages is excessive but liability is clear, it may be permissible to order a new trial limited to the issue of damages only. Marks v. District Court, 643 P.2d 741 (Colo.), cert. denied, 458 U.S. 1107, 102 S. Ct. 3486, 73 L. Ed. 2d 1368 (1982).

Excessive verdict based on bias requires new trial. Where the trial judge makes a finding that the excessive jury verdict resulted from bias, prejudice, and passion, firmly established precedent requires that a new trial on all issues be granted. Marks v. District Court, 643 P.2d 741 (Colo.), cert. denied, 458 U.S. 1107, 102 S. Ct. 3486, 73 L. Ed. 2d 1368 (1982).

Where the issue of liability is properly determined, but the jury has failed in its function adequately to assess the compensation required, it is mandatory that the court order a new trial on the issue of damages alone. Brncic v. Metz, 28 Colo. App. 204, 471 P.2d 618 (1970).

Court may order new trial on all issues where motion limited to damages. A party by moving for a new trial on the question of damages only cannot restrict the judge so as to prevent the exercise of sound judicial discretion. Dale v. Safeway Stores, Inc., 152 Colo. 581, 383 P.2d 795 (1963).

Where jury refuses to award compensatory damages, new trial on damages alone is warranted. Where the jury failed in its function in rendering a verdict by refusing to recognize the undisputed facts concerning plaintiff's injuries and to award him compensatory damages to which he was entitled, a new trial on the issue of damages only is warranted. Kistler v. Halsey, 173 Colo. 540, 481 P.2d 722 (1971).

New trial on the issue of damages only is warranted when there are undisputed facts as to injuries. In an action by a bicyclist seeking damages for injuries suffered as a result of an intersection pickup truck-bicycle collision, where the verdict, considering the undisputed evidence of severe multiple physical injuries sustained by plaintiff, was manifestly inadequate, indicating that the jury disregarded the trial court's instructions on damages, held a new trial on issue of damages only is warranted since the jury failed in its function to render a true verdict by refusing to recognize the undisputed facts concerning plaintiff's injuries and to award him compensatory damages to which he was entitled. Kistler v. Halsey, 173 Colo. 540, 481 P.2d 722 (1971).

Plaintiff's participation in new trial on damages alone waives other objections. Where plaintiffs, dissatisfied with verdict on first trial, file a motion for additur or a new trial on the question of damages only and the trial court grants a new trial on all issues, the plaintiffs by voluntarily participating in the second trial as ordered by the trial court waive any other error occurring in first trial. Dale v. Safeway Stores, Inc., 152 Colo. 581, 383 P.2d 795 (1963).

Verdict must be manifestly inadequate to be set aside. It is an abuse of discretion on the part of the court to set aside the verdict of the jury and grant a new trial solely on the ground of inadequacy of the verdict unless, under the evidence, it can be definitely said that the verdict is grossly and manifestly inadequate, or unless the amount thereof is so small as to clearly and definitely indicate that the jury neglected to take into consideration evidence of pecuniary loss or were influenced either by prejudice, passion or other improper considerations. Lehrer v. Lorenzen, 124 Colo. 17, 233 P.2d 382 (1951); King v. Avila, 127 Colo. 538, 259 P.2d 268 (1953); DeMott v. Smith, 29 Colo. App. 531, 486 P.2d 451 (1971).

Where plaintiff's evidence showed damages considerably in excess of the original jury award and the trial court could properly determine that the jury disregarded the instructions or ignored the evidence, there is no error in granting a new trial on the issue of damages. Thorpe v. City & County of Denver, 30 Colo. App. 284, 494 P.2d 129 (1971).

Jury damage award set aside on basis of inadequacy when evidence was undisputed with respect to the existence and nature of the injuries sustained, and the jury failed to award any damages for noneconomic losses. Martinez v. Shapland, 833 P.2d 837 (Colo. App. 1992).

Retrial on damages only was ordered because of the inconsistency in the damage award of the jury. The award of $3,000 for economic losses for the treatment and alleviation of pain is inconsistent with the award of zero dollars for noneconomic damages. Kepley v. Kim, 843 P.2d 133 (Colo. App. 1992).

When a new trial will be granted for excessive or inadequate damages rests in the discretion of the trial court, in cases where there is no legal measure of damages, or where the correctness of the result is not determinable by any definite and precise rule. Clark v. Aldenhoven, 26 Colo. App. 501, 143 P. 267 (1914).

The court of review will not interfere where there is evidence to support the verdict. Clark v. Aldenhoven, 26 Colo. App. 501, 143 P. 267 (1914).

Neither the Colorado supreme court nor any other appellate tribunal stands in as good a position as the trial court to review the relationship between an award of exemplary damages and the purposes these damages are to serve and, absent a clear abuse of discretion, the trial court's determination in this regard will not be disturbed on review. Leo Payne Pontiac, Inc. v. Ratliff, 178 Colo. 361, 497 P.2d 997 (1972).

Trial court may give prevailing party option to remit excessive damages. Following a motion for a new trial based on excessive damage, the trial judge may grant the motion for a new trial, but at the same time give the prevailing party the option of remitting that portion of the jury's award which is deemed to be excessive, or facing a new trial on damages. If the prevailing party thereafter remits this portion of

the award, the trial court would thereupon deny the motion for a new trial and enter a final judgment. Leo Payne Pontiac, Inc. v. Ratliff, 178 Colo. 361, 497 P.2d 997 (1972); McCrea & Co. Auctioneers, Inc. v. Dwyer Auto Body, 799 P.2d 394 (Colo. App. 1989).

A trial court has the power to grant a new trial under this rule or, in the alternative, to deny the new trial on the condition that the plaintiff will agree to a remittitur of the amount of the damages found by the court to be excessive. Marks v. District Court, 643 P.2d 741 (Colo.), cert. denied, 458 U.S. 1107, 102 S. Ct. 3486, 73 L. Ed. 2d 1368 (1982).

Option of remittitur or new trial permissible where damages manifestly excessive. The option of remittitur or new trial is permissible in cases where the trial court considers the damages manifestly excessive, subsection (a)(5) (now (d)(5)), but cannot conclude that the damages were a product of bias, prejudice, or passion. Burns v. McGraw-Hill Broadcasting Co., 659 P.2d 1351 (Colo. 1983); E-470 Pub. Hwy. Auth. v. Jagow, 30 P.3d 798 (Colo. App. 2001), aff'd, 49 P.3d 1151 (Colo. 2002).

Remittitur appropriate where evidence did not show that damages for fraud and those for breach of contract were separate and distinct, nor that damages for business interference were greater than or different from lost profits resulting from the breach. McCrea & Co. Auctioneers, Inc. v. Dwyer Auto Body, 799 P.2d 394 (Colo. App. 1989).

Remittitur is not sustainable where the amount of damages awarded is supported by the court's instruction and the evidence presented or, alternatively, where the plaintiff is not offered an opportunity to refuse the modified amount and request a new trial. Belfor USA Group v. Rocky Mtn. Caulking & Waterproofing, 159 P.3d 672 (Colo. App. 2006).

Trial court must enter findings to support order of remittitur. Belfor USA Group v. Rocky Mtn. Caulking & Waterproofing, 159 P.3d 672 (Colo. App. 2006).

New trial granted where trial court erred in damages instruction. Walton v. Kolb, 31 Colo. App. 95, 500 P.2d 149 (1972).

G. Error in Law.

A judicial admission can be made in closing argument. Counsel's statements that plaintiff had incurred some physical injury in the accident must be considered a binding judicial admission and a new trial ordered on the issue of damages. Larson v. A.T.S.I., 859 P.2d 273 (Colo. App. 1993).

V. GROUNDS FOR JUDGMENT NOTWITHSTANDING VERDICT.

Annotator's note. Since subsection (a)(6) (now (e)(1)) of this rule is similar to § 237 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

The weight of evidence does not depend upon its volume or the number of witnesses. Jurors exercise a large discretion in judging of the credibility of witnesses, and separating the true from the false. Their conclusions will not be disturbed, unless the verdict manifests bias, prejudice, or a wanton disregard of their duties and obligation by the jurors. Clark v. Aldenhoven, 26 Colo. App. 501, 143 P. 267 (1914).

As a general rule, when the evidence is conflicting the trial court will refuse a new trial even though there may be a slight preponderance against the verdict. Clark v. Aldenhoven, 26 Colo. App. 501, 143 P. 267 (1914).

The trial court's action will not be reviewed unless a manifest abuse of discretion appears. Clark v. Aldenhoven, 26 Colo. App. 501, 143 P. 267 (1914).

Where the verdict of a jury is manifestly against the weight of the evidence, it will be set aside by the appellate court. Denver & R. G. R. R. v. Peterson, 30 Colo. 77, 69 P. 578 (1902); McGraw v. Kerr, 23 Colo. App. 163, 128 P. 870 (1912).

Where the record fails to disclose any satisfactory evidence as to the real merits of the controversy, the judgment will be reversed and the cause remanded for a new trial. Scott v. Conrad, 24 Colo. App. 452, 135 P. 135 (1913).

In actions for tort a verdict will not so readily be vacated as against the weight of evidence, as in actions ex contractu. A verdict will not be set aside either in the trial court or the court of review unless it is so manifestly against the weight of evidence as to warrant a presumption that the jury misunderstood the evidence or misconstrued its effect, or were influenced by improper motives. Clark v. Aldenhoven, 26 Colo. App. 501, 143 P. 267 (1914).

VI. EFFECT OF GRANTING NEW TRIAL.

To grant a new trial decides no one's rights finally, but only submits them to another jury, with an opportunity to each party to bring forward better evidence if he can, and with opportunity to the judge to correct his own errors if any. Singer v. Chitwood, 126 Colo. 173, 247 P.2d 905 (1952).

A litigant may elect not to participate in trial and still seek review. In Colorado a litigant against whom a new trial has been ordered may elect to stand on such order, obtain a dismissal of the action, and thereupon seek review

by appeal. Chartier v. Winslow Crane Serv. Co., 142 Colo. 294, 350 P.2d 1044 (1960).

New trial participation does not waive other objections. Prior to the amendment in 1964, a party against whom an order granting a new trial had been entered waived any error in the order by participating in the new trial. The amendment merely removed this waiver. It did not change the rule of Chartier in Chartier v. Winslow (142 Colo. 294, 350 P.2d 1044 (1960)) that a party may decline to participate in a new trial, permit judgment to be entered against him and sue out appeal for a determination of the correctness of the order granting the new trial. Rice v. Groat, 167 Colo. 554, 449 P.2d 355 (1969).

Proceeding to terminate parental rights. The granting of a new trial in a proceeding to terminate parental rights placed the parties in the positions they occupied prior to the vacated hearing. People in Interest of M.B., 188 Colo. 370, 535 P.2d 192 (1975).

VII. EFFECT OF GRANTING JUDGMENT NOTWITHSTANDING VERDICT, AMENDMENT OF FINDINGS, OR AMENDMENT OF JUDGMENT.

The effect of this rule is merely to render unnecessary a request for a formal reservation of the question of law raised by the motion for a directed verdict and, in addition, to regulate the time and manner of moving for direction and of moving for judgment on the basis of the refusal to direct. Burenheide v. Wall, 131 Colo. 371, 281 P.2d 1000 (1955).

VIII. TIME FOR DETERMINATION OF POST-TRIAL MOTIONS.

Section (j) is applicable only to motions filed on or after January 1, 1985, and does not apply to motions which were pending upon that date. Stientjes v. Olde-Cumberlin Auctioneers, Inc. 754 P.2d 1384 (Colo. App. 1988).

Motion for costs is not a motion for post-trial relief governed by this section and, therefore, need not be determined within 60 days under section (j). Meier v. McCoy, 119 P.3d 519 (Colo. App. 2004).

Construction of "determine" within context of section (j) for purposes of resolving timeliness of notices of appeal. Trial court made a "determination" on post-trial motions upon oral ruling from bench within 60 days from date of filing of last of such motions even though written order was not signed and entered until after expiration of 60-day period. In re Forsberg, 783 P.2d 283 (Colo. 1989).

Motion for amendment of findings and judgment was "determined" when trial court came to a decision on the merits of such motion and directed movant's counsel to prepare order reflecting such decision, which order was not signed and entered until after 60-day period. In re Forsberg, 783 P.2d 283 (Colo. 1989).

A motion made pursuant to C.R.C.P. 60 cannot be used to circumvent the operation of section (j) unless the facts of the case constitute an "extreme situation" justifying relief from a judgment pursuant to C.R.C.P. 60(b)(5). Sandoval v. Trinidad Area Health Ass'n, 752 P.2d 1062 (Colo. App. 1988).

The "unique circumstances" doctrine is not available to a party seeking to modify the time for determination of a post-trial motion pursuant to section (j). Sandoval v. Trinidad Area Health Ass'n, 752 P.2d 1062 (Colo. App. 1988).

Time limits for filing notice of appeal under C.A.R. 4 must be met for appeals of judgments for attorney fees. The award of attorney fees in a case is sufficiently separate from an underlying judgment on the merits to require that a notice of appeal of the judgment awarding attorney fees be filed within the time limits of C.A.R. 4 independently of the judgment entered on the merits of the underlying case. If this is not done, the court of appeals is not vested with subject matter jurisdiction to determine issues related to the award of attorney fees. Dawes Agency v. Am. Prop. Mortg., 804 P.2d 255 (Colo. App. 1990).

Timely filing of motion for reconsideration of a completed post-trial ruling on an attorney fees issue tolls the time for filing a notice of appeal until the court determines the motion or the motion is deemed denied after 60 days pursuant to section (j). Jensen v. Runta, 80 P.3d 906 (Colo. App. 2003).

Time limits for filing notice of appeal under C.A.R. 4 are terminated as to all parties by timely filing of a motion under this rule. Thereafter, time begins to run upon determination of the motion or the date the motion is deemed denied, whichever is earlier. United Bank of Boulder, N.A. v. Buchanan, 836 P.2d 473 (Colo. App. 1992); Stone v. People, 895 P.2d 1154 (Colo. App. 1995).

Section (j) is designed to encourage expeditious determination of post-trial motions and to provide certainty in the calculation of the time within which a party must file a notice of appeal. Campbell v. McGill, 810 P.2d 199 (Colo. 1991).

Section (j) does not apply to issues concerning recovery of attorney fees not sought as damages. Tallitsch v. Child Support Servs., Inc., 926 P.2d 143 (Colo. App. 1996).

Section (j) satisfied where the court acted on motion within 60 days following the filing of the last multiple motions and where the court orally ruled upon the motions within 60 days, even though the written order was signed and entered after the period. Fenton v. Fibreboard Corp., 827 P.2d 564 (Colo. App. 1991).

Section (j) satisfied where plaintiff's motion for reconsideration was entered within 60 days of the date trial court granted plaintiff's motion to represent himself. Campbell v. McGill, 810 P.2d 199 (Colo. 1991).

The provisions of C.R.C.P. 54(b) regarding a trial court's jurisdiction to revise its initial judgment are expressly incorporated in C.R.C.P. 58 and, therefore, are applicable to motions filed pursuant to this rule. The 60-day limit specified in section (j) did not bar trial court's determination of a motion for new trial in case involving multiple claims and multiple parties when trial court did not make an express direction for entry of final judgment under C.R.C.P. 54(b) and there could be no entry of final judgment under C.R.C.P. 58(a). Smeal v. Oldenettel, 814 P.2d 904 (Colo. 1991).

Ruling on post-trial motion must be entered within 60-day time limit specified in section (j) and any order entered after such 60-day limitation is null and void. In re Micaletti, 796 P.2d 54 (Colo. App. 1990); Spencer v. Bd. of County Comm'rs, 39 P.3d 1272 (Colo. App. 2001).

A court loses jurisdiction when it fails to rule on a post-judgment motion within 60 days. The language of section (j) is mandatory and provides that the district court shall rule within 60 days or the motion shall be automatically denied. Arguelles v. Ridgeway, 827 P.2d 553 (Colo. App. 1991).

A motion under section (j) is automatically deemed denied after 60 days, however the court had authority under C.R.C.P. 60(a) to vacate such denial and rule on the motion because the court was unaware that defendant's motion was pending at the time it entered judgment in favor of plaintiff. Farmers Ins. Exchange v. Am. Mfrs. Mut. Ins. Co., 897 P.2d 880 (Colo. App. 1995).

The time period for responding to motions is not extended when a court grants a party additional time to respond to the opposing party's briefs. Arguelles v. Ridgeway, 827 P.2d 553 (Colo. App. 1991).

Failure to obtain an extension of time within which to file motion under this rule deprived the district court of jurisdiction to hear any motion filed after the 15-day period had expired and the untimely filing of that motion did not toll the running of the 45 days for the filing of a notice of appeal under C.A.R. 4. Stone v. People, 895 P.2d 1154 (Colo. App. 1995).

While section (a) provides that motions for amendment of judgment shall be filed within 15 days or such greater time as the court may allow, a court may only allow greater time during the 15 days following the entry of judgment. Once that period expires, the court loses jurisdiction to grant additional time. Spencer v. Bd. of County Comm'rs, 39 P.3d 1272 (Colo. App. 2001).

Plaintiff abandons timeliness issue if he or she does not argue that the trial court erred in rejecting her motion under this rule as untimely. In re McSoud, 131 P.3d 1208 (Colo. App. 2006).

Rule 60. Relief from Judgment or Order

(a) Clerical Mistakes. Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal such mistakes may be so corrected before the case is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Surprise; Excusable Neglect; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (3) the judgment is void; (4) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1) and (2) not more than six months after the judgment, order, or proceeding was entered or taken. A motion under this section (b) does not affect the finality of a judgment or suspend its operation. This Rule does not limit the power of a court: (1) To entertain an independent action to relieve a party from a judgment, order, or proceeding, or (2) to set aside a judgment for fraud upon the court; or (3) when, for any cause, the summons in an action has not been personally served within or without the state on the defendant, to allow, on such terms as may be just, such defendant, or his legal representatives, at any time within six months after the rendition of any judgment in such

action, to answer to the merits of the original action. Writs of coram nobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Cross references: For stay of proceedings to enforce judgments, see C.R.C.P. 62(b); for setting aside default, see C.R.C.P. 55(c).

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, "Notes on Proposed Amendments to Colorado Rules of Civil Procedure", see 27 Dicta 165 (1950). For article, "Amendments to the Colorado Rules of Civil Procedure", see 28 Dicta 242 (1951). For article, "Judgment: Rules 54-63", see 23 Rocky Mt. L. Rev. 581 (1951). For article, "One Year Review of Civil Procedure", see 34 Dicta 69 (1957). For article, "One Year Review of Civil Procedure", see 35 Dicta 3 (1958). For article, "One Year Review of Civil Procedure and Appeals", see 37 Dicta 21 (1960). For article, "One Year Review of Civil Procedure and Appeals", see 40 Den. L. Ctr. J. 66 (1963). For note, "One Year Review of Civil Procedure", see 41 Den. L. Ctr. 67 (1964). For a discussion of federal jurisdiction arising under this rule, see survey of Tenth Circuit decisions on federal practice and procedure, 53 Den. L.J. 153 (1976). For article, "Post-Trial Motions in the Civil Case: An Appellate Perspective", see 32 Colo. Law. 71 (November 2003).

Annotator's note. Since this rule is similar to §§ 50(e) and 81 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that sections have been included in the annotations to this rule.

Once a valid judgment is entered, the only means by which the trial court may thereafter alter, amend, or vacate the judgment is by appropriate motion under either C.R.C.P. 59 or this rule. Cortvriendt v. Cortvriendt, 146 Colo. 387, 361 P.2d 767 (1961).

This rule prescribes the conditions upon which the court may relieve a party from a final judgment. Riss v. Air Rental, Inc., 136 Colo. 216, 315 P.2d 820 (1957).

Court may relieve only a party or a party's legal representative from a final judgment; therefore, garnishor of judgment debtor could not seek to modify or set aside an order in the principal case since it was not a party to that case. Law Offices of Quiat v. Ellithorpe, 917 P.2d 300 (Colo. App. 1995).

A motion under this rule may not be used to circumvent the operation of C.R.C.P. 59(j), absent extraordinary circumstances involving extreme situations. Anderson v. Molitor, 770 P.2d 1305 (Colo. App. 1988).

A motion for relief from judgment under section (b) of this rule may not be construed to avoid C.R.C.P. 59(j) and its 60-day requirement. Diamond Back Servs., Inc. v. Willowbrook Water, 961 P.2d 1134 (Colo. App. 1998).

This rule is not a substitute for appeal, but instead is meant to provide relief in the interest of justice in extraordinary circumstances. Thus, a motion under this rule generally cannot be used to circumvent the operation of C.R.C.P. 59(j). De Avila v. Estate of DeHerrera, 75 P.3d 1144 (Colo. App. 2003).

After the expiration of his term of office, a judge may not entertain a motion under this rule, even though such motion is filed in a proceeding wherein the "former" judge had himself entered the final judgment at a time when he was actually serving as a judge. Olmstead v. District Court, 157 Colo. 326, 403 P.2d 442 (1965).

A court's error in interpreting a statutory grant of jurisdiction is not equivalent to acting with a total lack of jurisdiction. King v. Everett, 775 P.2d 65 (Colo. App. 1989), cert. denied, Everett v. King, 786 P.2d 411 (Colo. 1989).

Trial court could not amend judgment to include prejudgment interest when omission was intentional. Jennings v. Ibarra, 921 P.2d 62 (Colo. App. 1996).

A judgment creditor is not required to get an amended judgment showing trial court intended to award post-judgment interest where court inadvertently failed to do so. Bainbridge, Inc., v. Douglas County Sch. Dist., 973 P.2d 684 (Colo. App. 1998) (declining to follow Jennings v. Ibarra, 921 P.2d 62 (Colo. App. 1996)).

An appellate court does not grant or deny motions filed subsequent to entry of judgment under this rule, since this is a function of the trial court; once a trial court has acted, however, an appellate court may in appropriate proceedings be called upon to review the propriety of

the action thus taken by it. Olmstead v. District Court, 157 Colo. 326, 403 P.2d 442 (1965).

Default judgment entered after a hearing on damages was a final judgment because it left the court with nothing to do but execute upon the judgment. Therefore, motion to set aside the default judgment filed within six months was timely filed. Sumler v. District Ct., City & County of Denver, 889 P.2d 50 (Colo. 1995).

There were no grounds for vacating the default judgment where plaintiff failed to show a reason for not amending the original complaint during the three months before default judgment was entered. Since the judgment was not vacated, it was within the court's discretion to deny the motion to amend the original complaint after entry of the default judgment. Wilcox v. Reconditioned Office Sys., 881 P.2d 398 (Colo. App. 1994).

Where none of the grounds prescribed by this rule, upon which a party may be relieved from a final judgment or order is urged in a motion to vacate, no abuse of discretion in denying such motion can be shown. Cortvriendt v. Cortvriendt, 146 Colo. 387, 361 P.2d 767 (1961).

There were no grounds for vacating the default judgement where the federal district court entered an order denying defendant's attempt to remove the case to federal court and remanded the case to state court prior to the trial date. Plaintiff's request for reconsideration of the federal court's order did not cut off the state court's jurisdiction since, under federal law, remand orders are not reviewable on appeal or otherwise. Blazer Elec. Supply Co. v. Bertrand, 952 P.2d 857 (Colo. App. 1998).

Meritorious defense not grounds for vacation of judgment. A party may not have a judgment vacated solely upon an allegation of the existence of a meritorious defense. Craig v. Rider, 628 P.2d 623 (Colo. App. 1980), rev'd on other grounds, 651 P.2d 397 (Colo. 1982).

The mere existence of a meritorious defense is not sufficient alone to justify vacating the judgment. Biella v. State Dept. of Hwys., 652 P.2d 1100 (Colo. App. 1982).

Appellate review limited to whether trial court abused its discretion. Appellate review of the grant or denial of a motion under section (b) is normally limited to determining whether the district court abused its discretion. In re Stroud, 631 P.2d 168 (Colo. 1981).

It is within the discretion of the trial court to determine whether a party's conduct justifies relief from a judgment, and such determination will be upheld unless the court abused its discretion. Messler v. Phillips, 867 P.2d 128 (Colo. App. 1993).

Appellate review of the denial of a motion under section (b) of this rule is limited to whether the trial court abused its discretion. A trial court abuses its discretion if its decision is manifestly arbitrary, unreasonable, or unfair. Guevara v. Foxhoven, 928 P.2d 793 (Colo. App. 1996).

A motion pursuant to section (b) must meet the requirements of the rule in order to be subject to exercise of the court's discretion. Especially with respect to the residuary provision of section (b)(5), which has been narrowed to include only extreme situations and extraordinary circumstances, a trial court's ruling must be reviewed in light of the purposes of the rule and the importance to be accorded the principle of finality. Davidson v. McClellan, 16 P.3d 233 (Colo. 2001).

Where defendant failed to object to plaintiff's motion for substitution of parties and also failed to object to trial court's order permitting the substitution, the right to appeal on those issues is waived. Thomason v. McAlister, 748 P.2d 798 (Colo. App. 1987).

Where there has been a hearing on a motion pursuant to this rule involving controverted issues of fact, a motion for new trial is a jurisdictional prerequisite for appellate review. Canady v. Dept. of Admin., 678 P.2d 1056 (Colo. App. 1983).

Order granting relief on insufficient grounds not void. Failure to allege sufficient grounds for relief from a prior judgment does not make the subsequent order granting that motion void; rather, the court's action is legal error, vulnerable to reversal upon appeal. In re Stroud, 631 P.2d 168 (Colo. 1981).

Judgment must be final before time limitations apply. Where order of default was entered against one of two defendants but action remained pending and no C.R.C.P. 54(b) certification was obtained, timeliness of motion would be gauged in relation to date of dismissal of action against second defendant. United Bank of Boulder, N.A. v. Buchanan, 836 P.2d 473 (Colo. App. 1992).

Time limit inapplicable where judgment exceeded jurisdiction. Where a claim is made that the district court's judgment exceeded its jurisdiction, the time limit of section (b) does not apply. Mathews v. Urban, 645 P.2d 290 (Colo. App. 1982); United Bank of Boulder, N.A. v. Buchanan, 836 P.2d 473 (Colo. App. 1992).

Even though a motion under C.R.C.P. 59(j) is automatically denied after 60 days, the court had authority under section (a) to vacate the judgment on its own motion because the court was unaware that defendant's motion was pending at the time it entered judgment in favor of plaintiff. Farmers Ins. Exch. v. Am. Mfrs. Mut. Ins. Co., 897 P.2d 880 (Colo. App. 1995).

Successor judge may consider challenges to rulings of law presented in a motion for a

new trial. Faris v. Rothenberg, 648 P.2d 1089 (Colo. 1982).

Appeal from denial of motion. Denial of a motion under this rule is appealable independently of an underlying judgment. United Bank of Boulder, N.A. v. Buchanan, 836 P.2d 473 (Colo. App. 1992).

An order denying a motion under section (b) of this rule is appealable independently of an underlying judgment and requires a separate notice of appeal. Sender v. Powell, 902 P.2d 947 (Colo. App. 1995); Guevara v. Foxhoven, 928 P.2d 793 (Colo. App. 1996).

District court has jurisdiction to review a section (b)(2) motion where a magistrate has authority under § 13-5-301 to hear the motion without the consent of the parties. In re Malewicz, 60 P.3d 772 (Colo. App. 2002).

A section (b)(2) motion filed within six months of the district court's order is timely filed under this rule. In re Malewicz, 60 P.3d 772 (Colo. App. 2002).

Court's order discharging a receiver appointed under predecessor to § 38-38-601 is a final judgment subject to appellate review, and any claim based on misfeasance or malfeasance of the receiver must be presented prior to discharge, if at all, unless grounds exist for relief from judgment under this rule. Four Strong Winds, Inc. v. Lyngholm, 826 P.2d 414 (Colo. App. 1992).

Relief from foreign judgments available under this rule is limited by full faith and credit clause of federal constitution to: (1) Judgments based upon fraud; (2) void judgments; and (3) judgments which have been satisfied, released, or discharged, or a prior judgment upon which it was based has been reversed or vacated, or it is no longer equitable that judgment should have prospective application. Marworth, Inc. v. McGuire, 810 P.2d 653 (Colo. 1991).

A trial court's ruling in resolving a motion for relief from judgment predicated on newly discovered evidence under section (b) will not be disturbed absent a clear showing of an abuse of discretion. Sender v. Powell, 902 P.2d 947 (Colo. App. 1995).

Failure to submit financial information to the trial court and the failure of the trial court to review the modified child support agreement between the parties rendered the resulting trial court order subject to being set aside under section (b)(5). In re Smith, 928 P.2d 828 (Colo. App. 1996).

The provisions for vacating, modifying, or correcting an arbitration award are set forth in §§ 13-22-223 and 13-22-224 and are the exclusive means for challenging an award. Therefore, this rule is not the appropriate vehicle to challenge the award. Superior Constr. Co. v. Bentley, 104 P.3d 331 (Colo. App. 2004).

Applied in Valenzuela v. Mercy Hosp., 34 Colo. App. 5, 521 P.2d 1287 (1974); Janicek v. Hinnen, 34 Colo. App. 68, 522 P.2d 113 (1974); Bankers Union Life Ins. Co. v. Fiocca, 35 Colo. App. 306, 532 P.2d 57 (1975); In re Estate of Bonfils, 190 Colo. 70, 543 P.2d 701 (1975); Duran v. District Court, 190 Colo. 272, 545 P.2d 1365 (1976); Johnston v. District Court, 196 Colo. 261, 580 P.2d 798 (1978); In re Gallegos, 41 Colo. App. 116, 580 P.2d 838 (1978); O'Hara Group Denver, Ltd. v. Marcor Hous. Sys., 197 Colo. 530, 595 P.2d 679 (1979); Sec. State Bank v. Weingardt, 42 Colo. App. 219, 597 P.2d 1045 (1979); In re Stroud, 657 P.2d 960 (Colo. App. 1979); Collection Agency, Inc. v. Golding, 44 Colo. App. 421, 616 P.2d 988 (1980); Town of Breckenridge v. City & County of Denver, 620 P.2d 1048 (Colo. 1980); People in Interest of T.A.F. v. B.F., 624 P.2d 349 (Colo. App. 1980); In re Van Camp, 632 P.2d 1062 (Colo. App. 1981); Soehner v. Soehner, 642 P.2d 27 (Colo. App. 1981); Cross v. District Court, 643 P.2d 39 (Colo. 1982); Best v. Jones, 644 P.2d 89 (Colo. App. 1982); Moore & Co. v. Williams, 657 P.2d 984 (Colo. App. 1982); Kendall v. Costa, 659 P.2d 715 (Colo. App. 1982); Falzon v. Home Ins. Co., 661 P.2d 696 (Colo. App. 1982); Ground Water Comm'n v. Shanks, 658 P.2d 847 (Colo. 1983); In re Hiner, 669 P.2d 135 (Colo. App. 1983); Yard v. Ambassador Bldr. Corp., 669 P.2d 1040 (Colo. App. 1983); Wright Farms, Inc. v. Weninger, 669 P.2d 1054 (Colo. App. 1983); In re Ward, 670 P.2d 1260 (Colo. App. 1983); Turchick & Kempter v. Hurd & Titan Constr., 674 P.2d 969 (Colo. App. 1983); Realty World-Range Realty, Ltd. v. Prochaska, 691 P.2d 761 (Colo. App. 1984); E.B. Jones Constr. Co. v. Denver, 717 P.2d 1009 (Colo. App. 1986); In re Allen, 724 P.2d 651 (Colo. 1986); People v. Caro, 753 P.2d 196 (Colo. 1988); Blesch v. Denver Publ'g Co., 62 P.3d 1060 (Colo. App. 2002).

II. CLERICAL MISTAKES.

The failure to include interest is an oversight or omission and falls squarely within this rule. Crosby v. Kroeger, 138 Colo. 55, 330 P.2d 958 (1958); Reasoner v. District Court, 197 Colo. 516, 594 P.2d 1060 (1979).

Since the statute required an award of prejudgment interest and failure to include such interest was merely a ministerial oversight, passage of five years since entry of the award would not prevent the addition of prejudgment interest, even though the original amount of the award had been satisfied. Brooks v. Jackson, 813 P.2d 847 (Colo. App. 1991).

It is not error for a court to correct a judgment by including interest when the omission is called to its attention. Crosby v. Kroeger, 138 Colo. 55, 330 P.2d 958 (1958).

An error in the calculation of interest is merely clerical and does not require court intervention and stay of execution. Schaffer v. District Court, 172 Colo. 43, 470 P.2d 18 (1970).

Where the written, final decree does not reflect the oral findings of fact and an earlier order of the court, the decree is not in accord with the expectations and understanding of the court and the parties and that is the type of error section (a) of this rule is designed to remedy. Reasoner v. District Court, 197 Colo. 516, 594 P.2d 1060 (1979).

This rule provides that a trial court may correct an oversight while the case is pending on appeal, provided leave of the appellate court is obtained. Callaham v. Slavsky, 153 Colo. 291, 385 P.2d 674 (1963).

Language of the order of remand was sufficiently broad to authorize the trial court's amendment of its order. Flatiron Paving Co. v. Wilkin, 725 P.2d 103 (Colo. App. 1986).

Where the failure is not that of a judge in entering an incorrect judgment or decree, or that of a clerk in incorrectly recording the proceedings had in a case, but rather, it is the attorney's failure to prosecute with due diligence the proceedings which he has commenced on behalf of a plaintiff, then, under these circumstances, relief is properly denied under section (a) of this rule. Hatcher v. Hatcher, 169 Colo. 174, 454 P.2d 812 (1969).

Attorney's failure to proceed diligently not clerical error. Unexcused attorney failure to diligently proceed on behalf of his client does not constitute clerical error justifying relief under section (a). Cavanaugh v. State Dept. of Soc. Servs., 644 P.2d 1 (Colo. 1982), appeal dismissed for want of substantial federal question, 459 U.S. 1011, 103 S. Ct. 367, 74 L. Ed. 2d 504 (1982), reh'g denied, 460 U.S. 1104, 103 S. Ct. 1806, 76 L. Ed. 2d 369 (1983).

Where the record reflects the court's intent to include amounts owing under a contract, the amount due under the contract was virtually undisputed, and the court made extensive findings that the contract was wrongfully terminated, it was judicial error and correctable under section (a) when the court omitted such amounts from its final order. Diamond Back Servs., Inc. v. Willowbrook Water, 961 P.2d 1134 (Colo. App. 1998).

Where plaintiff filed a motion under C.R.C.P. 59 for post-judgment relief for a clerical error made by the court for failure to include the amount unpaid in a wrongfully terminated contract, the court's failure to rule on the C.R.C.P. 59 motion did not bar the plaintiff from seeking relief under section (a) of this rule. Diamond Back Servs., Inc. v. Willowbrook Water, 961 P.2d 1134 (Colo. App. 1998).

A motion under section (a) is limited to making a judgment speak the truth as originally intended, and not intended to relitigate the matter before the court. Diamond Back Servs., Inc. v. Willowbrook Water, 961 P.2d 1134 (Colo. App. 1998).

A motion or order under section (a) does not extend the time for filing a notice of appeal of the underlying judgment. An order clarifying the original judgment relates back to the time of the filing of the initial judgment and does not extend the time for appeal of that judgment. In re Buck, 60 P.3d 788 (Colo. App. 2002).

Clerical error in a verdict form does not include an alleged error that either alters the legal effect of the jury's verdict or addresses the jury's misunderstanding or misapplication of the court's instructions. Clerical error corrections to a jury's verdict are disfavored. Stewart v. Rice, 47 P.3d 316 (Colo. 2002).

Use of Larimer county as the venue defendant had erroneously identified on the caption of the proposed order authorizing foreclosure sale was a clerical error that did not affect its validity. Colorado law looks to the substance of a pleading and not to the form of its caption. Moreover, under section (a), courts have the power to correct a clerical error in an order. Upon defendant's motion brought under section (a), district court magistrate corrected the clerical error by issuing an amended order, nunc pro tunc. Estates in Eagle Ridge, LLLP v. Valley Bank & Trust, 141 P.3d 838 (Colo. App. 2005).

Equipment failure resulting in the lack of a complete transcript is not a clerical error. Correction of clerical errors under section (a) is a matter within the discretion of the trial court, and the court here did not abuse its discretion in ruling that plaintiff's motion for a new trial based on equipment failure was not a clerical error as contemplated by section (a). In re McSoud, 131 P.3d 1208 (Colo. App. 2006).

III. MISTAKE; INADVERTENCE; SURPRISE; EXCUSABLE NEGLECT; FRAUD; ETC.

A. In General.

Law reviews. For article, "Appellate Procedure and the New Supreme Court Rules", see 30 Dicta 1 (1953). For article, "One Year Review of Appeals and Agency", see 33 Dicta 13 (1956). For article, "One Year Review of Civil Procedure and Appeals", see 36 Dicta 5 (1959). For note, "Res Judicata — Should It Apply to a Judgment Which is Being Appealed?", see 33 Rocky Mt. L. Rev. 95 (1960). For note, "Batton v. Massar: The Finality of Colorado Adoptions", see 35 U. Colo. L. Rev. 314 (1963).

Authority for relief from a judgment order or proceeding is conferred in an appropriate

proceeding by section (b) of this rule. Peercy v. Peercy, 154 Colo. 575, 392 P.2d 609 (1964).

It is incumbent upon one to prove mistake, inadvertence, surprise, excusable neglect, or fraud or that a judgment is void because no service was had upon him. Riss v. Air Rental, Inc., 136 Colo. 216, 315 P.2d 820 (1957).

In order to be entitled to relief under this rule, a defendant has to demonstrate to the trial court either mistake, inadvertence, surprise, excusable neglect, fraud, misrepresentation, or other misconduct on the part of plaintiff. Eisenson v. Eisenson, 158 Colo. 394, 407 P.2d 20 (1965).

Party seeking relief from judgment must demonstrate by clear, strong, and satisfactory proof that such relief is warranted. Domenico v. Sw. Props. Venture, 914 P.2d 390 (Colo. App. 1995).

A motion to vacate a judgment must allege a defense which is "prima facie" meritorious. Henritze v. Borden Co., 163 Colo. 589, 432 P.2d 2 (1967).

A meritorious defense must be stated with such particularity that the court can see that it is a substantial and meritorious defense, and not merely a technical or frivolous one. Henritze v. Borden Co., 163 Colo. 589, 432 P.2d 2 (1967).

This rule prescribes the conditions upon which a court may relieve a party from a final judgment. Riss v. Air Rental, Inc., 136 Colo. 216, 315 P.2d 820 (1957).

Motions for relief from a final order are governed by this rule under which the time for filing such motions is expressly limited to six months. Love v. Rocky Mt. Kennel Club, 33 Colo. App. 4, 514 P.2d 336 (1973).

To be entitled to have a judgment vacated or set aside, a disadvantaged party must bring himself within the terms and conditions of this rule. Peercy v. Peercy, 154 Colo. 575, 392 P.2d 609 (1964).

Surety bond not required. Section (b) of this rule, providing that a court may set aside a judgment upon such terms as may be just, does not warrant an order of court requiring defendants to post a surety bond in the full amount of a plaintiffs' claim as a condition to having their defense heard. Prather v. District Court, 137 Colo. 584, 328 P.2d 111 (1958); Rencher v. District Court, 160 Colo. 523, 418 P.2d 289 (1966).

This rule provides for the granting of relief from judgments entered by mistake, inadvertence, surprise, excusable neglect, fraud, etc. Prather v. District Court, 137 Colo. 584, 328 P.2d 111 (1958).

Section (b) of this rule permits a court to relieve a party from a final judgment or order for "mistake, inadvertence, surprise, or excusable neglect". Burson v. Burson, 149 Colo. 566, 369 P.2d 979 (1962); Dept. of Welfare v. Schneider, 156 Colo. 189, 397 P.2d 752 (1964); Domenico v. Sw. Props. Venture, 914 P.2d 390 (Colo. App. 1995).

A court may set aside a judgment in favor of a debtor if the judgement was entered into in violation of the automatic stay provision of the federal bankruptcy code. McGuire v. Champion Fence & Contstr., Inc., 104 P.3d 327 (Colo. App. 2004).

Relief under section (b) is limited to setting aside an order or judgment. It is beyond the authority of a court to grant additional affirmative relief, such as reformation of a settlement agreement, in instances of fraud, misrepresentation, or other misconduct. Affordable Country Homes, LLC v. Smith, 194 P.3d 511 (Colo. App. 2008).

Father's motion for relief not time-barred because judgment was void. Where notice through publication was inadequate because birth mother made fraudulent misrepresentations to the court, birth father was deprived of his constitutional right to due process, thus making the judgment terminating his parental rights void by default. The requirements of due process take precedence over statutory enactments. In re C.L.S., 252 P.3d 556 (Colo. App. 2011).

C.R.C.P. 11 imposes sanctions upon those who violate its provisions, it does not preclude relief under section (b)(1) of this rule. Domenico v. Sw. Props. Venture, 914 P.2d 390 (Colo. App. 1995).

Relief under section (b) is available for judgments entered pursuant to § 13-17-202. Domenico v. Sw. Props. Venture, 914 P.2d 390 (Colo. App. 1995).

Responsibility for reasons under clause (1) in the first sentence of section (b) shall be of party. The mistake, inadvertence, surprise, or excusable neglect subject to correction under this rule must be by a party to the action or his legal representative. Columbia Sav. & Loan Ass'n v. District Court, 186 Colo. 212, 526 P.2d 661 (1974).

Acceptance under judgment waives right to review. A party who accepts an award or legal advantage under a judgment normally waives his right to any review of the adjudication which may again put in issue his right to the benefit which he has accepted. Farmers Elevator Co. v. First Nat'l Bank, 181 Colo. 231, 508 P.2d 1261 (1973).

A motion to vacate upon any of the grounds must be made within a "reasonable time". Sunshine v. Robinson, 168 Colo. 409, 451 P.2d 757 (1969).

A motion to vacate judgment must be filed within a "reasonable time" under this rule. Salter v. Bd. of County Comm'rs, 133 Colo. 138, 292 P.2d 345, cert. denied, 352 U.S. 829, 77 S. Ct. 37, 1 L. Ed. 2d 48 (1956).

For purposes of motion based on evidence of perjury, there is a critical difference between

perjury and the mere presence of factual conflicts or deficiencies in the evidence; proponent must show that discrepancies or inaccuracies in testimony were not the result of the usual shortcomings inherent in human perception and memory but rather were the result of a willful fabrication of evidence bearing on a material issue. Aspen Skiing Co. v. Peer, 804 P.2d 166 (Colo. 1991); In re Eisenhuth, 976 P.2d 896 (Colo. App. 1999).

In dissolution of marriage case trial court did not abuse its discretion in denying husband's motion under section (b)(2) even though husband contended wife undervalued, omitted, or otherwise hid marital assets at dissolution of marriage hearings where husband did not show that such alleged discrepancies or inaccuracies in wife's testimony resulted from a willful fabrication of evidence. In re Eisenhuth, 976 P.2d 896 (Colo. App. 1999).

Denial of motion for new trial upheld where newly discovered evidence allegedly demonstrating that plaintiff perjured himself at trial was equally consistent with theory that plaintiff's perceptions and recollections of accident honestly differed from those of certain other witnesses. Aspen Skiing Co. v. Peer, 804 P.2d 166 (Colo. 1991).

Denial of motion for new trial upheld where intentional misconduct was ameliorated before and during trial. Court held that there was no reason to presume that defendant's misconduct substantially impaired plaintiff's ability to prepare for and proceed at trial. Antolovich v. Brown Group Retail, Inc., 183 P.3d 582 (Colo. App. 2007).

Relief from the operation of a judgment alleged to have resulted from mistake must be pursued by motion, to be made within a "reasonable time". Peercy v. Peercy, 154 Colo. 575, 392 P.2d 609 (1964).

"Any other reason justifying relief" language of section (b)(5) encompasses newly discovered evidence. A motion for relief from a judgment pursuant to this rule on the ground of newly discovered evidence should be resolved by the same criteria applicable to a C.R.C.P. 59 (d)(4) motion: Applicant must establish that the evidence could not have been discovered by the exercise of reasonable diligence and produced at the first trial; the evidence was material to an issue in the first trial; and the evidence, if admitted, would probably change the result of the first trial. S.E. Colorado Water Conservancy Dist. v. O'Neill, 817 P.2d 500 (Colo. 1991), aff'd, 854 P.2d 167 (Colo. 1993).

Section (b)(5) is a residuary clause for application only in situations not covered by other sections in this rule. McElvaney v. Batley, 824 P.2d 73 (Colo. App. 1991); Domenico v. Sw. Props. Venture, 914 P.2d 390 (Colo. App. 1995).

Section (b)(5) does not apply where motion is based on "fraudulent acts and misrepresentations". Instead, such a motion is subject to section (b)(2) and the corresponding six-month time limit. In re Adoption of P.H.A., 899 P.2d 345 (Colo. App. 1995).

This rule may be used as a mechanism for obtaining relief from a final judgment due to a change in case law precedent. State Farm Mut. Auto. Ins. Co. v. McMillan, 925 P.2d 785 (Colo. 1996).

However, while C.R.C.P. 59 gives a trial court "full power to correct any and all errors committed," under section (b)(5) of this rule, the erroneous application of the law is simply not a sufficient basis for relief. Spencer v. Bd. of County Comm'rs, 39 P.3d 1272 (Colo. App. 2001); SR Condos., LLC v. K.C. Constr., Inc., 176 P. 3d 866 (Colo. App. 2007).

Section (b) of this rule requires any motion for relief of judgment on the grounds of mistake or fraud to be made within six months after judgment. Schaffer v. District Court, 172 Colo. 43, 470 P.2d 18 (1970).

Less than five weeks is not unreasonable. A delay of less than five weeks, if the allegation of when they learned of the judgment be true, cannot be said to be unreasonable. Sunshine v. Robinson, 168 Colo. 409, 451 P.2d 757 (1969).

Relief must be sought not more than six months after the judgment by section (b) of this rule. Burson v. Burson, 149 Colo. 566, 369 P.2d 979 (1962); Peercy v. Peercy, 154 Colo. 575, 392 P.2d 609 (1964); Dept. of Welfare v. Schneider, 156 Colo. 189, 397 P.2d 752 (1964).

Under section (b)(1) a motion to vacate must be filed within six months, or it is barred. Atlas Constr. Co. v. District Court, 197 Colo. 66, 589 P.2d 953 (1979).

Where a judgment resulted from a mistaken belief in the existence of a terminated order, this constitutes grounds for relief under section (b)(1), and the "reasonable time" limitation of this rule for avoiding the effects of the judgment upon such grounds cannot exceed six months. Sauls v. Sauls, 40 Colo. App. 275, 577 P.2d 771 (1977).

Where one seeks to be relieved from the judgment more than six months after its entry, such attempt is too late. Peercy v. Peercy, 154 Colo. 575, 392 P.2d 609 (1964).

A motion filed seven months after entry of judgment is filed too late. Fiant v. Town of Naturita, 127 Colo. 571, 259 P.2d 278 (1953); Salter v. Bd. of County Comm'rs, 133 Colo. 138, 292 P.2d 345, cert. denied, 352 U.S. 829, 77 S. Ct. 37, 1 L. Ed. 2d 48 (1956).

Since each of the installments for support becomes a judgment when it accrues, the only relief from judgment on the grounds of fraud or mistake would pertain to those installments which became due six months or less before the

final judgment. Schaffer v. District Court, 172 Colo. 43, 470 P.2d 18 (1970).

Section (b) of this rule cannot be applied to bar a motion brought under § 14-10-122 (1)(c) for retroactive modification of child support based on a mutually agreed upon change of physical custody. Section (b) of the rule imposes a time limit for the motion and is inconsistent with the procedure contemplated in the statute. In re Green, 93 P.3d 614 (Colo. App. 2004).

A court has no authority to grant relief. Where a motion is filed after the six-month deadline required by this rule, a court would have had no authority to grant relief. AA Constr. Co. v. Gould, 28 Colo. App. 161, 470 P.2d 916 (1970).

Where plaintiff's motion for reinstatement of the case was not timely filed within the specified six-month period following entry of the order of dismissal, the trial court was without authority to reinstate the case or to provide further relief. Love v. Rocky Mt. Kennel Club, 33 Colo. App. 4, 514 P.2d 336 (1973).

When the limiting period has passed, an order vacating judgment is absolutely void for lack of jurisdiction. Elder v. Richmond Gold & Mining Co., 58 F. 536 (8th Cir. 1893); Empire Const. Co. v. Crawford, 57 Colo. 281, 141 P. 474 (1914); Bd. of Control v. Mulertz, 60 Colo. 468, 154 P. 742 (1916).

Claim preclusion (otherwise known as res judicata) bars independent damages actions for wrongs committed in dissolution proceedings. After the six-month period following entry of judgment provided by section (b)(2), independent damages action for wrongs allegedly committed in the dissolution proceeding are barred. Gavrilis v. Gavrilis, 116 P.3d 1272 (Colo. App. 2005).

There was no fraud upon the court in dissolution of marriage action where husband's fraudulent nondisclosure of assets and income was purely between the parties. In re Gance, 36 P.3d 114 (Colo. App. 2001).

Void judgment may be vacated at any time regardless of time limits established by rules of civil procedure. Don J. Best Trust v. Cherry Creek Nat. Bank, 792 P.2d 302 (Colo. App. 1990).

Independent equitable action permitted. The propriety of an independent equitable action to afford relief from a prior judgment is expressly permitted under the provisions of section (b) of this rule. Dudley v. Keller, 33 Colo. App. 320, 521 P.2d 175 (1974).

Six-month limitation has no application to independent equitable action. An independent action to obtain equitable relief from a prior judgment is not brought under section (b) of this rule, and, hence, the six months' time limitation contained in this rule has no application. Terry v. Terry, 154 Colo. 41, 387 P.2d 902 (1963); Caldwell v. District Court, 644 P.2d 26 (Colo. 1982).

An independent equitable action to afford relief from a prior judgment is not restricted by the six-month time limitation upon motions made under clauses (1) to (5) in the first sentence of this rule. Dudley v. Keller, 33 Colo. App. 320, 521 P.2d 175 (1974).

Because an independent equitable action is not brought under this rule, the six-month time limit of clauses (1) and (2) in the first sentence of section (b) do not apply; rather, an independent equitable action must only be brought within a "reasonable time". Atlas Constr. Co. v. District Court, 197 Colo. 66, 589 P.2d 953 (1979).

An independent equitable action may provide additional remedies. An independent equitable action to afford relief from a prior judgment may provide remedies in addition to those afforded under section (b) of this rule. Dudley v. Keller, 33 Colo. App. 320, 521 P.2d 175 (1974).

Essential criteria upon which relief may be granted in an equitable action to afford relief from a prior judgment contemplated by section (b) are as follows: (1) That the judgment ought not, in equity and good conscience, be enforced; (2) that there can be asserted a meritorious defense to the cause of action on which the judgment is founded; (3) that fraud, accident, or mistake prevented the defendant in the action from obtaining the benefit of his defense; (4) that there is an absence of fault or negligence on the part of defendant; (5) and that there exists no adequate remedy at law. Dudley v. Keller, 33 Colo. App. 320, 521 P.2d 175 (1974); In re Gance, 36 P.3d 114 (Colo. App. 2001).

Independent action to obtain equitable relief from prior judgment not brought under rule; rather, it is a new action, commenced in the same manner as any other civil action. Atlas Constr. Co. v. District Court, 197 Colo. 66, 589 P.2d 953 (1979).

Dismissal of judgment debtor's motion for relief under section (b)(4) on the basis of settlement agreement between judgment debtor and judgment creditor was proper where such motion was not timely filed and the court lacked jurisdiction since judgment debtor elected to litigate settlement agreement in a separate action. Tripp v. Parga, 764 P.2d 367 (Colo. App. 1988).

A party may not use an independent equitable action to accomplish what it could have accomplished by appeal. In case where plaintiff argued that second complaint was an independent equitable action seeking relief from order dismissing his first complaint, plaintiff's proper remedy was to seek timely appellate relief. Therefore, district court properly dismissed plaintiff's second complaint. Kelso v.

Rickenbaugh Cadillac Co., 262 P.3d 1001 (Colo. App. 2011).

This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding. Terry v. Terry, 154 Colo. 41, 387 P.2d 902 (1963).

Claimant seeking relief through an independent equitable action based on fraud must establish extrinsic fraud as opposed to mere intrinsic fraud. A mere showing of intrinsic fraud, such as perjury or nondisclosure between the litigants concerning the subject matter of the original action, is insufficient. In re Gance, 36 P.3d 114 (Colo. App. 2001).

Husband's concealment of income and assets in dissolution of marriage action pertained to the substance and merits of the litigation and involved the parties themselves; it therefore did not rise to the level of fraud necessary to support an independent equitable action to vacate the underlying permanent orders. In re Gance, 36 P.3d 114 (Colo. App. 2001).

"Excusable neglect" sufficient to vacate an order results from circumstances which would cause a reasonably careful person to neglect a duty, and the issue of negligence is determined by the trier of fact. Craig v. Rider, 628 P.2d 623 (Colo. App. 1980), rev'd on other grounds, 651 P.2d 397 (Colo. 1982).

Party's own negligence not excusable neglect. Where a party's own carelessness resulted in its failure to file a responsive pleading, this carelessness does not constitute excusable neglect. Biella v. State Dept. of Hwys., 652 P.2d 1100 (Colo. App. 1982); Johnston v. S.W. Devanney & Co., Inc., 719 P.2d 734 (Colo. App. 1986).

In general, excusable neglect involves unforeseen occurrences that would cause a reasonably prudent person to overlook a required act in the performance of some responsibility. Failure to act because of carelessness and negligence is not excusable neglect. Messler v. Phillips, 867 P.2d 128 (Colo. App. 1993).

Reliance on opposing party's pleadings held to be "excusable neglect". A defendant's reliance upon the plaintiff's verified statement and pleadings appearing to drop the defendant from the action, coupled with the advice of an attorney that he need not be concerned about the proceedings, constitutes "excusable neglect" as a matter of law. People in Interest of C.A.W., 660 P.2d 10 (Colo. App. 1982).

Reliance on district court's statements held to be "excusable neglect". A defendant's failure to move for a new trial, based on the district court's assurance that such a motion was unnecessary in order for the defendant to appeal, constitutes excusable neglect under this rule. Tyler v. Adams County Dept. of Soc. Servs., 697 P.2d 29 (Colo. 1985).

Excusable neglect not found. Pro se plaintiff's failure to comply with notice provisions of § 24-10-109 does not constitute excusable neglect. Deason v. Lewis, 706 P.2d 1283 (Colo. App. 1985).

The rule that negligence on the part of an attorney may constitute excusable neglect on the part of the client has no application if the client itself is also negligent. Johnson v. Capitol Funding, LTD., 725 P.2d 1179 (Colo. App. 1986).

Common carelessness and negligence do not amount to excusable neglect and a party's conduct constitutes excusable neglect when the surrounding circumstances would cause a reasonably careful person similarly to neglect a duty. Guynn v. State Farm Mut. Auto Ins. Co., 725 P.2d 1162 (Colo. App. 1986).

Defendant's assertion that its agent was without authority to enter into a contract with plaintiff was not excusable neglect. Merrill Chadwick Co. v. October Oil Co., 725 P.2d 17 (Colo. App. 1986).

Conduct of a party's legal representative constitutes excusable neglect when surrounding circumstances would cause a reasonably prudent person to overlook a required act in the performance of some responsibility; however, common carelessness and negligence by the party's attorney does not amount to excusable neglect. Guevara v. Foxhoven, 928 P.2d 793 (Colo. App. 1996).

Failure of settlement offer made by defendant's insurance attorney to specify whether offer addressed fewer than all of the claims between the parties, did not constitute excusable neglect. Guevara v. Foxhoven, 928 P.2d 793 (Colo. App. 1996).

Excusable neglect does not constitute grounds for relief from the operation of C.R.C.P. 59(j). Sandoval v. Trinidad Area Health Ass'n, 752 P.2d 1062 (Colo. App. 1988).

Relief from a judgment may be granted on equitable grounds. Continental Nat'l Bank v. Dolan, 39 Colo. App. 16, 564 P.2d 955 (1977).

A motion under this rule cannot be overturned on appeal in the absence of an abuse of discretion by the district court. Front Range Partners v. Hyland Hills Metro., 706 P.2d 1279 (Colo. 1985); Domenico v. Sw. Props. Venture, 914 P.2d 390 (Colo. App. 1995).

Abuse of discretion will warrant reversal. While the grant or denial of relief from a judgment on equitable grounds is within the discretion of the trial court, an abuse of this discretion will warrant reversal. Continental Nat'l Bank v. Dolan, 39 Colo. App. 16, 564 P.2d 955 (1977); S.E. Colo. Water Conservancy Dist. v. O'Neill, 817 P.2d 500 (Colo. 1991), aff'd, 854 P.2d 167 (Colo. 1993); Blesch v. Denver Publ'g Co., 62 P.3d 1060 (Colo. App. 2002).

It is error to deny relief where dismissal

erroneously ordered on court's own motion. Where court on own motion dismissed action for failure to prosecute without complying with notice requirements of C.R.C.P. 41(b) and C.R.C.P. 121, §1-10(2), erroneous dismissal constituted sufficient reason to justify relief. Maxwell v. W.K.A. Inc., 728 P.2d 321 (Colo. App. 1986).

Abuse of discretion found where trial court refused to set aside the damages portion of a judgment. Johnston v. S.W. Devanney & Co., Inc., 719 P.2d 734 (Colo. App. 1986).

Abuse of discretion not found. Luna v. Fisher, 690 P.2d 264 (Colo. App. 1984); Merrill Chadwick Co. v. October Oil Co., 725 P.2d 17 (Colo. App. 1986).

Existence of meritorious defense and lack of prejudice to the plaintiff are insufficient to show an abuse of discretion in denying a motion to set aside a default. Johnston v. S.W. Devanney & Co., Inc., 719 P.2d 734 (Colo. App. 1986).

Even without tainted expert's testimony, trial court found that other evidence in the case supported the judgment. People ex rel. S.G., 91 P.3d 443 (Colo. App. 2004).

This rule is not applicable to a motion to reform a property settlement agreement incorporated into a divorce decree, since C.R.C.P. 81(b) provides that the Rules of Civil Procedure shall not govern procedure and practice in divorce actions if in conflict with applicable statutes. Ingels v. Ingels, 29 Colo. App. 585, 487 P.2d 812 (1971).

This rule is not applicable to a juvenile court's entry of an order terminating probation by mistake. The Colorado Rules of Civil Procedure apply only to juvenile matters that are not governed by the Colorado Children's Code. People in Interest of M.T., 950 P.2d 669 (Colo. App. 1997).

District court erred in denying husband relief from provision of dissolution of marriage decree requiring him to pay part of his future social security benefits to wife. State law equitable estoppel principles cannot be applied to bar a party from challenging a judgment rendered void by the supremacy clause of the U.S. constitution. In re Anderson, 252 P.3d 490 (Colo. App. 2010).

A decree determining property rights in a divorce matter is final and cannot be subsequently modified by reason of a change of circumstances. Ferguson v. Olmsted, 168 Colo. 374, 451 P.2d 746 (1969).

Where a court may provide for custody of children by orders made "before or after" the entry of a final decree, the trial court may provide for the custody of the child even though the subject was not mentioned in the original decree. Kelley v. Kelley, 161 Colo. 486, 423 P.2d 315 (1967).

Six-month limit applicable in child support action. Where defendant in a child support action alleged there was fraud, extrinsic to the record, perpetrated by plaintiff, unless the fraud alleged was such as to defeat the jurisdiction of the court, defendant was subject to the six-month limit of this rule. McNeece v. McNeece, 39 Colo. App. 160, 562 P.2d 767 (1977).

Where defendant did not seek to reopen the divorce proceeding until approximately five years after entry of judgment, none of the grounds of C.R.C.P. 59 or this rule were available to him to reopen the divorce proceeding. McNeece v. McNeece, 39 Colo. App. 160, 562 P.2d 767 (1977).

Clause (5) of section (b) is residuary clause, covering extreme situations not covered by the preceding clauses in section (b). Atlas Constr. Co. v. District Court, 197 Colo. 66, 589 P.2d 953 (1979); Sisneros v. First Nat. Bank of Denver, 689 P.2d 1178 (Colo. App. 1984); Canton Oil v. District Court, 731 P.2d 687 (Colo. 1987).

A motion under this rule cannot be used to circumvent the operation of C.R.C.P. 59(j) unless the facts of the case constitute an "extreme situation" justifying relief from a judgment pursuant to clause (5) of section (b). Sandoval v. Trinidad Area Health Ass'n, 752 P.2d 1062 (Colo. App. 1988).

Total lack of judicial review of property division provisions of a separation agreement constitutes an omission falling within the ambit of clause (5) of section (b). In re Seely, 689 P.2d 1154 (Colo. App. 1984).

Reason alleged by a movant under clause (5) of section (b) must justify relief. Atlas Constr. Co. v. District Court, 197 Colo. 66, 589 P.2d 953 (1979); Sisneros v. First Nat. Bank of Denver, 689 P.2d 1178 (Colo. App. 1984).

Grievous jury misconduct raising sensitive issues of religion presents grounds for relief under clause (5) ("other reason") of section (b). Canton Oil v. District Court, 731 P.2d 687 (Colo. 1987).

Where there is misconduct of jurors or the intrusion of irregular influences in the course of a trial, the test for determining whether a new trial will be granted is whether such matters had capacity of influencing result. Butters v. Dee Wann, 363 P.2d 494 (1961); Canton Oil v. District Court, 731 P.2d 687 (Colo. 1987).

While trial court personally expressed belief that verdict would have been same with a "decent" jury, trial court made necessary finding, in setting aside judgment, that jurors' conduct had capacity of influencing verdict. Canton Oil v. District Court, 731 P.2d 687 (Colo. 1987).

Untimely assertion of federal statutory venue right is not an extreme situation justifying relief under clause (5) of section (b). Sisneros v. First Nat. Bank of Denver, 689 P.2d 1178 (Colo. App. 1984).

Repeated assurances by the court clerk that the defendant's motion to alter and amend

the judgment had been forwarded to the presiding judge when, in fact, no notification of said motion had been given to the judge did not constitute an "extreme situation" allowing relief under clause (5) of section (b). Sandoval v. Trinidad Area Health Ass'n, 752 P.2d 1062 (Colo. App. 1988).

Defense not timely raised. The existence of a defense not timely raised does not constitute an extreme situation justifying relief from a default judgment under clause (5) of section (b). Sisneros v. First Nat. Bank of Denver, 689 P.2d 1178 (Colo. App. 1984).

Changes in decisional law, even by the United States supreme court and even involving constitutionality, do not necessarily amount to the extraordinary circumstances required for relief pursuant to section (b)(5). Davidson v. McClellan, 16 P.3d 233 (Colo. 2001); SR Condos., LLC v. K.C. Constr., Inc., 176 P. 3d 866 (Colo. App. 2007).

Jurisdictional prerequisite for review of action on section (b) motion. A motion for a new trial is a jurisdictional prerequisite for appellate review of a grant or denial of a section (b) motion when there has been a hearing involving controverted issues of fact. Rowe v. Watered Down Farms, 195 Colo. 152, 576 P.2d 172 (1978).

Erroneous "in personam" decision may be vacated. A trial court may properly vacate its order of dismissal against a defendant where the original decision of the trial court to dismiss under the theory that the action was "in personam" and not "in rem" was erroneous. Linker v. Linker, 28 Colo. App. 136, 470 P.2d 882 (1970).

When a defendant voluntarily pays a judgment, he is barred from questioning any technicalities, either of pleading or form, incident to the entry of the judgment. Salter v. Bd. of County Comm'rs, 133 Colo. 138, 292 P.2d 345, cert. denied, 352 U.S. 829, 77 S. Ct. 37, 1 L. Ed. 2d 48 (1956).

Misplaced reliance on the advice of counsel is not in itself sufficient grounds for granting of relief under section (b) of this rule. BB v. SS, 171 Colo. 534, 468 P.2d 859 (1970); Luna v. Fisher, 690 P.2d 264 (Colo. App. 1984).

Where a party commits a cause to the agency of an attorney, the neglect, omission, or mistake of such attorney resulting in the rendition of a judgment against the party is available to authorize the vacation of the judgment. Fidelity Fin. Co. v. Groff, 124 Colo. 223, 235 P.2d 994 (1951); Domenico v. Sw. Props. Venture, 914 P.2d 390 (Colo. App. 1995).

When a trial court permits counsel to withdraw from a case without notice to his client and then adjudicated his rights "ex parte", a judgment entered is void for lack of due process. Dalton v. People in Interest of Moors, 146 Colo. 15, 360 P.2d 113 (1961); Sunshine v. Robinson, 168 Colo. 409, 451 P.2d 757 (1969).

Malfeasance by attorney, consisting of failure to notify clients of motion for summary judgment or to respond to motion while under suspension from the practice of law, furnished grounds for relief from judgment where clients were unaware of the motion or of their attorney's suspension. Valley Bank of Frederick v. Rowe, 851 P.2d 267 (Colo. App. 1993).

Action of trial court renders judgment void if defendants had no notice. The action of the trial judge in permitting the withdrawal of counsel and proceeding to judgment "ex parte" constituted a failure to protect the constitutional right of defendants to their day in court and renders judgment void if defendants had no notice that their counsel intended to seek permission to withdraw. Calkins v. Smalley, 88 Colo. 227, 294 P. 534 (1930); Blackwell v. Midland Fed. Sav. & Loan Ass'n, 132 Colo. 45, 284 P.2d 1060 (1955); Sunshine v. Robinson, 168 Colo. 409, 451 P.2d 757 (1969).

Where a judgment is entered upon a cognovit note without notice to the defendant, a motion in apt time is thereafter filed to set aside the same, and a meritorious defense is tendered by answer, it is the duty of a court to vacate the judgment and try the case on the merits. Richards v. First Nat'l Bank, 59 Colo. 403, 148 P. 912 (1915); Commercial Credit Co. v. Calkins, 78 Colo. 257, 241 P. 529 (1925); Mitchell v. Miller, 81 Colo. 1, 252 P. 886 (1927); Denver Indus. Corp. v. Kesselring, 90 Colo. 295, 8 P.2d 767 (1932); Lucero v. Smith, 110 Colo. 165, 132 P.2d 791 (1943); Prather v. District Court, 137 Colo. 584, 328 P.2d 111 (1958); Rencher v. District Court, 160 Colo. 523, 418 P.2d 289 (1966).

If a judgment of dismissal has terminated and put an end to, a case remains final for all purposes and is unaffected by a motion to grant relief therefrom. Johnson v. Johnson, 132 Colo. 236, 287 P.2d 49 (1955); Robles v. People in Interest of Robles, 150 Colo. 462, 373 P.2d 701 (1962).

A motion under section (b) does not affect the finality of a judgment or suspend its operation. Robles v. People in Interest of Robles, 150 Colo. 462, 373 P.2d 701 (1962).

A motion, in any event, is directed to the discretion of a trial court. Johnson v. Johnson, 132 Colo. 236, 287 P.2d 49 (1955); Robles v. People in Interest of Robles, 150 Colo. 462, 373 P.2d 701 (1962).

When one files such a motion, he admits for all practical purposes that the judgment is in all respects regular on the face of the record, but asserts that the record would show differently except for mistake, inadvertence, or excusable neglect on behalf of counsel or client. Johnson v. Johnson, 132 Colo. 236, 287 P.2d 49

(1955); Robles v. People in Interest of Robles, 150 Colo. 462, 373 P.2d 701 (1962).

The ruling on a motion to "dismiss and vacate" is not a final judgment from which an appeal will lie. Fiant v. Town of Naturita, 127 Colo. 571, 259 P.2d 278 (1953); Salter v. Bd. of County Comm'rs, 133 Colo. 138, 292 P.2d 345, cert. denied, 352 U.S. 829, 77 S. Ct. 37, 1 L. Ed. 2d 48 (1956).

Where defendant in prior action sought and obtained dismissal for failure to prosecute but did not specifically request dismissal with prejudice, order of dismissal did not so specify, and no good cause was shown for defendant's failure to request dismissal with prejudice, subsequent "clarification" of order to specify dismissal with prejudice was ineffective. McElvaney v. Batley, 824 P.2d 73 (Colo. App. 1991).

Where a judgment is set aside on jurisdictional grounds, it is vacated and of no force and effect. Weaver Constr. Co. v. District Court, 190 Colo. 227, 545 P.2d 1042 (1976).

Party who lets judgment become final without objection to the court's jurisdiction is precluded from attacking the subject matter jurisdiction through a motion under this rule. In re Mallon, 956 P.2d 642 (Colo. App. 1998).

Original judgment opened. Where a judgment is set aside on grounds other than those challenging the jurisdiction of the court, the judgment is opened and the moving party, after a showing of good cause and a meritorious defense, will be permitted to file an answer to the original complaint and participate in a trial on the merits. Weaver Constr. Co. v. District Court, 190 Colo. 227, 545 P.2d 1042 (1976).

If an issue is not res judicata, the district court's judgment may be challenged as void through a motion pursuant to section (b) of this rule to vacate the judgment or through an independent action. Moore & Co. v. Williams, 672 P.2d 999 (Colo. 1983).

A void judgment is a judgment entered where jurisdictional defects exist and is a nullity, whereas an erroneous judgment is one rendered in accordance with method of procedure and practice allowed by law but is contrary to law; if a trial court has jurisdiction, it may correct an erroneous judgment. In re Pierce, 720 P.2d 591 (Colo. App. 1985).

Judgment rendered without jurisdiction is void and may be attacked directly or collaterally. In re Stroud, 631 P.2d 168 (Colo. 1981).

Judgment entered on legal holiday not void and becomes effective next business day. Section 13-1-118 (1) does not provide that any judicial business transacted in violation of its provisions is void. Rather, the statute is silent as to the effect of any order entered or other judicial business transacted in violation of its prohibitions. Section 13-1-118 (2) provides that the effect of having a day fixed for the opening of a court that falls on a prohibited day is that "the court shall stand adjourned until the next succeeding day." Thus, the effect of the trial court's entry of an order reviving judgment on a legal holiday was not to invalidate the order but, rather, merely to postpone its effective date until the next day the courts were open. Because the challenged judgment is not void, section (b)(3) of this rule provides no basis for relief. Arvada 1st Indus. Bank v. Hutchison, 15 P.3d 292 (Colo. App. 2000).

Government agencies treated same as other litigants. Absent an express statutory mandate to the contrary, government agencies are to be treated as would be any other litigant while before the court. Biella v. State Dept. of Hwys., 652 P.2d 1100 (Colo. App. 1982).

C.R.C.P. 6(b)(2) is controlling over this rule as to whether a trial court may extend the period of time for filing a motion for new trial under C.R.C.P. 59(b) (now (a)(1)) after the original filing period has expired. Liberty Mutual Ins. Co. v. Safeco Ins. Co., 679 P.2d 1115 (Colo. App. 1984).

Where court had lost jurisdiction under C.R.C.P. 59(b) (now (a)(1)), court had jurisdiction to set aside judgment under clause (5) of section (b) of this rule without unduly expanding the contours of the rule or undercutting C.R.C.P. 59(b) (now (a)(1)). Canton Oil v. District Court, 731 P.2d 687 (Colo. 1987).

Only issues contained in a motion under this rule are properly before the appellate court for review; constitutional objections not appearing in the motion will not be reviewed. Front Range Partners v. Hyland Hills Metro., 706 P.2d 1279 (Colo. 1985).

No evidentiary hearing need be conducted by the trial court considering a motion under this rule nor is there an abuse of discretion when a trial court determines such a motion without conducting such a hearing. Front Range Partners v. Hyland Hills Metro., 706 P.2d 1279 (Colo. 1985).

But nothing in this rule prevents a trial court from holding an evidentiary hearing on a motion under this rule if such a hearing would assist in reaching a just determination of the issues raised by the motion. Sharma v. Vigil, 967 P.2d 197 (Colo. App. 1998).

Reversal of conviction in criminal case grounds for relief from monetary forfeiture judgment. While a conviction is not required in every civil forfeiture case, the reversal of the conviction was relevant here because the court relied on that conviction in its forfeiture judgment. The physical evidence upon which the trial court had based its forfeiture judgment had been determined to be unconstitutionally seized, making it relevant. People v. $11,200 U.S. Currency, __ P.3d __ (Colo. App. 2011).

B. Default Judgments.

Law reviews. For comment on Self v. Watt, appearing below, see 26 Rocky Mt. L. Rev. 107 (1953). For comment on Coerber v. Rath appearing below, see 45 Den. L.J. 763 (1968).

Annotator's note. For annotations relating to motions to vacate default judgments, see the annotations under the analysis title "IV. Setting Aside Default" under C.R.C.P. 55.

Review by writ of error is proper procedure. The only proper procedure to secure review of a trial court's order granting an application to set aside a default judgment is by writ of error after final judgment, not prohibition. Stiger v. District Court, 188 Colo. 403, 535 P.2d 508 (1975).

Section (b) of this rule sets forth the procedure to be followed where one seeks to set aside a judgment entered by default. Fraka v. Malernee, 129 Colo. 87, 267 P.2d 651 (1954).

Section (b)(3) is the proper basis for vacating a default judgment if the defaulting party's due process rights were violated by failure to receive notice of a default judgment. First Nat. Bank of Telluride v. Fleisher, 2 P.3d 706 (Colo. 2000).

Section (b) of this rule and C.R.C.P. 55(c) leave the matter of setting aside defaults and judgments entered thereon to the discretion of a trial judge. Ehrlinger v. Parker, 137 Colo. 514, 327 P.2d 267 (1958).

Allegations in a C.R.C.P. 55 motion for default are sufficient to assert a basis for relief from judgment on the basis of fraud. Salvo v. De Simone, 727 P.2d 879 (Colo. App. 1986).

Motion for a new trial is a jurisdictional prerequisite for appellate review of denial of a motion to vacate a default judgment, unless the hearing on the motion to vacate does not involve "controverted issues of fact". Rowe v. Watered Down Farms, 195 Colo. 152, 576 P.2d 172 (1978).

The granting or denial of an application to vacate a default based on excusable neglect rests in the sound judicial discretion of a trial court. Browning v. Potter, 129 Colo. 448, 271 P.2d 418 (1954); Burr v. Allard, 133 Colo. 270, 293 P.2d 969 (1956); Ehrlinger v. Parker, 137 Colo. 514, 327 P.2d 267 (1958).

The determination of granting or denying relief under this rule rests in the sound discretion of the trial court on the particular facts of the case. Weeks v. Sigala, 32 Colo. App. 121, 509 P.2d 320 (1973).

The determination of whether to vacate or set aside a default judgment is within the sound discretion of the trial court. Dudley v. Keller, 33 Colo. App. 320, 521 P.2d 175 (1974).

A trial court's determination of a motion to vacate a judgment under this rule will not be disturbed on appellate review in the absence of a clear abuse of discretion. Columbine Valley Constr. Co. v. Bd. of Dirs., 626 P.2d 686 (Colo. 1981).

The underlying goal in ruling on motions to set aside default judgments is to promote substantial justice. Whether substantial justice will be served by setting aside a default judgment on the ground of excusable neglect is to be determined by the trial court in the exercise of its sound discretion. Craig v. Rider, 651 P.2d 397 (Colo. 1982).

Where the moving party has delayed substantially in seeking to set aside a default judgment, relief is disfavored by the courts. Martinez v. Dixon, 710 P.2d 498 (Colo. App. 1985).

The trial court's order on a motion for relief, based on a residuary clause covering extreme situations, may not be reversed absent an abuse of discretion. Fukutomi v. Siegel, 785 P.2d 147 (Colo. App. 1989).

To warrant a reversal, it must appear that there is an abuse of the court's discretion. Browning v. Potter, 129 Colo. 448, 271 P.2d 418 (1954); Burr v. Allard, 133 Colo. 270, 293 P.2d 969 (1956); Ehrlinger v. Parker, 137 Colo. 514, 327 P.2d 267 (1958).

The determination of granting or denying relief under this rule will not be disturbed on review unless it clearly appears that there has been abuse of that discretion. Weeks v. Sigala, 32 Colo. App. 121, 509 P.2d 320 (1973).

Where service is not proper, judgment is void and may be challenged at any time. United Bank of Boulder, N.A. v. Buchanan, 836 P.2d 473 (Colo. App. 1992).

Discretion of the court in considering any application to vacate a default is controlled by fixed legal principles, to be exercised in conformity with the spirit of the law, and in a manner to serve, and not to impede or defeat, the ends of justice. Dudley v. Keller, 33 Colo. App. 320, 521 P.2d 175 (1974).

A default judgment as to a party was properly set aside by the judge on the ground that he was not subjected to the personal jurisdiction of the court at the time of the judgment due to a lack of service of process because service had been served on his behalf on his alleged wife, but at the time of service, the couple had been divorced for over a month. Weaver Constr. Co. v. District Court, 190 Colo. 227, 545 P.2d 1042 (1976).

Default judgment was not void because process was adequately served and trial court therefore had personal jurisdiction over defendant. In case where process was properly served upon defendant's registered agent pursuant to C.R.C.P. 4, agent's failure to timely respond because of his own carelessness and negligence did not constitute excusable neglect. Therefore, trial court erred in setting aside the default judgment pursuant to sections (b)(1) and (b)(3) of this rule. Goodman Assocs., LLC

v. WP Mtn. Props., LLC, 222 P.3d 310 (Colo. 2010).

Judgment must be final before time limitations apply. Where order of default was entered against one of two defendants but action remained pending and no C.R.C.P. 54(b) certification was obtained, timeliness of motion would be gauged in relation to date of dismissal of action against second defendant. United Bank of Boulder, N.A. v. Buchanan, 836 P.2d 473 (Colo. App. 1992).

Where a motion is not filed within six months after the default was entered, then, under section (b) of this rule, a trial court is correct in denying the motion to vacate the default. Browning v. Potter, 129 Colo. 448, 271 P.2d 418 (1954).

The trial court had no jurisdiction to hear, much less grant, a motion for relief from judgment filed more than six months after entry of judgment. Wesson v. Johnson, 622 P.2d 104 (Colo. App. 1980).

Seventeen years is not a "reasonable time". Where for a period of more than 17 years one took no action to vacate or otherwise attack the validity of a default judgment, it can hardly be said that under such circumstances 17 years is a "reasonable time". Haskell v. Gross, 145 Colo. 365, 358 P.2d 1024 (1961).

Petition to vacate such a judgment held filed in apt time. Senne v. Conley, 110 Colo. 270, 133 P.2d 381 (1943).

In cases such as this, a defendant must establish his grounds for relief by clear, strong, and satisfactory proof. Browning v. Potter, 129 Colo. 448, 271 P.2d 418 (1954); Riss v. Air Rental, Inc., 136 Colo. 216, 315 P.2d 820 (1957); Moskowitz v. Michaels Artists & Eng'r Supplies, Inc., 29 Colo. App. 44, 477 P.2d 465 (1970).

It is not sufficient to show that the neglect which brought about the default is excusable. Gumaer v. Bell, 51 Colo. 473, 119 P. 681 (1911); Riss v. Air Rental, Inc., 136 Colo. 216, 315 P.2d 820 (1957); Moskowitz v. Michaels Artists & Eng'r Supplies, Inc., 29 Colo. App. 44, 477 P.2d 465 (1970).

To vacate a default, a mere showing of excusable neglect is not sufficient. Burr v. Allard, 133 Colo. 270, 293 P.2d 969 (1956); Orebaugh v. Doskocil, 145 Colo. 484, 359 P.2d 671 (1961).

A defendant must show a meritorious defense to the action. Gumaer v. Bell, 51 Colo. 473, 119 P. 681 (1911); Riss v. Air Rental, Inc., 136 Colo. 216, 315 P.2d 820 (1957); Moskowitz v. Michaels Artists & Eng'r Supplies, Inc., 29 Colo. App. 44, 477 P.2d 465 (1970); Weeks v. Sigala, 32 Colo. App. 121, 509 P.2d 320 (1973).

The judge was acting within his jurisdiction under this rule when he set aside a default judgment on the ground of "excusable neglect" supported by a specific statement of meritorious defense. Weaver Constr. Co. v. District Court, 190 Colo. 227, 545 P.2d 1042 (1976).

A defense to the action "prima facie" meritorious must also appear. Burr v. Allard, 133 Colo. 270, 293 P.2d 969 (1956); Orebaugh v. Doskocil, 145 Colo. 484, 359 P.2d 671 (1961).

It must be stated with such fullness and particularity that the court can see it is substantial, not technical, meritorious, and not frivolous. Burr v. Allard, 133 Colo. 270, 293 P.2d 969 (1956); Orebaugh v. Doskocil, 145 Colo. 484, 359 P.2d 671 (1961).

Where there were no reasons proffered to the trial court as grounds for relief under section (b) other than youth and indifference, the trial court's denial of motion to set aside default judgment was not an abuse of discretion. People in Interest of J.M.W., 36 Colo. App. 398, 542 P.2d 392 (1975).

It is not the duty of the trial court to relieve one of the consequences incident to the mistakes of his counsel. Self v. Watt, 128 Colo. 61, 259 P.2d 1074 (1953).

Where it is clear that defendants' counsel was negligent and that such neglect was the primary cause for their failure, counsel's neglect is inexcusable, but this neglect should not be imputed to the defendants. Coerber v. Rath, 164 Colo. 294, 435 P.2d 228 (1967).

Gross negligence on the part of counsel resulting in a default judgment is considered excusable neglect on the part of the client entitling him to have the judgment set aside. Temple v. Miller, 30 Colo. App. 49, 488 P.2d 252 (1971); Dudley v. Keller, 33 Colo. App. 320, 521 P.2d 175 (1974).

Gross negligence on the part of counsel, under certain circumstances, should be considered excusable neglect on the part of a client sufficient to permit the client to set aside a default judgment. Weeks v. Sigala, 32 Colo. App. 121, 509 P.2d 320 (1973).

Although a court recognizes the gross neglect of counsel, yet enters a default, it unwarrantly punishes defendants whose only dereliction is the misplacing of confidence in their attorney. Coerber v. Rath, 164 Colo. 294, 435 P.2d 228 (1967).

To hold that such reasons are inapplicable because a defendant failed to check the progress of the litigation is to make the client erroneously totally responsible for the attorney's negligent failure to comply with the rules of civil procedure. Temple v. Miller, 30 Colo. App. 49, 488 P.2d 252 (1971).

Where one was, or should have been, aware that his interest in the action was adverse to another, his reliance on such individual does not constitute excusable neglect so as to justify vacating entry of default judgment. Moskowitz v. Michaels Artists & Eng'r Supplies, Inc., 29 Colo. App. 44, 477 P.2d 465 (1970).

Where the record discloses that the defendant himself was guilty of negligence separate and apart from that of his counsel, the alleged negligence of counsel would not be considered as excusable neglect for purpose of setting aside default judgment. Weeks v. Sigala, 32 Colo. App. 121, 509 P.2d 320 (1973).

The entry of a default judgment does not apply to a stipulated judgment. Where parties dealing at arm's length have stipulated for the entry of a judgment, it is not a default judgment in the true sense of the word, but a stipulated judgment; consequently, there is no mistake, inadvertence, surprise or excusable neglect. Kopel v. Davie, 163 Colo. 57, 428 P.2d 712 (1967).

Where the parties to litigation, dealing at arm's length, stipulate for the entry of a judgment of dismissal, and they do not claim mistake, inadvertence, surprise, or excusable neglect, nor are any of the parties to the action seeking to have the order set aside, that judgment is final. Columbia Sav. & Loan Ass'n v. District Court, 186 Colo. 212, 526 P.2d 661 (1974).

A default judgment may only be the subject of collateral attack when the trial court lacked jurisdiction over the parties or the subject matter. DeBoer v. District Court, 184 Colo. 112, 518 P.2d 942 (1974).

Where a default judgment has been entered and made final, it is not a proper subject of collateral attack particularly by strangers to the original action, although the rule prohibiting such attack applies to parties as well. DeBoer v. District Court, 184 Colo. 112, 518 P.2d 942 (1974).

Criteria to be utilized by court in ruling on a motion to vacate a judgment include whether the neglect that resulted in entry of judgment by default was excusable, whether the moving party has alleged a meritorious defense, and whether relief from the challenged order would be consistent with considerations of equity. Buckmiller v. Safeway Stores, Inc., 727 P.2d 1112 (Colo. 1986); Dunton v. Whitewater West Recreation, Ltd., 942 P.2d 1348 (Colo. App. 1997); Goodman Assocs., LLC v. WP Mtn. Props., LLC, 222 P.3d 310 (Colo. 2010).

The preferred procedure is to consider all three criteria in a single hearing, as evidence relating to one factor might shed light on another and consideration of all three factors will provide the most complete information for an informed decision. Buckmiller v. Safeway Stores, Inc., 727 P.2d 1112 (Colo. 1986); Dunton v. Whitewater West Recreation, Ltd., 942 P.2d 1348 (Colo. App. 1997).

Motion to vacate judgment under this rule on basis of excusable neglect and motion to set aside default judgment under C.R.C.P. 55(c) on the basis of failure to prosecute are sufficiently analogous to justify application of the same standards to either motion; thus, the same three criteria which are legal standard are applicable in both motions. Buckmiller v. Safeway Stores, Inc., 727 P.2d 1112 (Colo. 1986).

In determining whether a party has established excusable neglect to obtain relief, the court should not impute gross negligence of an attorney to his client for the purpose of foreclosing the client from relief. Buckmiller v. Safeway Stores, Inc., 727 P.2d 1112 (Colo. 1986).

Moving party must establish by factual averments, and not simply by legal conclusions, that claim previously dismissed was indeed meritorious and substantial. Buckmiller v. Safeway Stores, Inc., 727 P.2d 1112 (Colo. 1986).

In determining whether relief would be consistent with equitable considerations, court should take into account promptness of moving party in filing motion, fact of any detrimental reliance by opposing party on order or judgment of dismissal, and any prejudice to opposing party if motion were to be granted, including impairment of party's ability to adduce proof at trial in defense of claim. Buckmiller v. Safeway Stores, Inc., 727 P.2d 1112 (Colo. 1986).

The mere existence of some negligence by client does not serve as per se basis to automatically deny relief, where motion was made based upon excusable neglect. Buckmiller v. Safeway Stores, Inc., 727 P.2d 1112 (Colo. 1986).

Defendant failed to show excusable neglect where he failed to seek a continuance or communicate with the trial court in any manner while seeking to remove the case to federal court and failed to appear and participate at trial even though he knew the federal court had remanded the case back to state court. Blazer Elec. Supply Co. v. Bertrand, 952 P.2d 857 (Colo. App. 1998).

Rule as basis for jurisdiction. Welborn v. Hartman, 28 Colo. App. 11, 470 P.2d 82 (1970); Morehart v. Nat'l Tea Co., 29 Colo. App. 465, 485 P.2d 907 (1971).

Applied in Finegold v. Clarke, 713 P.2d 401 (Colo. App. 1985).

Rule 61. Harmless Error

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the

court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

ANNOTATION

Law reviews. For article, "Judgment: Rules 54-63", see 23 Rocky Mt. L. Rev. 581 (1951). For article, "The Applicability of the Rules of Evidence in Non-Jury Trials", 24 Rocky Mt. L. Rev. 480 (1952).

A substantial right is one which relates to the subject matter and not to a matter of procedure and form. Sowder v. Inhelder, 119 Colo. 196, 201 P.2d 533 (1948); Corbin by Corbin v. City and County of Denver, 735 P.2d 214 (Colo. App. 1987).

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

A new trial will not be granted for error which did not prejudice or harm the party seeking a new trial, or where the trial resulted in substantial justice. Francis v. O'Neal, 127 Colo. 432, 257 P.2d 973 (1953); Tincombe v. Colo. Const. & Supply Corp., 681 P.2d 533 (Colo. App. 1984).

To the extent there was any error in judge's comments that defendant was "playing games" by filing motions for recusal, such error was harmless where defendant filed a subsequent motion for recusal which included the arguments made in the previous recusal motions and the subsequent motion was decided. Moody v. Corsentino, 843 P.2d 1355 (Colo. 1993).

Error in admission of immaterial evidence is not prejudicial where the findings are not based on, nor related to, any of the immaterial matter. Lloyd A. Fry Roofing Co. v. State, 179 Colo. 223, 499 P.2d 1176 (1972).

Violation of rule provisions allowing for a response from the party opposing a motion for summary judgment found to be harmless error under the circumstances. Union Ins. Co. v. Hottenstein, 83 P.3d 1196 (Colo. App. 2003).

It was harmless error for the court to enter summary judgment on an issue which was not raised by the parties when the party against whom judgment is entered has the opportunity to respond to the new issue raised by the trial court. Ferrera v. Nielsen, 799 P.2d 458 (Colo. App. 1990); Davis v. Lira, 817 P.2d 539 (Colo. App. 1991).

Where testimony is hearsay, its admission is harmless when the essential and operative facts upon which an award rests are established by competent evidence in the record. San Isabel Elec. Ass'n v. Bramer, 31 Colo. App. 134, 500 P.2d 821 (1972), aff'd, 182 Colo. 15, 510 P.2d 438 (1973).

The admission of part of the deposition of a party in court and able to testify is harmless error where the evidence contained therein is merely cumulative to the evidence already before the court. Its admission neither adds to nor detracts from evidence previously admitted. Therefore, the admission of the deposition is not reversible error. Sentinel Petroleum Corp. v. Bernat, 29 Colo. App. 109, 478 P.2d 688 (1970).

It was harmless error to admit evidence that deposition was taken at Texas state penitentiary, since defendants failed to prove that its admission affected substantial rights. Cheney v. Hailey, 686 P.2d 808 (Colo. App. 1984).

Where a trial judge drives past the premises in question in a zoning case to gain familiarity with its location and topography so he could better understand references in the record to the property, he does not commit reversible error so long as there is no indication that when the trial judge viewed the property it was not in substantially the same condition as when the ordinance in question was passed nor is there any indication that the trial court was influenced by or based its decision upon any evidence not a part of the record. Trans-Robles Corp. v. City of Cherry Hills Village, 30 Colo. 511, 497 P.2d 335 (1972), aff'd, 181 Colo. 356, 509 P.2d 797 (1973).

Where the stated reason for a transcript record's use is to show the scope of a previous judgment, which it fails to include, its admission is error, but harmless error. Wasinger v. Miller, 154 Colo. 61, 388 P.2d 250 (1964).

Errors and deficiencies of counsel will be disregarded where not to do so would result in palpable injury. Griffith v. Anderson, 109 Colo. 265, 124 P.2d 599 (1942).

Although a trial court applies the wrong test, the failure to dismiss does not result in reversible error, where had the trial court applied the right rule, the result would have been the same. Am. Nat'l Bank v. First Nat'l Bank, 28 Colo. App. 486, 476 P.2d 304 (1970).

Error held harmless. Where the record is clear that adequate funds were in fact remitted on behalf of the judgment debtor, and at all times subsequent to the inaccurate change refund by the clerk, the judgment debtor was willing and able to pay the interest to the judgment creditor, and payment was obstructed solely by the latter, substantial justice would not be served by penalizing the defendant for the minor mathematical error of the clerk of the trial court, and thus the error is harmless.

Osborn Hdwe. Co. v. Colo. Corp., 32 Colo. App. 254, 510 P.2d 461 (1973).

Even if the trial court erred in issuing a protective order precluding discovery by plaintiff, such error was harmless because it would not alter the court's conclusion that summary judgment was proper. Pierce v. St. Vrain Valley Sch. Dist., 944 P.2d 646 (Colo. App. 1997); rev'd on other grounds, 981 P.2d 600 (Colo. 1999).

Failure to include a citation of legal authorities in trial data certificate and late filing of authorities in trial memorandum held to be harmless error. Yoder v. Hooper, 695 P.2d 1182 (Colo. App. 1984), aff'd, 732 P.2d 852 (Colo. 1987).

Presentation of factual requirements for entry of default judgment by means of testimony and other evidence, rather than by affidavit as required by C.R.C.P. 121 § 1-14, held to be harmless error. Dunton v. Whitewater West Recreation, Ltd., 942 P.2d 1348 (Colo. App. 1997).

Applied in Jones v. Gates Serv. Station, Inc., 108 Colo. 201, 115 P.2d 396 (1941); Odell v. Pub. Serv. Co., 158 Colo. 404, 407 P.2d 330 (1965); McQueen v. Robbins, 28 Colo. App. 436, 476 P.2d 57 (1970); Kerby v. Flamingo Club, Inc., 35 Colo. App. 127, 532 P.2d 975 (1974); Lopez v. Motor Vehicle Div., Dept. of Rev., 189 Colo. 133, 538 P.2d 446 (1975); Osborne v. Holford, 40 Colo. App. 365, 575 P.2d 866 (1978); Kaltenbach v. Julesburg Sch. Dist. Re-1, 43 Colo. App. 150, 603 P.2d 955 (1979); Baum v. S.S. Kresge Co., 646 P.2d 400 (Colo. App. 1982); In re Tatum, 653 P.2d 74 (Colo. App. 1982); Jackson v. Harsco Corp., 653 P.2d 407 (Colo. App. 1982); Banek v. Thomas, 697 P.2d 743 (Colo. App. 1984), aff'd, 733 P.2d 1171 (Colo. 1986); Kedar v. Pub. Serv. Co., 709 P.2d 15 (Colo. App. 1985); Greenemeier by Redington v. Spencer, 719 P.2d 710 (Colo. 1986); Denman v. Burlington Northern R. Co., 761 P.2d 244 (Colo. App. 1988); Clark v. Buhring, 761 P.2d 266 (Colo. App. 1988); Southerland v. Argonaut Ins. Co., 794 P.2d 1102 (Colo. App. 1990); States v. R.D. Werner Co., 799 P.2d 427 (Colo. App. 1990); Cook Inv. v. Seven-Eleven Coffee Shop, 841 P.2d 333 (Colo. App. 1992); Cherry Creek Sch. Dist. v. Voelker, 859 P.2d 805 (Colo. 1993).

Rule 62. Stay of Proceedings to Enforce a Judgment

(a) Automatic Stay; Exceptions; Injunctions; Receiverships. Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 14 days after its entry; provided that an interlocutory or final judgment in an action for an injunction or in a receivership action shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. Unless otherwise ordered by the court, the provisions of section (c) of this Rule govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal.

(b) Discretionary stay. In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of, or any proceedings to enforce, a judgment: (1) pending the disposition of a motion for post-trial relief made pursuant to C.R.C.P. 59; (2) pending a motion for relief from a judgment or order made pursuant to C.R.C.P. 60; (3) during the time permitted for filing of a notice of appeal; or (4) during the pendency of a motion for approval of a supersedeas bond.

COMMITTEE COMMENT

The 1988 amendment to C.R.C.P. 62(b) is a change to make that section fully consistent with the changes made to C.R.C.P. 59. The post-trial relief features of C.R.C.P. 50 and 52(b) were brought into C.R.C.P. 59. As a result, those Rules (50) and (52) no longer bear on post-trial relief and need not be referenced in C.R.C.P. 62.

(c) Injunction Pending Appeal. When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the trial court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

(d) Stay upon Appeal. When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay from the trial court subject to the exceptions contained in section (a) of this Rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

(e) Stay in Favor of the State of Colorado or Municipalities Thereof. When an appeal is taken by the State of Colorado, or by any county or municipal corporation of this state, or of any officer or agency thereof acting in official capacity and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant unless otherwise ordered by the court.

(f) [There is no section (f).]

(g) Power of Appellate Court Not Limited. The provisions in this Rule do not limit any power of the appellate courts or of a justice or judge thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered. (See Rule 8, Colorado Appellate Rules.)

(h) Stay of Judgment as to Multiple Claims or Multiple Parties. When a court has ordered a final judgment under the conditions stated in Rule 54 (b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

Source: (b) amended and adopted, effective November 16, 1995; (a) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Cross references: For directed verdicts, see C.R.C.P. 50; for motions for post-trial relief, see C.R.C.P. 59; for when bond not required, see C.A.R. 8(c); for stays pending appeal, see C.A.R. 8; for judgment upon multiple claims or involving multiple parties, see C.R.C.P. 54(b).

ANNOTATION

I. General Consideration.
II. Automatic Stay.
III. Stay on Motion.
IV. Injunction.
V. Stay upon Appeal.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Amendments to the Colorado Rules of Civil Procedure", see 28 Dicta 242 (1951). For article, "Judgment: Rules 54-63", see 23 Rocky Mt. L. Rev. 581 (1951). For article, "Obtaining a Supersedeas Bond", see 23 Colo. Law. 607 (1994). For article, "Bonds in Colorado Courts: A Primer for Practitioners", see 34 Colo. Law. 59 (March 2005).

No power is lodged in any court to stay an order of discharge in a "habeas corpus" proceeding, as such action would defeat the very purpose of "habeas corpus". Geer v. Alaniz, 137 Colo. 432, 326 P.2d 71 (1958).

Generally, court may not impair creditor's right to enforce judgment. As a general rule, a court may not stay execution and thereby impair or destroy the statutory right of a judgment creditor to enforce collection of its judgment against nonexempt property of the judgment debtor. First Nat'l Bank v. District Court, 652 P.2d 613 (Colo. 1982).

Right to enforce may be statutorily limited. The substantive right of a judgment creditor to enforce collection of the judgment may be statutorily limited, as by § 7-60-128. First Nat'l Bank v. District Court, 652 P.2d 613 (Colo. 1982).

Effect of stay on certain statutory requirements. The stay of execution provided for in this rule has no effect on the requirement that a transcript of judgment be issued on payment of the fee pursuant to § 13-32-104 (1)(g). Rocky Mt. Ass'n of Credit Mgt. v. District Court, 193 Colo. 344, 565 P.2d 1345 (1977).

Applied in Ireland v. Wynkoop, 36 Colo. App 206, 539 P.2d 1349 (1975).

II. AUTOMATIC STAY.

Under section (a) of this rule, a judgment order dividing property is automatically stayed and unenforceable for a period of 10 (now 15) days following its entry. Sarno v. Sarno, 28 Colo. App. 598, 478 P.2d 711 (1970).

Section (a) is inapplicable to temporary custody order the mother was found to have violated. Order was not subject to fifteen-day automatic stay. In re Adams, 778 P.2d 294 (Colo. App. 1989).

A forcible medication administration order is not the type of action contemplated by section (a) and is thus not automatically stayed for 14 days after entry. People ex rel. Strodtman, __ P.3d __ (Colo. App. 2011).

III. STAY ON MOTION.

Unless stayed by the court, a judgment may be executed upon before a new trial motion is decided. Oman v. Morris, 28 Colo. App. 124, 471 P.2d 430 (1970).

IV. INJUNCTION.

Effect of section (c) is to protect rights of parties. Section (c) of this rule authorizes the trial court to enter orders which preserve the status quo, or otherwise protect the rights of the parties pending appeal, but does not give the trial court authority to enter an order which alters the rights granted, or created by the original order. Rivera v. Civil Serv. Comm'n, 34 Colo. App. 152, 529 P.2d 1347 (1974).

By virtue of this rule, a trial court can, in its discretion, suspend, modify, restore, or grant an injunction, so long as an appellate court has not granted a supersedeas. Woitchek v. Isenberg, 151 Colo. 544, 379 P.2d 392 (1963).

Injunctive power of the court has been long recognized. At least since 1887, it has been recognized statutorily that trial courts can more speedily, economically, and satisfactorily consider applications for injunctive relief in actions which are pending in an appellate court. Woitchek v. Isenberg, 151 Colo. 544, 379 P.2d 392 (1963).

An obvious reason for recognizing the court's injunctive power is that trial courts are equipped to conduct the trial process. Woitchek v. Isenberg, 151 Colo. 544, 379 P.2d 392 (1963).

But injunctive proceedings may not be invoked to bring about a forfeiture of a property right. Injunction and forfeiture cannot be equated; they are separate and distinct concepts. Woitchek v. Isenberg, 151 Colo. 544, 379 P.2d 392 (1963).

V. STAY UPON APPEAL.

Annotator's note. Since section (d) of this rule is similar to § 428 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing § 428 have been included in the annotations to this rule.

A trial court retains jurisdiction in order to enforce a judgment it has rendered where defendant does not move for stay of execution or file a supersedeas bond. Oman v. Morris, 28 Colo. App. 124, 471 P.2d 430 (1970).

Where a defendant fails to take these affirmative steps necessary in order to prevent the trial court from making a final disposition of the case in accordance with its findings, no error is committed by a trial court in entering a final decree confirming a title after an appeal has issued. Failure of defendant to stay the execution means that the trial court retains jurisdiction, and its actions subsequent to the issuance of the notice of appeal are fully within its powers. Oman v. Morris, 28 Colo. App. 124, 471 P.2d 430 (1970).

Effect of trial court's failure to rule on motion. In foreclosure action, where motion for stay under section (d) of this rule and for waiver of the supersedeas bond requirement had been filed in the trial court but not determined at time of appeal, and where a request for stay under C.A.R. 8 had not been filed in the court of appeals, title to secured property vested in certificate holder and appeal was moot. Mount Carbon Metro. Dist. v. Lake George Co., 847 P.2d 254 (Colo. App. 1993).

Stay may be issued before or after appeal filed. The trial court may issue a stay either before or after a notice of appeal is filed. Odd Fellows Bldg. & Inv. Co. v. City of Englewood, 667 P.2d 1358 (Colo. 1983).

The filing of a supersedeas bond is a prerequisite for obtaining an order staying execution of judgment pending appeal under paragraph (d) of this section. Muck v. District Ct., 814 P.2d 869 (Colo. 1991).

The issuance of a writ of "supersedeas" is the consideration for the giving of a "supersedeas" bond. Buchhalter v. Solomon, 78 Colo. 227, 241 P. 718 (1925).

There can be no "supersedeas" where one cannot furnish bond therefor. Riant Amusement Co. v. Bailey, 80 Colo. 65, 249 P. 7 (1926).

A "supersedeas" writ may not be granted on an invalid bond. Buchhalter v. Solomon, 78 Colo. 227, 241 P. 718 (1925).

Trial court erred in entering an order staying all proceedings relative to enforcement of family support order without requiring appellant to file supersedeas bond. Muck v. District Ct., 814 P.2d 869 (Colo. 1991).

Rule 63. Disability of a Judge

If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then any other judge sitting in or assigned to the court in which the action was tried may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

ANNOTATION

Law reviews. For article, "Judgment: Rules 54-63", see 23 Rocky Mt. L. Rev. 581 (1951).

"Disability" construed. "Disability" includes anything that renders a judge incapable of performing his legal duties. Faris v. Rothenberg, 648 P.2d 1089 (Colo. 1982).

"Disability", under this rule, includes resignation. Faris v. Rothenberg, 648 P.2d 1089 (Colo. 1982); Friedman v. Colo. Nat. Bank, 825 P.2d 1033 (Colo. App. 1991), aff'd in part and rev'd on other grounds, 846 P.2d 159 (Colo. 1993).

This rule specifically provides that a successor judge may complete a case providing a verdict is returned or findings of fact and conclusions of law are filed. Sunshine v. Sunshine, 30 Colo. App. 67, 488 P.2d 1131 (1971).

This rule does not give a successor judge authority to determine the credibility of witnesses or compare and weigh testimony. Sunshine v. Sunshine, 30 Colo. App. 67, 488 P.2d 1131 (1971); Friedman v. Colo. Nat. Bank, 825 P.2d 1033 (Colo. App. 1991), aff'd in part and rev'd on other grounds, 846 P.2d 159 (Colo. 1993).

Successor judge has discretion to rule on a motion for new trial which challenges the sufficiency of the evidence. Faris v. Rothenberg, 648 P.2d 1089 (Colo. 1982); Murphy v. Glenn, 964 P.2d 581 (Colo. App. 1998).

A successor judge may consider challenges to rulings of law presented in a motion for a new trial. Faris v. Rothenberg, 648 P.2d 1089 (Colo. 1982).

A successor judge may grant a new trial upon a determination that he or she is unable to rule on post-trial matters as a result of not having been at the original trial. Murphy v. Glenn, 964 P.2d 581 (Colo. App. 1998).

Successor judge may pass on original judge's award of attorney fees. Friedman v. Colo. Nat. Bank, 825 P.2d 1033 (Colo. App. 1991), aff'd in part and rev'd on other grounds, 846 P.2d 159 (Colo. 1993).

Rule inapplicable where findings and conclusions are void. This rule does not apply to a situation where the findings of fact and conclusions of law which have been filed are void. Merchants Mtg. & Trust Corp. v. Jenkins, 659 P.2d 690 (Colo. 1983).

Interpretation of federal cases persuasive. Because F.R.C.P. 63 is identical to this rule, federal cases and authorities interpreting the federal rule are highly persuasive. Faris v. Rothenberg, 648 P.2d 1089 (Colo. 1982).

Rule 64.

[Note: There is no Colorado rule under this heading. The number is here retained to preserve correspondence between federal and state numbering system rules 1 to 97.]

CHAPTER 7

Injunctions, Receivers, Deposits in Court, Offer of Judgment

CHAPTER 7

INJUNCTIONS, RECEIVERS, DEPOSITS IN COURT, OFFER OF JUDGMENT

Rule 65. Injunction

(a) Preliminary Injunction.

(1) **Notice.** No preliminary injunction shall be issued without notice to the adverse party.

(2) **Consolidation of Hearing with Trial on Merits.** Before or after the commencement of the hearing on an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon a trial on the merits becomes part of the record on the trial and need not be repeated upon the trial, this subsection (a)(2) shall be so construed and applied as to save the parties any rights they may have to trial by jury.

(b) Temporary Restraining Order; Notice; Hearing; Duration. A temporary retraining order may be granted without written or oral notice to the adverse party or his attorney only if: (1) It clearly appears from specific facts shown by affidavit or by the verified complaint or by testimony that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing or on the record the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry not to exceed 14 days, as the court fixes, unless within the time so fixed, the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and take precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On two (2) business days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(c) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the state or of any county or municipal corporation of this state or of any officer or agency thereof acting in official capacity. If at any time it shall appear to the court that security given under this Rule has become impaired or is insufficient, the court may vacate the restraining order or preliminary injunction unless within such time as the court may fix the security be made sufficient.

(d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(e) [There is no section (e).]

(f) Mandatory. If merely restraining the doing of an act or acts will not effectuate the relief to which the moving party is entitled, an injunction may be made mandatory. Such relief may include an injunction restoring to any person any property from which he may have been ousted or deprived of possession by fraud, force, or violence, or from which he may have been kept out of possession by threats or words or actions which have a natural tendency to excite fear or apprehension of danger.

(g) When Relief Granted. Relief under this Rule may also be granted on the motion of any party at any time after an action is commenced and before or in connection with final judgment.

(h) When Inapplicable. This Rule shall not apply to suits for dissolution of marriage, legal separation, maintenance, child support, or custody of minors. In such suits, the court may make prohibitive or mandatory orders, without notice or bond, as may be just.

(i) State Court's Jurisdiction When Suit Commenced in Federal Court; Stay of Proceedings; Notice; Appeal. Whenever a suit praying for an interlocutory injunction shall have been begun in a federal district court to restrain any official or officials of this state from enforcing or administering any statute or administrative order of this state, or to set aside such statute or administrative order, any defendant in such suit or the attorney general of the state may bring a suit to enforce such statute or order in the district court of the state at any time before the hearing on the application for an interlocutory injunction in the suit in the federal court; and the district courts of this state may entertain such suits and the state appellate courts may entertain appeals from judgments therein. When such suit is brought, the district court shall grant a stay of proceedings by any state officer or officers under such statute or order pending the determination of such suit in the courts of this state. Upon the bringing of such suit, the district court shall at once cause a notice thereof together with a copy of the stay order by it granted, to be sent to the federal district court in which the action was originally begun. An appeal may be taken within 14 days after the termination of the suit in the state district court to the appropriate state appellate court and such appeal shall be in every way expedited and set for an early hearing.

Source: (b) amended and effective June 28, 2007; (b) and (i) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Cross references: For a temporary injunction in a proceeding for dissolution of marriage, legal separation, or child custody, see § 14-10-108, C.R.S.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, "Notes on Proposed Amendments to Colorado Rules of Civil Procedure", see 27 Dicta 165 (1950). For article, "Injunctions and Receivers: Rules 65 and 66", see 23 Rocky Mt. L. Rev. 594 (1951). For article, "Amendments to the Colorado Rules of Civil Procedure", see 28 Dicta 242 (1951). For article, "One Year Review of Civil Procedure and Appeals", see 37 Dicta 21 (1960). For article, "One Year Review of Civil Procedure and Appeals", see 38 Dicta 133 (1961).

Annotator's note. Since this rule is similar to § 159 of the former Code of Civil Procedure,

which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Equity will not intervene where one has a plain and adequate remedy at law. Am. Investors Life Ins. Co. v. Green Shield Plan, Inc., 145 Colo. 188, 358 P.2d 473 (1960).

Such is the case where everything that a plaintiff asserts is measurable and compensable in money and the evidence shows that defendant is amply able to respond to a money judgment and is subject to the jurisdiction of the Colorado courts. Am. Investors Life Ins. Co. v. Green Shield Plan, Inc.; 145 Colo. 188, 358 P.2d 473 (1960).

Where there is an adequate legal remedy which provides for the orderly termination of a nonconforming use, an injunction which is unduly harsh in its application will not be allowed to be used as a substitute for those legal means of phasing out the nonconforming use. Hobbs v. Smith, 177 Colo. 299, 493 P.2d 1352 (1972).

Injunction may not be obtained to restrain commission of a crime. Am. Television & Communications Corp. v. Manning, 651 P.2d 440 (Colo. App. 1982).

The power to issue injunction should be exercised with great discretion. The writ of injunction is the strong arm of the court and, to render its operation benign and useful, the power to issue it should be exercised with great discretion and when necessity requires it. McLean v. Farmers' Highline Canal & Reservoir Co., 44 Colo. 184, 98 P. 16 (1908).

Trial courts have considerable latitude in injunction cases. Brennan v. Monson, 97 Colo. 448, 50 P.2d 534 (1935).

If convinced that a plaintiff should comply with certain conditions in order that equity might be done between the parties, such conditions may be prescribed, and compliance therewith required as a prerequisite to the granting of injunctive relief. Brennan v. Monson, 97 Colo. 448, 50 P.2d 534 (1935).

Prohibition for failure to comply with this rule. When an inferior court exceeds its jurisdiction by issuing injunctive orders without complying with the provisions of this rule, relief in the nature of prohibition does lie to prevent manifest injustice. Stull v. District Court, 135 Colo. 86, 308 P.2d 1006 (1957).

A plaintiff who has sued out a writ of attachment upon personal property before judgment cannot secure an injunction without complying with this rule where there are no special requirements or procedure provided under statute by which an injunction or other relief shall be granted. Stull v. District Court, 135 Colo. 86, 308 P.2d 1006 (1957).

If an injunction is void it can be collaterally attacked. Resler v. North E. Motor Freight, Inc., 154 Colo. 52, 388 P.2d 255 (1964).

A collateral attack on a temporary restraining order or a preliminary injunction, contained in a motion for a new trial directed to contempt orders issued for disobedience of the restraining order or injunction, is proper only if the orders granting the temporary restraining order or the preliminary injunction are void for some jurisdictional defect. Bd. of Water Works v. Pueblo Water Works Employees Local 1045, 196 Colo. 308, 586 P.2d 18 (1978).

In a proper case where there will not be a double recovery, a court may issue an injunction to open a blocked easement, and, if necessary to grant an injured party complete relief for past interference with his easement, the court may also award monetary damages. Proper v. Greager, 827 P.2d 591 (Colo. App. 1992).

Applied in Ireland v. Wynkoop, 36 Colo. App. 206, 539 P.2d 1349 (1975); Sanderson v. District Court, 190 Colo. 431, 548 P.2d 921 (1976); Jeffrey v. Colo. State Dept. of Soc. Servs., 198 Colo. 265, 599 P.2d 874 (1979); Jack Kent Cadillac, Inc. v. District Court, 198 Colo. 403, 601 P.2d 626 (1979); In re Davis, 44 Colo. App. 355, 618 P.2d 692 (1980); State Pers. Bd. v. District Court, 637 P.2d 333 (Colo. 1981); Pasbrig v. Walton, 651 P.2d 459 (Colo. App. 1982); Gold Messenger, Inc. v. McGuay, 937 P.2d 907 (Colo. App. 1997).

II. PRELIMINARY INJUNCTION.

The purpose of the preliminary injunction is to preserve the "status quo" or protect rights pending the final determination of a cause. McLean v. Farmers' Highline Canal & Reservoir Co., 44 Colo. 184, 98 P. 16 (1908) (decided under § 167 of the former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941).

Preliminary injunctive relief is an extraordinary remedy designed to protect a plaintiff from sustaining irreparable injury and to preserve the power of the district court to render a meaningful decision following a trial on the merits. Rathke v. MacFarlane, 648 P.2d 648 (Colo. 1982); Zoning Bd. of Adjustment v. DeVilbiss, 729 P.2d 353 (Colo. 1986).

A preliminary injunction is to maintain the status quo. Combined Communications Corp. v. City & County of Denver, 186 Colo. 443, 528 P.2d 249 (1974).

The granting of a preliminary injunction pursuant to section (a) of this rule is to preserve the status quo or otherwise to grant emergency relief. Macleod v. Miller, 44 Colo. App. 313, 612 P.2d 1158 (1980).

The matter of a preliminary injunction is to prevent further harm where harm is alleged, or otherwise to grant emergency relief, and a hearing on the merits is contemplated at a later date. Graham v. Hoyl, 157 Colo. 338, 402 P.2d 604 (1965).

A court errs and is precipitous in its action by making an injunction permanent where issues remain to be tried upon which parties are entitled to be heard before any orders could be made final. Graham v. Hoyl, 157 Colo. 338, 402 P.2d 604 (1965).

Grant or denial of preliminary injunction not an adjudication of ultimate rights in controversy. The trial court erred when it determined, on a motion for a preliminary injunction, the title to the property at issue in the underlying transaction. Litinsky v. Querard, 683 P.2d 816 (Colo. App. 1984).

Different considerations govern issues relating to preliminary injunctions and requests for permanent injunctions, with the standards applicable to permanent injunctions less demanding. Henson v. Hoth, 258 F. Supp. 33 (D. Colo. 1966).

A trial court has broad discretion to formulate the terms of injunctive relief when equity so requires. Colo. Springs Bd. of Realtors v. State, 780 P.2d 494 (Colo. 1989).

Decision within court's discretion. The grant or denial of a preliminary injunction is a decision which lies within the sound discretion of the trial court. Rathke v. MacFarlane, 648 P.2d 648 (Colo. 1982); Litinsky v. Querard, 683 P.2d 816 (Colo. App. 1984); Zuments v. Colo. H.S. Activities Ass'n, 737 P.2d 1113 (Colo. App. 1987); Baseline Farms Two, LLP v. Hennings, 26 P.3d 1209 (Colo. App. 2000).

Threshold requirement that relief necessary to protect rights. Before a trial court may enjoin the enforcement of a criminal statute in a preliminary injunction proceeding, the moving party must establish, as a threshold requirement, a clear showing that injunctive relief is necessary to protect existing legitimate property rights or fundamental constitutional rights. Rathke v. MacFarlane, 648 P.2d 648 (Colo. 1982).

As a prerequisite to the issuance of a preliminary injunction, there must be a showing of real, immediate, and irreparable injury which will occur pending a final hearing, and that the injunction is necessary to prevent such injury or damage. Am. Investors Life Ins. Co. v. Green Shield Plan, Inc., 145 Colo. 188, 358 P.2d 473 (1960).

The prerequisites to the issuance of a preliminary injunction are: A showing of real, immediate and irreparable injury which will occur pending a final hearing, and that the injunction is necessary to prevent such injury or damage; and a showing of the reasonable probability of success on the merits on the part of the plaintiff. Macleod v. Miller, 44 Colo. App. 313, 612 P.2d 1158 (1980).

In exercising its discretion, the trial court must find that the moving party has demonstrated: (1) A reasonable probability of success on the merits; (2) a danger of real, immediate, and irreparable injury which may be prevented by injunctive relief; (3) that there is no plain, speedy, and adequate remedy at law; (4) that the granting of a preliminary injunction will not disserve the public interest; (5) that the balance of equities favors the injunction; and (6) that the injunction will preserve the status quo pending a trial on the merits. Rathke v. MacFarlane, 648 P.2d 648 (Colo. 1982); Wakabayashi v. Tooley, 648 P.2d 655 (Colo. 1982); Am. Television & Communications Corp. v. Manning, 651 P.2d 440 (Colo. App. 1982); Iowa Nat. Mut. Ins. Co. v. Cent. Mortg. & Inv., 708 P.2d 480 (Colo. App. 1985); Bloom v. NCAA, 93 P.3d 621 (Colo. App. 2004); Gitlitz v. Bellock, 171 P.3d 1274 (Colo. App. 2007).

Each prerequisite must be established by the moving party before a preliminary injunction will issue to prevent the enforcement of a criminal statute. Wakabayashi v. Tooley, 648 P.2d 655 (Colo. 1982).

A loss of a contractual right to manage and control a business may constitute irreparable harm. Monetary damages are an inadequate remedy for such a loss. A contractual right to participate in the management and control of a business has intrinsic value in and of itself that may not be adequately compensated by monetary damages. Gitlitz v. Bellock, 171 P.3d 1274 (Colo. App. 2007).

One of the issues before a court on a preliminary injunction is the reasonable probability of success on the part of the plaintiff. Combined Communications Corp. v. City & County of Denver, 186 Colo. 443, 528 P.2d 249 (1974).

Where a trial court issues a preliminary injunction without making any findings of fact as to the likelihood of plaintiff's success on the merits, the order must be set aside and the matter remanded for a hearing. O'Connell v. Colo. State Bank, 633 P.2d 511 (Colo. App. 1981).

Decision to issue preliminary injunction is binding upon review. Absent a showing of an abuse of discretion, trial court's decision to issue a preliminary injunction is binding upon review. Macleod v. Miller, 44 Colo. App. 313, 612 P.2d 1158 (1980).

Telephone company is not entitled to preliminary injunction preventing maintenance of rates and allowing higher charges during judicial review of P.U.C. rates. Mountain States Tel. & Tel. Co. v. P. U. C., 176 Colo. 457, 491 P.2d 582 (1971).

Relief seldom granted to enjoin governmental actions. Because equitable relief in the nature of an injunction constitutes a form of judicial interference with continuing activities, the courts have generally been reluctant to grant such relief where the actions complained of are those of departments of the executive and legislative branches of government, in the exercise

of their authority. Rathke v. MacFarlane, 648 P.2d 648 (Colo. 1982).

Preliminary injunction enjoining enforcement of criminal statute held abuse of discretion. Wakabayashi v. Tooley, 648 P.2d 655 (Colo. 1982).

Preliminary injunction should not be enforced when a period of less than two months remains after enforcement commences until trial on the merits. Combined Communications Corp. v. City & County of Denver, 186 Colo. 443, 528 P.2d 249 (1974).

When order deemed preliminary injunction. Where an order is issued after notice and an evidentiary hearing and for a period beyond 10 days, it is a preliminary injunction. O'Connell v. Colo. State Bank, 633 P.2d 511 (Colo. App. 1981).

Effect of denial of preliminary injunction on remaining proceedings. The pending appeal of a denial of a motion for preliminary injunction does not deprive the trial court of jurisdiction to proceed in a timely and orderly fashion with the declaratory judgment and permanent injunction proceedings. Rathke v. MacFarlane, 648 P.2d 648 (Colo. 1982).

Existence of liquidated damages does not automatically preclude imposition of an injunction. Boulder Medical Center v. Moore, 651 P.2d 464 (Colo. App. 1982).

Conditions of this rule inapplicable to C.R.C.P. 106. While this rule provides that no restraining order or preliminary injunction shall issue except upon giving security by the applicant, that no order or injunction shall issue without notice, except under certain situations, and that an early hearing shall be provided, no such conditions appear in C.R.C.P. 106. PII of Colo., Inc. v. District Court, 197 Colo. 239, 591 P.2d 1316 (1979).

Contempt is proper where preliminary injunction is lawful and is not complied with, even where eventually found to be wrongfully entered. Charles Milne Associates v. Toponce, 770 P.2d 1313 (Colo. App. 1988).

The prerequisites of this rule apply to § 7-74-103 actions for preliminary injunction to prevent or restrain actual or threatened misappropriations of a trade secret. Bishop & Co. v. Cuomo, 799 P.2d 444 (Colo. App. 1990).

Consolidation of trial and preliminary injunction. Parties should normally receive notice of the court's intent to consolidate the trial and the preliminary injunction either before the hearing or when the parties will still have an opportunity to present their cases. Taxpayers were not denied due process and if any error occurred, it was harmless, when the trial court announced it would consolidate the injunction hearing with the trial on the merits after commencement of the preliminary injunction hearing, both parties submitted offers of proof and had a full opportunity to present their cases, and no specific harm was alleged. Leek v. City of Golden, 870 P.2d 580 (Colo. App. 1993).

III. TEMPORARY RESTRAINING ORDER.

Law reviews. For article, "In the Matter of Ex Parte Restraining Orders, Injunctions and Writs of Ne Exeat in Divorce Cases", see 9 Dicta 190 (1932). For article, "Expediting Court Procedure", see 10 Dicta 113 (1933). For article on restraining orders and injunctions without notice to defendant in divorce cases, see 20 Dicta 46 (1943).

This rule relates to the issuance of restraining orders without notice to the person to be restrained, and adequate protections are afforded in the matter of a bond and prompt hearing on the question of whether the "ex parte" order should be continued. Simpson v. Simpson, 151 Colo. 88, 376 P.2d 55 (1962).

A court has no authority to grant a restraining order to prevent an administrative board from holding hearings as scheduled by it. Such court action is a direct and unjustified judicial interference with a function properly delegated to the executive branch of government. Banking Bd. v. District Court, 177 Colo. 77, 492 P.2d 837 (1972).

A restraining order which fails to comply with this rule is void. Renner v. Williams, 140 Colo. 432, 344 P.2d 966 (1959); Intermountain Rural Elec. Ass'n v. District Court, 160 Colo. 128, 414 P.2d 911 (1966).

Where a restraining order is completely devoid of virtually all of the requirements of this rule, any one of the deficiencies is sufficient to render the order a nullity. Renner v. Williams, 140 Colo. 432, 344 P.2d 966 (1959).

Requirements under sections (b) and (d) of this rule are mandatory and must be complied with before a temporary restraining order issued without notice is valid. Mile High Kennel Club v. Colo. Greyhound Breeders Ass'n, 38 Colo. App. 519, 559 P.2d 1120 (1977).

Hearing required for determination that order wrongfully issued. Absent a hearing on the merits, no determination can be made that a temporary restraining order has been wrongfully issued. Cross v. Bd. of Dirs. of Plains Coop. Tel. Ass'n, 39 Colo. App. 569, 570 P.2d 1307 (1977).

Only after the enjoined party has been vindicated by successfully defending against the suit on the merits can it be held that he was wrongfully restrained and entitled to damages. Cross v. Bd. of Dirs. of Plains Coop. Tel. Ass'n, 39 Colo. App. 569, 570 P.2d 1307 (1977).

Orders held deficient. Orders merely stating that the defendants were engaged in a boycott, and concluding that the plaintiffs would be irreparably damaged if the boycott was not restrained, do not specifically define the injury

and do not state why the injury is irreparable. Either one of these deficiencies is sufficient to render the orders a nullity. Mile High Kennel Club v. Colo. Greyhound Breeders Ass'n, 38 Colo. App. 519, 559 P.2d 1120 (1977).

In a contempt proceeding, it is proper as a defense to raise the validity of a restraining order. Renner v. Williams, 140 Colo. 432, 344 P.2d 966 (1959).

Upon hearing on a citation for contempt for violation of a temporary restraining order where the issues have not been joined in the action and only the validity of a temporary order has been challenged, it is error for a trial court to rule on the issue of a permanent injunction. Renner v. Williams, 140 Colo. 432, 344 P.2d 966 (1959).

A temporary restraining order issued under this rule is not an appealable order under C.A.R. 1(a). Freshpict Foods, Inc. v. Campos, 30 Colo. App. 354, 492 P.2d 867 (1971); O'Connell v. Colo. State Bank, 633 P.2d 511 (Colo. App. 1981).

Rationale behind nonappealability of temporary restraining orders is that they are of short duration and terminate with the ruling of the preliminary injunction so that an immediate appeal is not necessary to protect the rights of the parties. O'Connell v. Colo. State Bank, 633 P.2d 511 (Colo. App. 1981).

IV. SECURITY.

Law reviews. For article, "In the Matter of Ex Parte Restraining Orders, Injunctions and Writs of Ne Exeat in Divorce Cases", see 9 Dicta 190 (1932). For article, "Expediting Court Procedure", see 10 Dicta 113 (1933).

Action on bond where injunction suit dismissed at instance of plaintiff. In an action on the bond to secure a temporary injunction, the fact that the injunction, suit is dismissed at the instance of the plaintiff is not to be taken as an admission that an emergency requiring the issuance of an injunction did not exist, if the dismissal is for matters done or arising subsequent to the issuance of the injunction and the original issuance was proper. Hammaker v. Behm, 116 Colo. 523, 182 P.2d 141 (1947).

An injunction was issued without compliance with this rule where trial court determined that it would not require defendants to post any bond or other security and made no mention of potential costs and losses that might be sustained by plaintiff. Apache Village, Inc. v. Coleman Co., 776 P.2d 1154 (Colo. App. 1989).

The amount of security required by this rule is discretionary with the court so long as it bears a reasonable relationship to the potential costs and losses occasioned by a preliminary injunction which is later determined to have been improperly granted. Apache Village, Inc. v. Coleman Co., 776 P.2d 1154 (Colo. App. 1989).

Injunction, including TRO, not void or invalid for failure to post a bond, unless the court's order provides otherwise and injunction remains in effect until vacated by subsequent order or terminates by own terms. Kaiser v. Market Square Discount Liquors, Inc., 992 P.2d 636 (Colo. App. 1999).

Bond was properly ordered paid to defendant to reimburse the costs of an improvidently issued injunction even when the plaintiff's failure to prevail was based solely on a question of law. Wick v. Pueblo West Metro., 789 P.2d 457 (Colo. App. 1989).

Section (c) of this rule imposes two conditions on an enjoined defendant seeking to recover damages on a bond: First, the injunction must have been "wrongful", and second, the defendant must have suffered damages as a result of the issuance of the injunction. City & County of Denver v. Ameritrust, 832 P.2d 1054 (Colo. App. 1992); Lazy Dog Ranch v. Telluray Ranch Corp., 948 P.2d 74 (Colo. App. 1997).

The judicial discretion standard, under which the trial court has discretion in deciding whether to award damages on the bond, is the most consistent with the plain language of section (c) of this rule. City & County of Denver v. Ameritrust, 832 P.2d 1054 (Colo. App. 1992).

Section (c) of this rule requires that an applicant give a bond, but it does not expressly order the court to pay that bond to a prevailing defendant. City & County of Denver v. Ameritrust, 832 P.2d 1054 (Colo. App. 1992).

Under the "good reason" rule principle of preference, which limits the judicial discretion standard, a trial court presumes that a prevailing defendant is entitled to damages on the injunction bond, unless there is good reason for not requiring such payment in the particular case. City & County of Denver v. Ameritrust, 832 P.2d 1054 (Colo. App. 1992); Lazy Dog Ranch v. Telluray Ranch Corp., 948 P.2d 74 (Colo. App. 1997).

When an appellate court reviews a trial court's determination of "good reason", the standard of review regarding which factors the trial court has used is akin to review by the standard of simple error used in reviewing decisions of questions of law. City & County of Denver v. Ameritrust, 832 P.2d 1054 (Colo. App. 1992).

Trial court considered and balanced appropriate factors in determining that good reason existed to deny damages, where it considered the outcome of the underlying suit, the fact that the claims were brought in good faith, the financial status of the parties, and the fact that the action was brought solely in the public interest. City & County of Denver v. Ameritrust, 832 P.2d 1054 (Colo. App. 1992).

V. FORM AND SCOPE.

An injunction must be specific to be valid. Resler v. North E. Motor Freight, Inc., 154 Colo. 52, 388 P.2d 255 (1964).

Injunctions may be issued without being reviewed "as to form only" by counsel. Such notice is not required under C.R.C.P. 6 since that rule concerns notice of written motions as to enlargements of time and has no relevance to the issue of injunctions. Shoenberg Farms, Inc. v. People ex rel. Swisher, 166 Colo. 199, 444 P.2d 277 (1968).

An injunction prohibiting conduct must be sufficiently precise to enable the party subject to the equitable decree to conform its conduct to the requirements thereof. Colo. Springs Bd. of Realtors v. State, 780 P.2d 494 (Colo. 1989).

There is no requirement in this rule that an injunction must be included in a written judgment granting injunctive relief, as this rule contains no requirements with respect to judgments; it merely sets forth what must be contained in an injunction which followed the judgment at a later date. Shoenberg Farms, Inc. v. People ex rel. Swisher, 166 Colo. 199, 444 P.2d 277 (1968).

Inconsistencies between this rule and § 25-7-102 resolved in section's favor. Where the proceeding is a special statutory proceeding under the air pollution control act, any inconsistency between this rule and § 25-7-102 regarding the form and scope of an injunction is resolved in favor of the statutory section. Lloyd A. Fry Roofing Co. v. State Dept. of Health Air Pollution Variance Bd., 191 Colo. 463, 553 P.2d 800 (1976).

If the statute does not create a special statutory procedure for obtaining a preliminary injunction, the normal requisites of this rule apply. Because neither § 25-8-611 nor § 25-8-612 authorizes injunctions or creates a private cause of action or right to proceed in the public interest, this rule, including the requirement of a showing of real, immediate, and irreparable injury, applies to a suit to seek a preliminary injunction to enforce Colorado's Water Quality Control Act. Baseline Farms Two, LLP v. Hennings, 26 P.3d 1209 (Colo. App. 2000).

Specific oral pronouncement followed by minute order was sufficient to satisfy rule that injunctions be specific in terms and described in detail. Charles Milne Associates v. Toponce, 770 P.2d 1313 (Colo. App. 1988).

VI. MANDATORY DECREE.

This section is a correct statement of the general law, and provides for restoration of property where proper. This section affords a complete answer to the problem of whether property obtained by force and violence, and perhaps by fraud, which prior thereto had been used by plaintiffs in the conduct of a legitimate business, may, in the administration of equitable relief, be restored to plaintiffs. Cuddigan v. San Juan Fed'n of Mine, Mill & Smelter Workers, 110 Colo. 97, 130 P.2d 923 (1942).

In an action founded on a complaint for injunction and affirmative relief wherein it is alleged that the plaintiffs were ousted by the defendants by force and violence from the possession of property and its possession ever since withheld from them by threats of violence, a decree ordering restitution of the property to the plaintiffs is a final judgment from which an appeal will lie. Sprague v. Locke, 1 Colo. App. 171, 28 P. 142 (1891).

Plaintiff seeking injunctive relief is obligated to obtain a preliminary injunction or temporary restraining order to maintain the status quo pending trial, because, if the defendant completes the act sought to be restrained pending trial, the plaintiff's action becomes moot and should properly be dismissed. Zoning Bd. of Adjustment v. DeVilbiss, 729 P.2d 353 (Colo. 1986).

Injunction not available under § 30-28-110 (4). Although section (f) provides for the issuance of a mandatory injunction, the strict construction of § 30-28-110 (4) precludes the availability of such relief to a county. Bd. of County Comm'rs v. Pfeifer, 190 Colo. 275, 546 P.2d 946 (1976).

Denial of mandatory injunction held correct. Eugene Cervi & Co. v. Russell, 31 Colo. App. 525, 506 P.2d 748 (1972), aff'd, 184 Colo. 282, 519 P.2d 1189 (1974).

VII. WHEN RELIEF GRANTED.

Section (g) clearly contemplates that an injunction may be provided for in a separate document, rather than in a judgment. Shoenberg Farms, Inc. v. People ex rel. Swisher, 166 Colo. 199, 444 P.2d 277 (1968).

Probate court had authority under section (h) to enter no-contact order between father and children after a full hearing on motions related to parenting time and child support. People ex rel. A.R.D., 43 P.3d 632 (Colo. App. 2001).

VIII. WHEN INAPPLICABLE.

This rule does not apply to suits for "divorce". Where, in a divorce action, a temporary restraining order was issued against the husband preventing him from disposing of his property, "pending the further order of the court", such order is not controlled by the provisions of this rule which specifically provide in section (h) that this rule shall not apply to suits for divorce, alimony, separate maintenance or custody of infants. Gillespie v. District Court, 119 Colo. 242, 202 P.2d 151 (1949).

Rule not applicable to divorce actions except in circumstances of actual emergency. Under this rule, restraining orders should not be issued in divorce actions except in circumstances of actual emergency and where it is clearly established that grounds exist for granting such extraordinary remedy. Simpson v. Simpson, 151 Colo. 88, 376 P.2d 55 (1962).

Only under extraordinary circumstances should third persons not involved in the marital difficulties of the parties to a divorce action, who are carrying on legitimate business transactions with one of the parties thereto, be restrained or enjoined from continuing business activities with such persons, even upon notice. Simpson v. Simpson, 151 Colo. 88, 376 P.2d 55 (1962).

Discretion rests with trial court to enter a restraining order without notice or bond, as may be just. Simpson v. Simpson, 151 Colo. 88, 376 P.2d 55 (1962).

In the judicial enforcement proceeding under the Pet Animal Care and Facilities Act, the normally applicable irreparable injury and posting of security requirements under the rule do not apply. The usually applicable discretion to postpone the effective date of agency action under the Administrative Procedures Act, which the court may issue upon a finding of irreparable injury pending judicial review, does not apply to the statute. Kourlis v. District Court, El Paso County, 930 P.2d 1329 (Colo. 1997).

Applied in Wolfberg v. Noland, 122 Colo. 338, 222 P.2d 426 (1950); Mann v. Friden, 132 Colo. 273, 287 P.2d 961 (1955).

Rule 65.1. Security: Proceedings Against Sureties

Whenever these Rules require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the sureties if their addresses are known.

Rule 66. Receivers

(a) When Appointed. A receiver may be appointed by the court in which the action is pending at any time:

(1) Before judgment, provisionally, on application of either party, when he establishes a prima facie right to the property, or to an interest therein, which is the subject of the action and is in possession of an adverse party and such property, or its rents, issues, and profits are in danger of being lost, removed beyond the jurisdiction of the court, or materially injured or impaired; or

(2) By or after judgment, to dispose of the property according to the judgment, or to preserve it during appellate proceedings; or

(3) In other cases where proper and in accordance with the established principles of equity.

(b) Oath and Bond; Suit on Bond. Before entering upon his duties, the receiver shall be sworn to perform them faithfully, and shall execute, with one or more sureties, an undertaking with the people of the state of Colorado, in such sum as the court shall direct, to the effect that he will faithfully discharge his duties and will pay over and account for all money and property which may come into his hands as the court may direct, and will obey the orders of the court therein. The undertaking, with the sureties, must be approved by the court, or by the clerk thereof when so ordered by the court, and may be sued upon in the name of the people of the state of Colorado, at the instance and for the use of any party injured.

(c) Dismissal of Receivership Action. An action in which a receiver has been appointed shall not be dismissed except by order of the court.

(d) Sole Claim for Relief; Service of Process; Notice.

(1) The appointment of a receiver may be the sole claim for relief in an action. The action shall be commenced by filing a complaint, or by service of a summons and a complaint, as provided in C.R.C.P. 3(a).

(2) If the receivership is requested in connection with a mortgage, trust deed or other lien on real property, the current owner of the property, as shown by the records of the clerk and recorder, and any other person then collecting the rents and profits as a result of that person's lien on the rents or profits, shall be named as defendants.

(3) If a receiver is appointed by the court *ex parte*, copies of the summons, complaint, and order appointing the receiver shall be served on the defendants without delay, as provided in C.R.C.P. 4 or as directed by the court. The court, in its order for appointment of the receiver, shall direct the receiver to provide written notice of the action to any persons in possession of the property or otherwise affected by the order.

Source: (d) amended and effective September 12, 1991.

Cross references: For appointment of receivers for dissolution of corporations, see § 7-114-303, C.R.S.

ANNOTATION

I. General Consideration.
II. When Appointed.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Notes on Proposed Amendments to Colorado Rules of Civil Procedure", see 27 Dicta 165 (1950). For article, "Injunctions and Receivers: Rules 65 and 66", see 23 Rocky Mt. L. Rev. 594 (1951). For article, "Amendments to the Colorado Rules of Civil Procedure", see 28 Dicta 242 (1951). For article, "Use of Receivers in Real Estate Foreclosures", see 16 Colo. Law. 988 (1987).

Annotator's note. Since this rule is similar to § 180 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

A receiver is an officer of the court. Casserleigh v. Malone, 50 Colo. 597, 115 P. 520 (1911); McClain v. Saranac Mach. Co., 94 Colo. 145, 28 P.2d 1009 (1934).

This rule does not authorize a receiver to practice law on behalf of the receivership estate in federal court. This rule makes a receiver accountable to the state court that appointed the receiver. In re Shattuck, 411 B.R. 378 (B.A.P. 10th Cir. 2009).

His possession of property in his official capacity is the possession of the court and not of the party at whose instance he is appointed. McClain v. Saranac Mach. Co., 94 Colo. 145, 28 P.2d 1009 (1934).

One who interferes with receivership property in the custody of the law, without permission of the court in whose custody it is, is guilty of contempt. Clear Creek Power Dev. Co. v. Cutler, 79 Colo. 355, 245 P. 939 (1926).

Receiver has only right and title of owner. A receiver holds the property coming into his hands by the same right and title as the person for whose property he is receiver, subject to liens, priorities, and equities existing at the time of his appointment. Tolland Co. v. First State Bank, 95 Colo. 321, 35 P.2d 867 (1934).

A stranger has right to have receiver institute suit to try title. While the court which appoints a receiver exercises general control over the property that comes into the possession of the receiver as such, this power of control does not deprive a stranger, who claims by paramount title, of the right to have a suit or proceeding instituted by the receiver to try the question of title. Pomeranz v. Nat'l Beet Harvester Co., 82 Colo. 482, 261 P. 861 (1927).

The better practice is for the receiver to bring an independent adverse suit in the tribunal where the defendant has the right to have the controversy decided. Pomeranz v. Nat'l Beet Harvester Co., 82 Colo. 482, 261 P. 861 (1927).

The plaintiffs have established their entitlement to an evidentiary hearing relative to the appointment of a receiver. It need not appear from the movant's request for appointment that any imminent insolvency result only from fraud. Diaz v. Fernandez, 910 P.2d 96 (Colo. App. 1995).

For the power of receiver to administer assets, see Flint v. Powell, 18 Colo. App. 425, 72 P. 60 (1903).

For the duties as to management of railroad property, see Frank v. Denver & Rio Grande Ry., 23 F. 757 (D. Colo. 1885).

Applied in State ex rel. Colo. Dept. of Health v. I.D.I., Inc., 642 P.2d 14 (Colo. App. 1981).

II. WHEN APPOINTED.

This rule does not apply to any case in which an action is not pending. Jones v. Bank of Leadville, 10 Colo. 464, 17 P. 272 (1887).

Action is "pending" under section (a) of this rule after it is commenced under C.R.C.P. 3, by either filing a complaint with the court or by the service of a summons. Johnson v.

McCaughan, Carter & Scharrer, 672 P.2d 221 (Colo. App. 1983).

The plain intent of this rule is that there shall be a controversy between two or more adverse parties moved in the court, involving some conflicting and hostile claims to property that is, at least in part, the subject matter of the litigation in the mind of the general assembly it is necessary to this jurisdiction that there should be some party in all these proceedings who is adverse to the defendant and whose right to certain property are to be protected and adjudicated. Jones v. Bank of Leadville, 10 Colo. 464, 17 P. 272 (1887).

Appointment of receiver is discretionary. Whether a receiver will or will not be appointed upon a preliminary hearing is a matter which ordinarily rests in the sound discretion of a trial court. Melville v. Weybrew, 106 Colo. 121, 103 P.2d 7, cert. denied, 311 U.S. 695, 61 S. Ct. 140, 85 L. Ed. 450 (1940); Rigel v. Kaveny, 133 Colo. 556, 298 P.2d 396 (1956); Oman v. Morris, 28 Colo. App. 124, 471 P.2d 430 (1970).

There will be no interference with the exercise of that discretion by an appellate court, save in a clear case of abuse. Melville v. Weybrew, 106 Colo. 121, 103 P.2d 7, cert. denied, 311 U.S. 695, 61 S. Ct. 140, 85 L. Ed. 450 (1940); Oman v. Morris, 28 Colo. App. 124, 471 P.2d 430 (1970).

Court held not to have abused its discretion in making appointment. Riant Amusement Co. v. Bailey, 80 Colo. 65, 249 P. 7 (1926).

Courts have no jurisdiction to appoint a receiver except in a suit pending in which the receiver is desired, unless in cases of persons under disability which is a particular jurisdiction. Jones v. Bank of Leadville, 10 Colo. 464, 17 P. 272 (1887).

A minor may by his guardian or next friend procure the appointment of a receiver for the purpose of collecting the rents and profits of premises deeded. Hutchinson v. McLaughlin, 15 Colo. 492, 25 P. 317, 11 L.R.A. 287 (1890).

Courts of equity have no jurisdiction to appoint a receiver except in a pending action in which the receiver is desired. People ex rel. Daniels v. District Court, 33 Colo. 293, 80 P. 908 (1905).

Allegations of a complaint in a receivership proceeding held sufficient. Riant Amusement Co. v. Bailey, 80 Colo. 65, 249 P. 7 (1926).

Complaint held insufficient where indebtedness not alleged. In a proceeding by petition for the appointment of a receiver for the purpose of an accounting where there is no complaint alleging the indebtedness and no service of process, a court has no jurisdiction to enter a judgment. Paddack v. Staley, 13 Colo. App. 363, 58 P. 363 (1899).

The appointment of a receiver to impound assets of an estate to pay a claim that does not exist is a nullity. Wright v. Halley, 95 Colo. 148, 33 P.2d 966 (1934).

While courts have jurisdiction to appoint receivers for corporations, the power should be exercised with the utmost caution and only where a receiver is imperatively necessary to protect property rights. Eureka Coal Co. v. McGowan, 72 Colo. 402, 212 P. 521 (1922).

A receiver should not be appointed for a corporation in an action by a simple contract creditor to prevent the corporation from fraudulently disposing of its property, and putting beyond its power the ability to respond to a judgment sought to be obtained on an unsecured debt. International Trust Co. v. United Coal Co., 27 Colo. 246, 60 P. 621 (1900).

This rule does not give an equity court authority to appoint a receiver at the suit of an individual stockholder who complains of fraud in the management of the affairs of the corporation. People ex rel. Daniels v. District Court, 33 Colo. 293, 80 P. 908 (1905).

Receiver for corporation may be appointed when no board of directors to manage. Where the principal stockholders of a corporation are engaged in a contest over the control of the property, and the outstanding capital stock is so distributed that no board of directors can be elected to manage the affairs of the company, a receiver is properly appointed. Eureka Coal Co. v. McGowan, 72 Colo. 402, 212 P. 521 (1922).

This rule does not give an equity court authority to dissolve a corporation. People ex rel. Daniels v. District Court, 33 Colo. 293, 80 P. 908 (1905).

The appointment of a receiver for a corporation does not work its dissolution. Steinhauer v. Colmar, 11 Colo. App. 494, 55 P. 291 (1898).

Appointment of a receiver is authorized under appropriate circumstances without a pending request for dissolution of the company. A member of a limited liability company has a personal property interest in the company. Diaz v. Fernandez, 910 P.2d 96 (Colo. App. 1995).

Where equity will sustain a creditor's bill, it will also grant the aid of the ancillary remedies of injunction and receiver. Livingston v. Swofford Bros. Dry Goods Co., 12 Colo. App. 320, 56 P. 351 (1898).

The appointment of a receiver contrary to this rule is only an error, and not a jurisdictional question where it appears that the court had jurisdiction of the subject matter and parties. Riant Amusement Co. v. Bailey, 80 Colo. 65, 249 P. 7 (1926).

Improper appointment cannot be considered in contempt proceedings. In proceedings where a receiver is appointed to take charge of property, the improper appointment of the re-

ceiver cannot be considered in contempt proceedings based upon interference with the receivership property. Clear Creek Power & Dev. Co. v. Cutler, 79 Colo. 355, 245 P. 939 (1926).

Where there is no objection made by defendant to the appointment of a receiver, he is deemed to have acquiesced in the court's action. Oman v. Morris, 28 Colo. App. 124, 471 P.2d 430 (1970).

Rule 67. Deposit in Court

(a) By Party. In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing, to be held by the clerk of the court subject to withdrawal in whole or in part at any time thereafter upon order of the court.

(b) By Trustee. When it is admitted by the pleadings or examination of a party that he has in his possession or under his control any money or other things capable of delivery which, being the subject of litigation, is held by him as trustee for another party, or which belongs or is due to another party, upon motion, the court may order the same to be deposited in court or delivered to such party, upon such conditions as may be just, subject to the further direction of the court.

ANNOTATION

The Colorado Governmental Immunity Act specifies the amount of plaintiff's maximum recovery from public entities or public employees, and this rule establishes the procedure by which defendant may deposit an undisputed sum into the court registry. Rudnick v. Ferguson, 179 P.3d 26 (Colo. App. 2007).

Trial court did not err in permitting defendants to tender $150,000 into the court registry and in dismissing the case as moot without requiring defendants to confess judgment, admit their liability, or enter into a settlement with the plaintiffs. Rudnick v. Ferguson, 179 P.3d 26 (Colo. App. 2007).

Rule 68. Offer of Judgment

Repealed July 12, 1990, effective, nunc pro tunc, July 1, 1990.

NOTE: See Offer of Settlement Procedure, section 13-17-202, 6A C.R.S.

CHAPTER 8

Execution and Supplemental Proceedings; Judgment for Specific Acts; Vesting Title; Proceedings in Behalf of and Against Persons Not Parties

CHAPTER 8

EXECUTION AND SUPPLEMENTAL PROCEEDINGS; JUDGMENT FOR SPECIFIC ACTS; VESTING TITLE; PROCEEDINGS IN BEHALF OF AND AGAINST PERSONS NOT PARTIES

Rule 69. Execution and Proceedings Subsequent to Judgment

(a) In General. Except as provided in C.R.C.P. 103 or an order of court directing otherwise, process to enforce a final money judgment shall be by writ of execution.

(b) Proceedings for Costs. Costs finally awarded by order of court may be enforced in the same manner as any final money judgment. Costs awarded by an appellate court may be enforced in the same manner upon application by filing a remittitur or other order of the appellate court with the clerk of the trial court showing the award of costs.

(c) Debtor of Judgment Debtor; Debtor May Pay Sheriff. After issuance of a writ of execution against property, the judgment debtor or any person indebted to the judgment debtor may pay to the sheriff to whom the writ of execution is directed the amount necessary to satisfy the execution. The sheriff's receipt for the amount shall be a discharge for the amount so paid.

(d) Requirement That Judgment Debtor Answer Written Interrogatories. (1) At any time after entry of a final money judgment, the judgment creditor may serve written interrogatories upon the judgment debtor in accordance with C.R.C.P. 45, requiring the judgment debtor to answer the interrogatories. Within 21 days of service of the interrogatories upon the judgment debtor, the judgment debtor shall appear before the clerk of the court in which the judgment was entered to sign the answers to the interrogatories under oath and file them.

(2) If the judgment debtor, after being properly served with written interrogatories as provided by this Rule, fails to answer the served interrogatories, the judgment creditor may file a motion, with return of the previously served written interrogatories attached thereto, and request an order of court requiring the judgment debtor to either answer the previously served written interrogatories within 21 days in accordance with the provisions of (d)(1) of this Rule or appear in court at a specified time to show cause why the judgment debtor shall not be held in contempt of court for failure to comply with the order requiring answers to interrogatories; a copy of the motion, written interrogatories and a certified order of court shall be served upon judgment debtor in accordance with C.R.C.P. 45.

(e) Subpoena for Appearance of Judgment Debtor. (1) At any time after entry of a final money judgment, a judgment creditor may cause a subpoena or subpoena to produce to be served as provided in C.R.C.P. 45 requiring the judgment debtor to appear before the court, master or referee with requested documents at a specified time obtained from the court to answer concerning property. A judgment debtor may be required to attend outside the county where such judgment debtor resides and the court may make reasonable orders for mileage and expenses. The subpoena shall include on its face a conspicuous notice to the judgment debtor that provides: "Failure to Appear Will Result in Issuance of a Warrant for Your Arrest."

(2) If the judgment debtor, after being properly served with a subpoena or subpoena to produce as provided in C.R.C.P. 45, fails to appear, the court upon motion of the judgment creditor shall issue a bench warrant commanding the sheriff of any county in which the judgment debtor may be found, to arrest and bring the judgment debtor forthwith before the court for proceedings under this Rule.

(f) Subpoena for Appearance of Debtor of Judgment Debtor. At any time after entry of a final money judgment, upon proof to the satisfaction of the court, that any person

has property of, or is indebted to a judgment debtor in any amount exceeding Five Hundred Dollars not exempt from execution, the court may issue a subpoena or subpoena to produce to such person to appear before the court, master or referee at a specified time and answer concerning the same. Service shall be made in accordance with C.R.C.P. 45, and the court may make reasonable orders for mileage and expenses.

(g) Order to Apply Property on Judgment; Contempt. The court, master, or referee may order any party or other person over whom the court has jurisdiction, to apply any property other than real property, not exempt from execution, whether in the possession of such party or other person, or owed the judgment debtor, towards satisfaction of the judgment. Any party or person who disobeys an order made under the provisions of this Rule may be punished for contempt. Nothing in this rule shall be construed to prevent an action in the nature of a creditor's bill.

(h) Witnesses. Witnesses may be subpoenaed to appear and testify in accordance with C.R.C.P. 45.

(i) Depositions. After entry of a final money judgment, the judgment creditor, upon order of court which may be obtained ex parte, may take the deposition of any person including the judgment debtor, in the manner provided in these Rules.

Source: (d)(1) amended May 17, 1994, effective July 1, 1994; (d) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Cross references: For sale of perishable property, see C.R.C.P. 102(q); for judgments and executions, see articles 51 to 64 of title 13, C.R.S.; for homestead exemptions, see part 2 of article 41 of title 38, C.R.S.; for certificates in name of officer, see C.R.C.P. 110(c); for civil contempt, see C.R.C.P. 107; for subpoena for attendance of witnesses, see C.R.C.P. 45(a); for taking depositions, see C.R.C.P. 26 to 37.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, "Supplementary Proceedings in Enforcement of Judgments", see 27 Dicta 128 (1950). For article "One Year Review of Civil Procedure", see 35 Dicta 3 (1958).

Annotator's note. Since this rule is similar to § 265 et seq. of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing those sections have been included in the annotations to this rule.

This rule assumes the existence of valid judgment obtained over one properly made a party to the suit on the debt by service of process. Havens v. Hardesty, 43 Colo. App. 162, 600 P.2d 116 (1979).

This rule deals with supplemental proceedings available to a judgment creditor which enable him to enforce the collection of a judgment. Hudson v. Am. Founders Life Ins. Co., 160 Colo. 420, 417 P.2d 772 (1966).

Supplemental proceedings are for the purpose of making effectual a judgment rendered in the main or original action. Sweeney v. Cregan, 89 Colo. 94, 299 P. 1058 (1931).

Proceedings also for purpose of discovering what property is available to satisfy such. The purpose of supplementary proceedings in aid of execution is to discover what property the judgment debtor has that is subject to execution and to apply to the satisfaction of the judgment any such property that is in the hands of such debtor or any other person as well as due to the judgment debtor. Walker v. Staley, 89 Colo. 292, 1 P.2d 924 (1931).

Original proceeding considered as still pending. Jurisdiction of the defendant having been acquired in the original proceeding, that action is considered as still pending until the judgment rendered thereon is fully discharged. Hexter v. Clifford, 5 Colo. 168 (1879); Sweeney v. Cregan, 89 Colo. 94, 299 P. 1058 (1931).

This rule authorizes the court to act based upon its continuing jurisdiction over the defendant named in the underlying action. Havens v. Hardesty, 43 Colo. App. 162, 600 P.2d 116 (1979).

These proceedings are ancillary and auxiliary to the original action. Sweeney v. Cregan, 89 Colo. 94, 299 P. 1058 (1931).

Further proceedings to enforce a judgment should be presented to the court that entered it. Urbancich v. Mayberry, 124 Colo. 311, 236 P.2d 535 (1951).

A court does not have the authority, under this rule 69 or otherwise, to prevent the sale of property under execution to satisfy a judgment where the property in question is not included within any class of assets exempt from execution under the provisions of any exemption law. Jones v. District Court, 135 Colo. 468, 312 P.2d 503 (1957).

Levy upon property. A sheriff's sale of property to which defendant had no title and satisfaction based thereon were void and defendant's subsequent pledge of stock to secure the same judgment was valid. Ada Mechanical Servs., Inc., v. Goehring, 707 P.2d 1034 (Colo. App. 1985).

Applied in People v. Barbour, 639 P.2d 1065 (Colo. 1982); Lobb v. Hodges, 641 P.2d 310 (Colo. App. 1982); First Nat'l Bank v. District Court, 652 P.2d 613 (Colo. 1982).

II. PROCEEDINGS FOR COSTS.

Where both parties each have against the other a right of execution in the same case, the costs in the supreme court may be offset against those in the court below. Wallace Plumbing Co. v. Dillon, 73 Colo. 10, 213 P. 130 (1922) (decided under § 461 of the former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941).

III. SUBPOENA FOR APPEARANCE OF JUDGMENT DEBTOR.

Law reviews. For article, "Discoverability of Insurance Limits", see 40 Den. L. Ctr. J. 272 (1963).

Annotator's note. Since section (d) of this rule is similar to §§ 265 and 266 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing those sections have been included in the annotations to this rule.

Section (d) is constitutional. Sweeney v. Cregan, 89 Colo. 94, 299 P. 1058 (1931).

Even if defendant is deprived of his constitutional right against self-incrimination, it does not follow that this rule requiring his presence in court is unconstitutional and void. Sweeney v. Cregan, 89 Colo. 94, 299 P. 1058 (1931).

Section (d) does not purport to grant a judgment creditor such a right to require his debtor to answer questions which might subject the latter to a criminal prosecution. Sweeney v. Cregan, 89 Colo. 94, 299 P. 1058 (1931).

In addition, it must be presumed that every constitutional right of the debtor will be respected and safeguarded. Sweeney v. Cregan, 89 Colo. 94, 299 P. 1058 (1931).

Production of documents not privileged under fifth amendment. Judgment debtor can be required to produce automobile titles and recorded deeds to real estate, determined to be within the public domain, as well as tax returns that he filed, because there is no fifth amendment privilege as to such documents. Griffin v. Western Realty Sales Corp., 665 P.2d 1031 (Colo. App. 1983).

Section (d) is a method of discovery. Hudson v. Am. Founders Life Ins. Co., 160 Colo. 420, 417 P.2d 772 (1966).

It permits the judgment creditor to require a judgment debtor to appear before the court to answer questions concerning his assets. Hudson v. Am. Founders Life Ins. Co., 160 Colo. 420, 417 P.2d 772 (1966).

Section (d) takes the place of former bill of discovery. These "supplemental proceedings" are chiefly directed to discovery, and in this respect, they are to be regarded as taking the place of the former bill of discovery. Allen v. Tritch, 5 Colo. 222 (1880).

Service on attorney. Service on an attorney in accordance with the provisions of C.R.C.P. 5(b), does not satisfy the requirements of section (d). Stubblefield v. District Court, 198 Colo. 569, 603 P.2d 559 (1979).

Service of citation to appear under section (d) is proper if it complies with the provisions of C.R.C.P. (4)(e)(1). Stubblefield v. District Court, 198 Colo. 569, 603 P.2d 559 (1979).

Service on registered agent. Personal delivery of interrogatories on foreign corporation's registered agent constitutes effective service. Isis Litig., L.L.C., v. Svensk Filmindustri, 170 P.3d 742 (Colo. App. 2007).

A defendant is clearly guilty of contempt in refusing to be sworn and prematurely refusing to answer question to be propounded. Sweeney v. Cregan, 89 Colo. 94, 299 P. 1058 (1931).

IV. SUBPOENA FOR APPEARANCE OF DEBTOR OF JUDGMENT DEBTOR.

Annotator's note. Since section (e) of this rule is similar to § 268 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Section (e) is a method of discovery. Hudson v. Am. Founders Life Ins. Co., 160 Colo. 420, 417 P.2d 772 (1966).

It permits the court, upon proper proof, to examine a third person who is believed to hold property of, or owe a debt to the judgment debtor. Hudson v. Am. Founders Life Ins. Co., 160 Colo. 420, 417 P.2d 772 (1966).

Proceedings to compel the application of money or property in the hands of other parties to the satisfaction of the judgment are proceedings in the original action, and no notice to defendant is necessary. Hexter v. Clifford, 5 Colo. 168 (1879).

Other parties are entitled to their day in court. In supplementary proceedings in aid of execution, a court has no power to order a receiver to take possession of and sell property belonging to other parties without according them their day in court. Walker v. Staley, 89 Colo. 292, 1 P.2d 924 (1931).

Notice, affidavit, or other showing of indebtedness waived by insurers. In an action for damages where the parties and insurers stipulate for entry of judgment and for determination by the court of the issue of liability as between the insurers and provide for hearing in accordance with this rule, the trial court has jurisdiction to determine such issue, the stipulation being a waiver of notice, affidavit, or other showing of indebtedness pursuant to this rule. Traders & Gen. Ins. Co. v. Pioneer Mut. Comp. Co., 127 Colo. 516, 258 P.2d 776 (1953).

Where person, not a party to original action, appears pursuant to a subpoena under subdivision (e) and denies that he is obligated to or in possession of any property of a judgment debtor, trial court is precluded from proceeding further in a proceeding under this rule, and creditor's sole remedy is a creditor's bill. Equisearch, Inc. v. Lopez, 722 P.2d 426 (Colo. App. 1986) (decided under former rule); In re Livingston, 999 F. Supp. 1413 (D. Colo. 1998).

V. ORDER TO APPLY PROPERTY ON JUDGMENT; CONTEMPT.

Law reviews. For article, "The Enforcement of Divorce Decrees in Colorado", see 21 Rocky Mt. L. Rev. 364 (1949). For comment on Urbancich v. Mayberry, appearing below, see 24 Rocky Mt. L. Rev. 259 (1952). For article, "The Nuts and Bolts of Collecting Support", see 19 Colo. Law. 1595 (1990).

Annotator's note. Since section (f) of this rule is similar to §§ 270 and 271 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing those sections have been included in the annotations to this rule.

Section (f) is an enforcement provision. Hudson v. Am. Founders Life Ins. Co., 160 Colo. 420, 417 P.2d 772 (1966).

It provides that, if certain prerequisites are met, the trial court may order property applied to the judgment. Hudson v. Am. Founders Life Ins. Co., 160 Colo. 420, 417 P.2d 772 (1966).

Including property held by court. Where a judgment debtor is "discharged" on a prior occasion from a citation issued pursuant to section (d) of this rule, such fact does not bar a judgment creditor from seeking to obtain, under the provisions of this section (f), known property held by a third person, including the court. Hudson v. Am. Founders Life Ins. Co., 160 Colo. 420, 417 P.2d 772 (1966).

It is not, however, adapted to reach disputed property of a judgment debtor, since no contested title to property can be determined. Allen v. Tritch, 5 Colo. 222 (1880); Walker v. Staley, 89 Colo. 292, 1 P.2d 924 (1931).

Where title to real property claimed to belong to a judgment debtor stands in the name of another, a creditor's suit is the proper proceeding to subject the property to the satisfaction of a judgment, and not supplementary proceedings in aid of execution. Walker v. Staley, 89 Colo. 292, 1 P.2d 924 (1931).

This rule does not contemplate that real property may be sold under an order of court made in a supplementary proceeding, even when title stands in the name of the judgment debtor. Walker v. Staley, 89 Colo. 292, 1 P.2d 924 (1931).

Rather, in such case, the judgment creditor may cause execution to be levied upon the property and it requires no order of court. Walker v. Staley, 89 Colo. 292, 1 P.2d 924 (1931).

The fact that the property sought is a trust fund interposes no obstacle in subjecting it to the satisfaction of a judgment when the fund was created by the debtor himself and the fund sought to be reached has risen from the sale of his own property. Hexter v. Clifford, 5 Colo. 168 (1879).

Contingent fees not yet earned cannot be reached in proceedings supplementary to execution. Walker v. Staley, 89 Colo. 292, 1 P.2d 924 (1931).

Remedy of contempt is specifically authorized to be exercised by the court which pronounced the judgment sought to be collected and not any other court. Urbancich v. Mayberry, 124 Colo. 311, 236 P.2d 535 (1951).

VI. WITNESSES.

Judgment debtor not within purview of C.R.C.P. 45. Although a judgment debtor may testify as a witness in a hearing under this rule, he is not a witness within the purview of C.R.C.P. 45 for the purposes of service of process. Stubblefield v. District Court, 198 Colo. 569, 603 P.2d 559 (1979).

Rule 70. Judgment for Specific Acts; Vesting Title

If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the district, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk.

ANNOTATION

Law reviews. For note, "Decrees in Rem Under the New Rules", see 13 Rocky Mt. L. Rev. 140 (1941).

This rule does not apply in situation where party holding title to leases is willing to vest title and party held to have lawfully contracted for such leases is unwilling to take them. Schnier v. District Court, 696 P.2d 264 (Colo. 1985).

This rule offers relief only when there is noncompliance with an order issued by the court. The rule can not provide relief if there is no previous order for the action. In re Dauwe, 97 P.3d 369 (Colo. App. 2004).

A Colorado court may invoke its equitable authority under this rule to enforce a judgment for attorney fees awarded under 42 U.S.C. § 1983. Duran v. Lamm, 701 P.2d 609 (Colo. App. 1984).

A trial court has authority under this rule to enter a judgment divesting title of defendant to the subject property and vesting it in the claimants. AA Constr. Co. v. Gould, 28 Colo. App. 161, 470 P.2d 916 (1970).

Failure of the general assembly to act to satisfy a judgment sufficiently expressed its unwillingness to comply with the valid judgment of the trial court justifies invocation of this rule. Duran v. Lamm, 701 P.2d 609 (Colo. App. 1984).

Applied in Circle Sav. & Loan Ass'n v. Norton, 28 Colo. App. 167, 471 P.2d 625 (1970).

Rule 71. Process in Behalf of and Against Persons Not Parties

When an order is made in favor of a person who is not a party to the action, he may enforce obedience to the order by the same process as if he were a party; and, when obedience to an order may be lawfully enforced against a person who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party.

ANNOTATION

Person who has advanced money on realty may be awarded lien. In an action to quiet title where the plaintiff names as defendants all "persons who claim any interest in the subject matter of this action", a person who has advanced money in connection with the realty has a sufficient interest to be a party and to be awarded a lien to secure such advance. Hahn v. Pitts, 118 Colo. 173, 193 P.2d 716 (1948).

Rule 71-A. Condemnation of Property

No Colorado Rule

Rules 72 to 76.

[Note: There are at present no Colorado Rules 72 to 76.]

CHAPTER 9

Court Administration

CHAPTER 9

COURT ADMINISTRATION

Rule 77. Courts and Clerks

(a) Courts Always Open. Courts shall be deemed always open for the purpose of filing any pleading or other proper paper, of issuing and returning process, and of making and directing all interlocutory motions, orders, and rules. Each term shall be deemed open and continuous until the commencement of the next succeeding term.

(b) Proceedings in Court and Chambers. All trials upon the merits shall be conducted in open court and so far as convenient in a regular courtroom. All other acts or proceedings may be done or conducted in open court or by a judge in chambers, without the attendance of the clerk or other court officials and at any place within the state; but no hearing, other than on ex parte, shall be conducted outside the judicial district in which the action is pending without the consent of all parties affected thereby who are not in default.

(c) Clerk's Office and Orders by Clerk. The clerk's office with the clerk or a deputy in attendance shall be open at such hours and on such days as may be provided by law, and by local rule not in conflict with law. All motions and applications in the clerk's office for issuing process, for entering defaults or judgments by default, and for other proceedings which do not require allowance or order of the court are grantable of course by the clerk; but his action may be suspended or altered or rescinded by the court upon cause shown.

(d) Orders in Any County. Any ex parte order in any pending action may be entered by the court, or by any judge thereof in any county of the district, irrespective of the county in which said action is pending.

ANNOTATION

Law reviews. For article, "In the Matter of Ex Parte Restraining Orders, Injunctions and Writs of Ne Exeat in Divorce Cases", see 9 Dicta 190 (1932). For article, "Expediting Court Procedure", see 10 Dicta 113 (1933). For article, "Court Administration and General Provisions: Rules 77-85", see 23 Rocky Mt. L. Rev. 599 (1951).

Rule 78. Motion Day

Each court may establish regular times and places, at intervals sufficiently frequent for the prompt dispatch of business, at which motions requiring notice and hearing may be heard and disposed of; but the judge at any time or place and on such notice, if any, as he considers reasonable may make orders for the advancement, conduct, and hearing of actions. To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing, upon brief written statements of reasons in support and opposition. Trial courts may also provide by local rule for notices to set motions for hearing or for calling upon motions for hearing without prior setting.

ANNOTATION

Law reviews. For article, "Court Administration and General Provisions: Rules 77-85", see 23 Rocky Mt. L. Rev. 599 (1951).

Rule 79. Records

(a) Register of Actions. The clerk shall keep a record known as the register of actions and shall enter therein those items set forth below. The register of actions may be in any of the following forms or styles:

(1) A page, sheet, or printed form in a book, case jacket, or separate file.

(2) A microfilm roll, film jacket, or microfiche card.

(3) Computer magnetic tape or magnetic disc storage, where the register of actions items appear on the terminal screen, or on a paper print-out of the screen display.

(4) Any other form or style prescribed by supreme court directive. A register of actions shall be prepared for each case or matter filed. The file number of each case or matter shall be noted on every page, film, or computer record whereon the first and all subsequent entries of actions are made. All papers filed with the clerk, all process issued and return made thereon, all costs, appearances, orders, verdicts, and judgments shall be noted chronologically in the register of actions. These notations shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The notation of an order, or of the entry of judgment, shall show the date the order or judgment was ordered in open court, in chambers, or under the provisions of Rule 55 regarding default. When trial by jury has been demanded or ordered, the clerk shall enter the word jury on the page, film, or computer record assigned to that case.

(b) Copies of Civil Judgments and Orders. (Repealed effective September 4, 1974.)

(c) Indices; Calendars. The clerk shall keep suitable indices of all records as directed by the court. The clerk shall also keep, as directed by the court, calendars of all hearings and all cases ready for trial, which shall distinguish trials to a jury from trials to the court. Indices and calendars may be in any of the following forms or styles:

(1) A page or sheet in a book or separate file.

(2) A mechanical or hand-operated index machine or card file.

(3) Computer magnetic tape or magnetic disc storage, where the information appears on the terminal screen, or on a print-out of the screen display.

(4) Microfilm copies of 1, 2, and 3 above.

(5) Any other form or style prescribed by supreme court directive.

(d) Judgment Record. The clerk shall keep a judgment record in which a notation shall be made of every money judgment. The judgment record may be in any of the following forms or styles:

(1) A page, sheet, or printed form in a book, case jacket, or separate file.

(2) Computer magnetic tape or magnetic disc storage, where the judgment and subsequent transactions appear on the terminal screen, or on a paper print-out of the screen display.

(3) A microfilm copy of 1 and 2 above.

(4) Any other form or style prescribed by supreme court directive.

(e) Retention and Disposition of Records. The clerk shall retain and dispose of all court records, including those created under Rule 79(b) prior to its repeal, in accordance with instructions provided in the manual entitled, Colorado Judicial Department, Records Management.

Cross references: For provisions on records and indices required to be kept by clerks, see §§ 13-1-101 and 13-1-102, C.R.S.; for order of selecting jurors from list of jurors, see C.R.C.P. 47(g).

ANNOTATION

Law reviews. For article, "Notes on Proposed Amendments to Colorado Rules of Civil Procedure", see 27 Dicta 165 (1950). For article, "Court Administration and General Provisions: Rules 77-85", see 23 Rocky Mt. L. Rev. 599 (1951).

Although trial judge had power and obligation to assure that records and reporter's notes in dissolution of marriage action were preserved by the clerk for an extended period of time and to enter any order with respect to those records and notes, the trial court was not re-

quired to enter an order obligating itself to preserve such records. In re Smith, 757 P.2d 1159 (Colo. App. 1988).

The rules provide that a motion for a new trial must be filed not later than 10 days following the notation of judgment in the trial court's register of actions (or judgment docket). In re Gardella, 190 Colo. 402, 547 P.2d 928 (1976).

Relation back of judgment unconstitutional. Trial court's action in relating back matters decided on May 28 to the May 15 entry on the judgment docket had the effect of extinguishing the petitioner's right to appeal from the determinations made on May 28. Under these circumstances, the 10-day period of C.R.C.P. 59 expired before the remaining issues in the case had even been determined by the trial court. This result contravenes the right of appeal granted by the Colorado constitution. In re Gardella, 190 Colo. 402, 547 P.2d 928 (1976).

Admissibility of register in action upon bond of clerk. In an action upon the official bond of a clerk of the district court for fees collected and not paid over, where it appears that he made entries of fees collected by him in his register of actions such register is admissible in evidence and the entries therein are prima facie evidence against the clerk and also against the sureties on his bond. Cooper v. People ex rel. Bd. of Comm'rs, 28 Colo. 87, 63 P. 314 (1900) (decided under § 416 of the former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941).

For purposes of timely filing of a motion for new trial under C.R.C.P. 59 a judgment is "entered" only upon notation in the judgment docket pursuant to C.R.C.P. 58(a)(3) and section (d) of this rule. City and County of Denver v. Just, 175 Colo. 260, 487 P.2d 367 (1971).

Entry of judgment effective on notation in register. Both C.R.C.P. 58(a)(3) and section (a)(4) of this rule clearly state that entry of a judgment is effective upon notation in the register of actions. Hebron v. District Court, 192 Colo. 346, 558 P.2d 997 (1977).

Then judgment becomes final, though not recorded in judgment record. Hebron v. District Court, 192 Colo. 346, 558 P.2d 997 (1977).

Applied in Dill v. County Court, 37 Colo. App. 75, 541 P.2d 1272 (1975); Poor v. District Court, 190 Colo. 433, 549 P.2d 756 (1976); Moore & Co. v. Williams, 657 P.2d 984 (Colo. App. 1982); Moore & Co. v. Williams, 672 P.2d 999 (Colo. 1983).

Rule 80. Reporter; Stenographic Report or Transcript as Evidence

(a) Reporter. Unless the parties stipulate to the contrary, a district court or superior court shall, and any other court or referee or master in its discretion may, direct that evidence be taken stenographically and appoint a reporter for that purpose. His fee shall be fixed by the court subject to limitations imposed by law, and shall be paid in the manner provided by law; and if taxed to litigant may be taxed ultimately as costs in the discretion of the court. The cost of a transcript shall be paid in the first instance by the party ordering same.

(b) Official Reporters. Each court of record may designate one or more official court reporters.

(c) Stenographic Report or Transcript as Evidence. Whenever the testimony of a witness at a trial or hearing which was stenographically reported is admissible in evidence at a later trial, it may be proved by the transcript thereof duly certified by the person who reported the testimony.

(d) Reporter's Notes: Custody, Use, Ownership, Retention. All reporter's notes shall be the property of the state. Reporter's notes shall be retained by the court for no less than twenty-one years after the creation of the notes, or such other period as may be prescribed by supreme court directive or by instructions in the manual entitled, Colorado Judicial Department, Records Management. During the period of retention, reporter's notes shall be made available to the reporter of record, or to any other reporter or person the court may designate. During the trial or the taking of other matters on the record, the notes shall be considered the property of the state, even though in the custody of the reporter. After the trial and appeal period, the reporter shall list, date, and index all notes and shall properly pack them for storage. The state shall provide the storage containers and space.

Cross references: For supreme court reporters and other employees of the supreme court, see § 13-2-111, C.R.S.

ANNOTATION

Law reviews. For article, "Court Administration and General Provisions: Rules 77-85", see 23 Rocky Mt. L. Rev. 599 (1951). For article, "One Year Review of Criminal Law and Procedure", see 36 Dicta 34 (1959).

This rule is for the benefit of the litigants. Schleiger v. Schleiger, 137 Colo. 279, 324 P.2d 370 (1958).

It is mandatory only in the sense that a court cannot proceed to trial without a reporter against the wishes of the parties. Schleiger v. Schleiger, 137 Colo. 279, 324 P.2d 370 (1958).

When both parties proceed to trial without a court reporter, there is a waiver by them of the requirement of section (a) of this rule, and neither party can later be heard to complain of lack of a transcript. Schleiger v. Schleiger, 137 Colo. 279, 324 P.2d 370 (1958).

A party cannot assert that his attorney proceeded to hearing in the absence of a court reporter without his consent, and that he can raise this issue at any time, for clearly no written stipulation is required for waiver and it must be presumed that his attorney proceeded knowingly, as it is within the scope of his counsel's employment to try a case as his best judgment dictates, and his client is bound by the course of procedure adopted in the trial of a case. Schleiger v. Schleiger, 137 Colo. 279, 324 P.2d 370 (1958).

Court is not required to provide reporter for default judgments. The general rule providing that the district court shall direct that evidence be taken stenographically unless the parties stipulate to the contrary must give way to the specific rule governing the entry of default judgments, so while it may be better practice to have a reporter present when testimony is offered prior to the entry of a default judgment, C.R.C.P. 55(b) does not require it. Orebaugh v. Doskocil, 145 Colo. 484, 359 P.2d 671 (1961).

A certified transcript is admissible as official record. A reporter certified transcript of a previous trial is, if properly certified, tendered within the scope of the applicable rules, and relevant, admissible as an official record of the same court after a proper foundation is laid. Wasinger v. Miller, 154 Colo. 61, 388 P.2d 250 (1964).

Where stenographic notes of an annexation hearing were made by a reporter who attended the hearing and died shortly thereafter, and the notes were transcribed and certified by a different reporter even though the certification was not made by the attending reporter, there was no failure of compliance with this rule and § 31-12-109 (2). Bd. of County Commr's v. City & County of Denver, 37 Colo. App. 395, 548 P.2d 922 (1976).

Although trial judge had power and obligation to assure that records and reporter's notes in dissolution of marriage action were preserved by the clerk for an extended period of time and to enter any order with respect to those records and notes, the trial court was not required to enter an order obligating itself to preserve such records. In re Smith, 757 P.2d 1159 (Colo. App. 1988).

CHAPTER 10

General Provisions

CHAPTER 10

GENERAL PROVISIONS

Rule 81. Applicability in General

(a) Special Statutory Proceedings. These rules do not govern procedure and practice in any special statutory proceeding insofar as they are inconsistent or in conflict with the procedure and practice provided by the applicable statute. Where the applicable statute provides for procedure under a former Code of Civil Procedure, such procedure shall be in accordance with these rules.

(b) Dissolution of Marriage and Legal Separation. These rules shall not govern procedure and practice in actions in dissolution of marriage and legal separation insofar as they may be inconsistent or in conflict with the procedure and practice provided by the applicable statutes.

(c) Appeals from County to District Court. These rules do not supersede the provisions of the statutes of this state now or hereafter in effect relating to appeals from final judgments and decrees of the county court to the district court.

Cross references: For application of the Colorado Rules of Civil Procedure to proceedings for dissolution of marriage or legal separation, see § 14-10-105, C.R.S.; for limitation on taking appeals by appellate court, see C.A.R. 1(b).

ANNOTATION

I. General Consideration.
II. Special Statutory Proceedings.
III. Divorce and Separate Maintenance.
IV. Appeals.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Court Administration and General Provisions: Rules 77-85", see 23 Rocky Mt. L. Rev. 599 (1951). For article, "Amendments to the Colorado Rules of Civil Procedure", see 28 Dicta 242 (1951). For article, "One Year Review of Civil Procedure and Appeals", see 37 Dicta 21 (1960). For article, "One Year Review of Civil Procedure and Appeals", see 39 Dicta 133 (1962). For article, "Rule-Making in Colorado: An Unheralded Crisis in Procedural Reform", see 38 U. Colo. L. Rev. 137 (1966).

Applied in Rogers Concrete, Inc. v. Jude Contractors, 38 Colo. App. 26, 550 P.2d 892 (1976); People in Interest of S.S.T., 38 Colo. App. 110, 553 P.2d 82 (1976); Lloyd A. Fry Roofing Co. v. State Dept. of Health Air Pollution Variance Bd., 191 Colo. 463, 553 P.2d 800 (1976); Rueda v. District Court, 194 Colo. 327, 575 P.2d 370 (1977); In re Blair, 42 Colo. App. 270, 592 P.2d 1354 (1979); West-Brandt Found., Inc. v. Carper, 199 Colo. 334, 608 P.2d 339 (1980); Judd Constr. Co. v. Evans Joint Venture, 642 P.2d 922 (Colo. 1982).

II. SPECIAL STATUTORY PROCEEDINGS.

Law reviews. For article, "Again — How Many Times?", see 21 Dicta 62 (1944).

There is a recognized distinction between "proceedings" and "special proceedings". Hewitt v. Landis, 75 Colo. 277, 225 P. 842 (1924); Sitler v. Brians, 126 Colo. 370, 251 P.2d 319 (1952) (decided under former C.R.C.P. 111).

This rule expressly provides that, where a matter is specifically covered by statute, the rules of civil procedure are inapplicable. Theobald v. District Court, 148 Colo. 466, 366 P.2d 563 (1961).

The rules of civil procedure do not apply where there is a special statutory proceeding which sets forth remedies. Brown v. Hansen, 177 Colo. 39, 493 P.2d 1086 (1972).

The rules of civil procedure do not govern the procedure and practice in any special statutory proceeding so far as they are inconsistent or in conflict therewith. Wright v. Tinsley, 148 Colo. 258, 365 P.2d 691 (1961); City of Westminster v. District Court, 167 Colo. 263, 447 P.2d 537 (1968); Durbin v. Bonanza Corp., 716 P.2d 1124 (Colo. App. 1986).

If a statute creates a special statutory procedure relating to a type of action then the rules of civil procedure by express exception do not

apply. Dallas v. Fitzsimmons, 137 Colo. 196, 323 P.2d 274 (1958).

Mere amendment of pleadings cannot accomplish ends which are inconsistent with statutory procedures. Trustees of Mtg. Trust of Am. v. District Court, 621 P.2d 310 (Colo. 1980).

Thus, the rules of civil procedure are not applicable to "habeas corpus", which is special statutory proceeding, insofar as they are inconsistent with the applicable statute pertaining to the special statutory proceeding. Hithe v. Nelson, 172 Colo. 179, 471 P.2d 596 (1970).

Likewise, water adjudication proceedings are "special statutory proceedings" as contemplated under this rule. Colo. River Water Conservation Dist. v. Rocky Mt. Power Co., 174 Colo. 309, 486 P.2d 438 (1971), cert. denied, 405 U.S. 996, 92 S. Ct. 1245, 31 L. Ed. 2d 465 (1972); S.E. Colo. Water Cons. v. Ft. Lyon Canal Co., 720 P.2d 133 (Colo. 1986).

The proceedings prescribed by § 37-92-302 for adjudication of water rights are special proceedings, and their scope is governed by statute. State, Dept. of Natural Res. v. Southwestern Colo. Water Conservation Dist., 671 P.2d 1294 (Colo. 1983); Meyring Livestock Co. v. Wamsley Cattle Co., 687 P.2d 955 (Colo. 1984).

Annexation review is a special statutory proceeding. City of Westminster v. District Court, 167 Colo. 263, 447 P.2d 537 (1968).

Likewise, proceedings under marketing act. If the procedure and practice set forth in the marketing act under § 35-28-119 are in any particulars inconsistent or in conflict with the rules of civil procedure, the statute, and not the rules, would govern. People ex rel. Orcutt v. District Court, 164 Colo. 385, 435 P.2d 374 (1967).

Rehearing by the public utilities commission is a special statutory proceeding. Peoples Natural Gas Div. v. Pub. Utils. Comm'n, 698 P.2d 255 (Colo. 1985).

Statutory procedures detailing methods for district court review of public utilities commission decisions are special statutory proceedings and govern over conflicting rules of civil procedure. Silver Eagle Servs. v. P.U.C., 768 P.2d 208 (Colo. 1989).

Release proceedings are special statutory proceedings. In view of the detailed procedure prescribed by § 16-8-115 the release proceedings are special statutory proceedings governed by this rule. People v. District Court, 192 Colo. 225, 557 P.2d 414 (1976).

Historically, the supreme court has considered mental health proceedings to be special statutory proceedings. People v. District Court, 192 Colo. 225, 557 P.2d 414 (1976).

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

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

Proceedings under § 16-5-209 are special statutory proceedings not exempt from application of the rules of civil procedure because said section lacks adequate, exclusive, full, and complete procedures. Moody v. Larsen, 802 P.2d 1169 (Colo. App. 1990).

Provisions of the Torrens Title Registration Act govern service of process in case brought under the Torrens Act. Rael v. Taylor, 876 P.2d 1210 (Colo. 1994).

Applied in Boxberger v. State Hwy. Comm'n, 126 Colo. 526, 251 P.2d 920 (1952); Stull v. District Court, 135 Colo. 86, 308 P.2d 1006 (1957).

III. DIVORCE AND SEPARATE MAINTENANCE.

Law reviews. For article, "What Divorce Statutes Are Now in Effect in Colorado?", see 21 Dicta 68 (1944). For article, "Comments on the Rules of Civil Procedure", see 22 Dicta 154 (1945).

The rules of procedure do not govern procedure and practice in actions in divorce or separate maintenance where they may conflict with the procedure and practice provided by the applicable statutes. Moats v. Moats, 168 Colo. 120, 450 P.2d 64 (1969).

Where the divorce statutes are silent as to any method of procedure the rules govern. Myers v. Myers, 110 Colo. 412, 135 P.2d 235 (1943); Holman v. Holman, 114 Colo. 437, 165 P.2d 1015 (1946).

The rules of civil procedure apply to a divorce action, unless a contrary rule appears in the divorce statutes. Bacher v. District Court, 186 Colo. 314, 527 P.2d 56 (1974).

Applied in People ex rel. Stanko v. Routt County Court, 110 Colo. 428, 135 P.2d 232 (1943); Ingels v. Ingels, 29 Colo. App. 585, 487 P.2d 812 (1971).

IV. APPEALS.

Applied in Niles v. Shinkle, 119 Colo. 458, 204 P.2d 1077 (1949).

Rule 82. Jurisdiction Unaffected

These rules shall not be construed to extend or limit the jurisdiction of any court.

Cross references: For service of process, see C.R.C.P. 4.

ANNOTATION

Law reviews. For article, "Court Administration and General Provisions: Rules 77-85", see 23 Rocky Mt. L. Rev. 599 (1951).

Applied in Andrews v. Lull, 139 Colo. 536, 341 P.2d 475 (1959).

Rule 83. Rules by Courts

Repealed April 1, 1982, effective July 1, 1982.

Cross references: For present provisions relating to adoption of local rules, see C.R.C.P. 121.

Rule 84. Forms

The forms contained in the Appendix to chapters 1 to 17 are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate.

ANNOTATION

Law reviews. For article, "Amendments to the Colorado Rules of Civil Procedure", see 28 Dicta 242 (1951). For article, "Court Administration and General Provisions: Rules 77-85", see 23 Rocky Mt. L. Rev. 599 (1951).

Rule 85. Title

Repealed December 5, 1996, effective January 1, 1997.

Rule 86. Pending Water Adjudications Under 1943 Act

In any water adjudication under the provisions of article 9 of chapter 148, C.R.S. 1963, as amended, pending on August 12, 1971, in which any applicant files any statement of claim asking that his date of priority antedate any earlier decrees or adjudications, in order not to be forever barred the owners of affected rights must object and protest within the times and in the manner provided by the Water Right Determination and Administration Act of 1969; and the judge shall direct the clerk to publish once in a newspaper or newspapers of general circulation in the water division as set forth in said Act of 1969, within which the water district is incorporated, to provide, and which shall be, notice to all water users within the division. The language of such notice shall be substantially as follows:

"There has been filed in this proceeding a claim or claims which may affect in priority any water right claimed or heretofore adjudicated within this division and owners of affected rights must appear to object and protest as provided in the Water Right Determination and Administration Act of 1969, or be forever barred."

Editor's note: Article 9 of chapter 148, C.R.S. 1963, was repealed concurrent with the enactment of the "Water Right Determination and Administration Act of 1969" (see L. 69, p. 1223, § 20), which act is now numbered as article 92 of title 37 (see C.R.C.P. 87).

Rule 87. Application of Following Water Rules

Rules 88 through 91 shall govern proceedings under article 92 of title 37, C.R.S. 1973.

Rule 88. Judgments and Decrees

(a) Record and Indices. The water clerk shall prepare and maintain books of all judgments and decrees in the sequence of their entry by the court, or shall keep microfilm or magnetic tape copies of the same. The water clerk shall prepare and maintain suitable indices of the judgments and decrees.

(b) Entry and Finality of Judgment. Immediately following the issuance of a judgment and decree the water clerk shall make an entry of record concerning the same, and the judgment and decree shall then be deemed final.

(c) Notice. A copy of such judgment and decree or notice thereof shall be given promptly to applicants and to any protestors and objectors, or their attorneys.

Rule 89. Notice When Priority Antedating an Adjudication Is Sought

Whenever a claimant makes application for the determination of a water right or a conditional water right and claims that his date of priority will antedate any earlier adjudication or claims a priority date earlier than the effective date of one or more priorities awarded by a previous decree or decrees within the water division in which the application is filed (except when provision for such antedation or earlier priority is made by statute), in order not to be forever barred, the owners of affected rights must object and protest within the times and in the manner provided by statute, and the water clerk shall include in the resume required by statute a specific notification in boldface type substantially as follows:

"The water right claimed by this application may affect in priority any water right claimed or heretofore adjudicated within this division and owners of affected rights must appear to object and protest within the time provided by statute, or be forever barred."

COMMENT

Following the announcement on March 24, 1971, of **United States v. District Court in and for the County of Eagle,** 401 U.S. 520, 91 S. Ct. 998, 28 L. Ed. 2d 278 (1971), and **United States v. District Court in and for Water Division Number 5,** 401 U.S. 527, 91 S. Ct. 1003, 28 L. Ed. 2d 284 (1971). The Colorado Supreme Court appointed a water advisory committee for study and recommendations as to the necessity and possible content of rules of court as a result of the two United States Supreme Court opinions. An attempt was made to have the membership of this committee representative of the different interests that might be affected by proceedings conducted in the light of these opinions and **United States v. District Court,** 169 Colo. 555, 458 P.2d 760 (1969), which was affirmed by the first mentioned United States Supreme Court opinion. After conferences and study the committee established tentative guidelines and recommended that a 5-man briefing and drafting committee be appointed for performance under the guidelines. Accordingly, a briefing and drafting committee was appointed, consisting of the following attorneys: Kenneth Balcomb, Glenwood Springs, Colorado; Charles J. Beise, Denver, Colorado; Kenneth L. Broadhurst, Denver, Colorado; Gene Alan Erl, Washington, D.C.; and Donald H. Hamburg, Denver, Colorado, with Mr. Beise acting as chairman. Early in the work of the briefing and drafting committee, Messrs. Beise and Balcomb prepared a memorandum which is set forth later herein.

After the briefing and drafting committee completed its work, it submitted proposed rules to the entire water advisory committee which, after some revision, unanimously approved them and recommended their adoption by the Colorado Supreme Court. The seven water judges of the state (Fred Calhoun, Donald A. Carpenter, Richard E. Conour, C. H. Darrow, William S. Eakes, William L. Gobin and Don Lorenz) then studied and conferred with respect to the proposed rules. After some revision, the water judges recommended their adoption. Accordingly, the proposed rules were adopted substantially as recommended on August 12, 1971, as Rules 86 through 91, C.R.C.P.

While the Colorado Supreme Court does not comment nor pass upon the contents of the memorandum prepared by Messrs. Beise and Balcomb, it believes that the bench and bar will find value in it and, therefore, sets it forth in its entirety:

By and large the Colorado Rules of Civil Procedure are to apply in conformity with section 37-92-304(3), C.R.S. 1973, unless varied by the proposed rules.

Experience gained from the use of forms presently furnished indicated an insufficiency of information therein, requiring in many cases, statements of opposition and protests when, with additional information, the same would be unnecessary.

Recommendations regarding the duties of the water clerk in the treatment of files, decrees, and judgments are made for the sake of simplicity, uniformity, and permanency.

The proposed rule relating to publication of a claim of right on the part of any claimant to antedate in priority previous orders, decrees, and judgments of courts establishing priorities gave the committee the greatest trouble, but the committee is satisfied that the requirements of due process are met by the proposed rule.

Due process relates to the right to be heard, and this right is subject to reasonable limitations.

The type or kind of notice to be given to and the method of service thereof on other parties possibly affected by water adjudication proceedings has varied in Colorado as changes in water law have occurred. In the original statutes of 1879 and 1881, personal service in addition to publication and posting was required where possible, with mailing of notice where not possible.

In 1905 special supplementary adjudication proceedings became possible. Original adjudication proceedings in a water district still required the 1879-1881 service treatment,[1] but after 1905 the supplementary proceedings required only such notice as was required by the court. As a matter of practice this was generally confined to publication and posting. Countless decrees were entered in such special proceedings. All priorities so established and fixed are recognized in the present system of administration.

The 1943 law abolished special proceedings, and substituted general supplementary proceedings. It required by way of notice publication plus the mailing of the notice to those persons who had not theretofore adjudicated their claims according to the records of the state engineer and to all users who within the preceding calendar year had diverted water according to a list furnished by the water commissioner or division engineer.

The incompleteness and insufficiency of these lists as a means of reaching claimants of water rights is well recognized. Factually, it is impossible to reach all claimants by any means other than publication.

The salient feature of the previous statutory notice provisions to be noted here is that the requisite statutory publication, posting and mailing was confined to the district boundaries, and did not extend to the division of which the district was a part, even though the priority or priorities awarded related to and affected rights in the entire division.

In 1887 the legislature required the division engineers to treat priorities awarded in the districts on a division-wide basis. The claim was made in **O'Neil v. Northern Colorado Irrigation District,** 56 Colo. 545, 139 P. 536 (1914), that if retrospective effect was given this statute allowing curtailment of plaintiffs' priority awarded subsequent to 1887 in favor of defendants' priority entered before 1887 without notice to the plaintiff but in another water district within the division, it resulted in a taking of plaintiffs' property without due process of law. The challenge was made more than four years after entry of defendants' decree. The Court held the four year statute effectively barred the suit irrespective of the 1887 statute. This result was affirmed by the Supreme Court of the United States in an opinion by Mr. Justice Holmes, 242 U.S. 20, 37 S. Ct. 7, 61 L. Ed. 123 (1916).

We are not unmindful of the service of process requirement of due process in other types of litigation (condemnation) and have considered other cases very kindly furnished by interested members of and advisors to the committee as a whole. Neither are we unmindful of Rule 4 of our Rules of Civil Procedure which by the statute and the rule here under

[1] **Nichols v. McIntosh,** 19 Colo. 22, 27 (1893).

consideration would have no application to notice requirements in water courts. We believe **O'Neil** followed by **Eagle County**[2] and **Darrow**[3] control.

Mr. Justice Holmes in **O'Neil** held that due process requirements were met when a party, though not entitled to be heard in the first instance, was allowed by statute a reasonable time thereafter to be heard. This was predicated on the fact that a decree regarding water priorities was a public fact. The fact that rights might be lost by inaction on the part of a claimant was likewise considered immaterial by Mr. Justice Holmes because the rule of limitation applied to him was likewise consistently applied by Colorado Courts to all similar situations. Plaintiff in **O'Neil** could not have been misled by contradictory rulings regarding applications of the rule.

Eagle County, of course, holds that the McCarren Amendment allows joinder the United States in adjudication proceedings under the 1943 Act. **Darrow** goes even farther and says such joinder can effectively be made under other but dissimilar state adjudicatory procedures. The key is the presence of a state statute providing the procedure for adjudication. The procedural steps themselves are a matter of state concern and need only be equally and fairly applied.[4]

The Supreme Court of Colorado in its review in **Eagle County** held the trial court had the power to require the giving of whatever additional notice of the claim of right to antedate previous decrees it deemed necessary.

The 1969 Act gives notice by requiring publication of the resume in one or more newspapers within the division as will give general circulation to water claimants in each county in the division. We do not believe this requires publication in every county which has a newspaper, but rather requires publication in a newspaper of general circulation in such county even if published elsewhere in the division. Thus publication in but one newspaper in the division might be found by the water court to be sufficient general circulation to meet due process requirements. Under this 1969 Act a well owner seeking his actual date of priority without prejudice because of his failure to participate in earlier adjudications antedates prior decrees. The only notice required is publication. Personal service is not required. The proposed rule is consistent with this procedure.

The additional statutory requirement of mailing to those requesting a copy of the resume relates not to the jurisdiction of the court or due process, but is for informational purposes only.

The final and important safeguard regarding notice is met when the statute requires the referee to direct mailing to those he deems affected by a particular claim.

On the surface **O'Neil** dealt with a statute of limitations, and in **Eagle County** and **Darrow** the problem of notice was not directly involved. But in **O'Neil** the only notice which could have possibly reached the adjacent district, other than the important notice the statute itself gave, was the publication. The same is true in **Eagle County**. In **Darrow,** however, as the rule herein under consideration will require, the notice was given division wide, and this was more effective as notice in the area affected than any previous statutory notice requirements.

We thus conclude that publication once in a newspaper or newspapers of general circulation within the division as required by statute and the proposed rule meets the requirements of due process, because:

1. Three years is a reasonable time for anyone to establish the error, if any, in the decree and judgment.[5]

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[2] 169 Colo. 555, 458 P.2d 760, 401 U.S. 520, 28 L. Ed. 2d 278, 91 S. Ct. 998 (1971).

[3] #24821, 401 U.S. 527, 28 L. Ed.2d 284, 91 S. Ct. 1003 (1971).

[4] **Ft. Lyon Canal Co. v. Arkansas Sugar Beet & Irrigated Land Co.,** 39 Colo. 332, 34 P. 278 (1907). At page 344 thereof the court said:

All persons are bound to take notice of a public law. The irrigation statutes are public, and apply to all persons taking water from the same source. The waters of the state belong to the public, and, as we said, in substance, in the original opinion, the state in its sovereign capacity had the right to provide a reasonable method whereby such rights might be adjudicated and settled, and to require claimants of such rights to present them in a prescribed manner, within a prescribed time, and unless the law in this respect was obeyed, that all claims not thus presented should be barred. That is what the statutes on the subject of the use of water for irrigation have provided. All persons are bound to take notice of these provisions.

[5] This limitation was increased from two to three years by the 1970 amendment, section 37-92-304(10), C.R.S. 1973.

2. In this day and age of rapid communication and transit, many newspapers are in general circulation throughout the state and not just a division.

3. The system has been effectively in force and in operation for nearly two years with relation to well owners and is the accepted state method of giving notice.

Rule 90. Dispositions of Water Court Applications

(a) The water clerk shall receive and file all applications and number them upon payment of filing fees. The water clerk shall not accept for filing any application that is not accompanied by the required filing fee. Each application filed within each division shall be consecutively numbered, preceded by the year and the letters CW (e.g. 2009CW100) to identify such applications as concerning water matters. The applicant for a finding of reasonable diligence relating to a conditional water right and/or to make a conditional water right absolute shall include in the application a listing of the original and any other prior case numbers pertaining to the conditional water right included in the application; thereafter, the assigned case number for the application shall appear on any document, pleading, or other item in the case. Referee rulings and water court judgments and decrees shall include all relevant prior case numbers.

(b) The water clerk shall include in the resume all applications filed during the preceding month that substantially contain the information required by Rule 3 of the Uniform Local Rules for All State Water Court Divisions and the standard forms approved by the water judges under C.R.S. § 37-92-302(2)(a), which together provide the information sufficient for publication to the public and potential parties. The water clerk, in consultation with the referee pursuant to Rule 6 of the Uniform Local Rules For All State Water Court Divisions, shall promptly refer to the water judge for consideration and disposition any application that does not substantially contain the information required by Rule 3 of the Uniform Local Rules For All State Water Court Divisions and the standard forms approved by the water judges under C.R.S. § 37-92-302(2)(a). Any such application shall not be published in the resume pending disposition by the water judge. The water clerk shall promptly inform the applicant that the application has been referred to the water judge and provide the applicant with a list of the required information that was not contained in the application.

(c) In determining whether or not to order publication of the application in the resume pursuant to C.R.S. § 37-92-302(3)(a), the water judge shall promptly review the application and shall employ an inquiry notice standard in conducting the review. Upon a finding that the application does not provide sufficient inquiry notice contemplated by Rule 3 of the Uniform Local Rules for All State Water Court Divisions and the standard forms approved by the water judges under C.R.S. § 37-92-302(2)(a) to justify publication, the water judge shall set a date pursuant to C.R.C.P. 41(b)(2) and C.R.C.P. 121, Section 1-10, by which date the application will be dismissed unless, prior to that date, a sufficient application is filed. The application will retain its original filing date unless and until the application is dismissed.

(d) For purposes of relation back of the filing date of a subsequent applicant's application for a water right or conditional water right pursuant to C.R.S. § 37-92-306.1, the subsequent application shall be filed within sixty days of the date the prior application is published in the resume.

(e) Upon request, the water clerk shall provide a prospective applicant or opposer with one copy of the form for the relevant application or statement of opposition. The standard forms for applications and statements of opposition may also be found in the "Water Courts" section of the Colorado Judicial Branch web page.

Source: Entire rule amended and effective February 19, 2009.

Editor's note: Amendments to this section, adopted February 19, 2009, are applicable to applications filed on or after July 1, 2009, but any portions thereof that can be adapted for use by the water judge or referee without prejudice to the parties may be utilized in existing cases.

ANNOTATION

Law reviews. For article, "Statutory and Rule Changes to Water Court Practice", see 38 Colo. Law. 53 (June 2009).

Rule 91. Entry of Decree When No Protest Has Been Filed

The water judge may enter a decree at any time upon any ruling of the referee to which no protest has been filed, and it shall be sufficient for such purpose to enter thereon substantially the following language:

No protest was filed in this matter. The foregoing ruling is confirmed and approved, and is made the Judgment and Decree of this Court.

Dated: _____

_____
Water Judge

Rule 92. Conditional Water Rights — Extension of Time for Entry of Findings of Reasonable Diligence

Where a decree or other determination with respect to a conditional water right was entered not earlier than June 7, 1971, and not later than June 6, 1973, the time during which the owner or user thereof must obtain a finding of reasonable diligence in the development of the proposed appropriation in order to maintain the conditional water right shall be extended by two years.

Rules 93 to 96.

[Note: There are at present no Colorado Rules 93 to 96.]

CHAPTER 11

Change of Judge; Place of Trial

CHAPTER 11

CHANGE OF JUDGE; PLACE OF TRIAL

Rule 97. Change of Judge

A judge shall be disqualified in an action in which he is interested or prejudiced, or has been of counsel for any party, or is or has been a material witness, or is so related or connected with any party or his attorney as to render it improper for him to sit on the trial, appeal, or other proceeding therein. A judge may disqualify himself on his own motion for any of said reasons, or any party may move for such disqualification and a motion by a party for disqualification shall be supported by affidavit. Upon the filing by a party of such a motion all other proceedings in the case shall be suspended until a ruling is made thereon. Upon disqualifying himself, a judge shall notify forthwith the chief judge of the district who shall assign another judge in the district to hear the action. If no other judge in the district is available or qualified, the chief judge shall notify forthwith the court administrator who shall obtain from the Chief Justice the assignment of a replacement judge.

Cross references: For disqualification of a judge, see Canon 2, rule 2:11, of the Code of Judicial Conduct (Appendix to Chapter 24); for change of judge in criminal cases, see Crim. P. 21.

ANNOTATION

I. General Consideration.
II. Illustrative Cases.

I. GENERAL CONSIDERATION.

Law reviews. For article, "One Year Review of Civil Procedure and Appeals", see 37 Dicta 21 (1960). For article, "One Year Review of Civil Procedure and Appeals", see 39 Dicta 133 (1962). For article, "Disqualification of Judges", see 13 Colo. Law. 54 (1984). For article, "Appointed Judges Under New C.R.C.P. 122: A Significant Opportunity for Litigants", see 34 Colo. Law. 37 (September 2005).

Annotator's note. Since this rule is similar to § 32 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Purpose of rule. The intent of the rule under which a judge should disqualify himself from a case if he has served as counsel for either of the parties is to insure a fair and impartial hearing of the issue involved. Bd. of County Comm'rs v. Blanning, 29 Colo. App. 61, 479 P.2d 404 (1970).

Purpose of disqualification rule is to prevent judge with a "bent of mind" from presiding over action. Goebel v. Benton, 830 P.2d 995 (Colo. 1992).

Trial judge's duty to preside. In the absence of a valid reason for disqualification relating to the subject matter of the litigation, the trial judge has the duty of presiding over the case. Blades v. DaFoe, 666 P.2d 1126 (Colo. App. 1983), rev'd on other grounds, 704 P.2d 317 (Colo. 1985).

Upon reasonable inference of a "bent of mind" that will prevent judge from dealing fairly with party seeking recusal, it is incumbent on trial judge to recuse himself. Wright v. District Court, 731 P.2d 661 (Colo. 1987).

The requirements for disqualification of a judge are that he be interested or prejudiced, or related to counsel for any party, or has been counsel for or related to any party, as required by this rule. Fehr v. Hadden, 134 Colo. 102, 300 P.2d 533 (1956).

Generally, a judge's ruling on a legal issue cannot form the basis for recusal. Brewster v. Dist. Court, 811 P.2d 812 (Colo. 1991); People ex rel. S.G., 91 P.3d 443 (Colo. App. 2004).

Also, a judge's opinion formed against a party from evidence before the court in a judicial proceeding, even as to the guilt or innocence of a defendant, is generally not a basis for disqualification. People ex rel. S.G., 91 P.3d 443 (Colo. App. 2004).

What a judge learns in his or her judicial capacity usually cannot form the basis for disqualification. People ex rel. S.G., 91 P.3d 443 (Colo. App. 2004).

Disqualifying interest must relate to subject matter of suit. The interest of a judge upon which he may disqualify himself must necessarily relate to the subject matter of the litigation, or be of a pecuniary interest in the outcome of the litigation, and not as it might relate to a determination of the facts and legal questions presented. Primarily, it is the duty of a judge to sit in a case in the absence of a showing that he is disqualified. Kubat v. Kubat, 124 Colo. 491, 238 P.2d 897 (1951); Bd. of County Comm'rs v. Blanning, 29 Colo. App. 61, 479 P.2d 404 (1970).

Rule does not apply to ordinary transfer for convenience. This rule, providing for designation by the chief justice of a justice to try a cause wherein the trial judge is disqualified, has no application to the ordinary transfer of causes for convenience from one division to another in a district court having more than one judge. Smaldone v. People, 102 Colo. 500, 81 P.2d 385 (1938) (decided under former Supreme Court Rule 14C).

There should be a supporting affidavit to the motion to disqualify, in compliance with the rules. Kubat v. Kubat, 124 Colo. 491, 238 P.2d 897 (1951).

In all cases necessary material or pertinent facts should be set out. In case of the prejudice of the judge, his attention would be called to some forgotten or unknown circumstance. Justice requires that the judge should not be charged with prejudice while left in surprise at a cause he may not imagine, or may believe exists only in the imagination of the applicant, and without the necessary knowledge upon which to act in the exercise of that discretion to allow or deny the charge. Hughes v. People, 5 Colo. 436 (1880).

The law contemplates that, upon application for change of venue, facts shall be stated sufficient to inform the judge of the nature of the causes for the change, and their alleged foundation. Hughes v. People, 5 Colo. 436 (1880).

The facts are not to be set out beyond what is necessary where they involve the judicial acts or character of the judge. Hughes v. People, 5 Colo. 436 (1880).

Only question on motion is sufficiency of facts alleged. The motion and supporting affidavit speak for themselves and the only question involved is whether the facts alleged are sufficient to compel the judge to disqualify himself. Kovacheff v. Langhart, 147 Colo. 339, 363 P.2d 702 (1961).

Supporting affidavits insufficient to warrant recusal where the allegations, even if accepted as true, did not state actual facts and statements evidencing impartiality or bias. In re Goellner, 770 P.2d 1387 (Colo. App. 1989).

Motion and supporting affidavits are insufficient to require disqualification if only allege opinions or conclusions and are unsubstantiated by facts supporting reasonable inference of actual or apparent bias or prejudice. Goebel v. Benton, 830 P.2d 995 (Colo. 1992); In re Elmer, 936 P.2d 617 (Colo. App. 1997).

Reasonable question as to impartiality requires disqualification. Where one might reasonably question the trial judge's impartiality, it is improper for him to preside over the trial. Wood Bros. Homes v. City of Fort Collins, 670 P.2d 9 (Colo. App. 1983).

Trial judge must accept affidavits filed with motion to disqualify as true, even though judge believes that the statements contained in the affidavits are false or the meaning attributed to them by the party seeking recusal is erroneous. Wright v. District Court, 731 P.2d 661 (Colo. 1987).

Disqualification is within trial court's discretion. Whether to disqualify in a civil case is a matter within the discretion of the trial court, and its ruling will not be disturbed on appeal except for an abuse of discretion. In re Mann, 655 P.2d 814 (Colo. 1982); Hollemon v. Murray, 666 P.2d 1107 (Colo. App. 1982); Goebel v. Benton, 830 P.2d 995 (Colo. 1992).

Whether to disqualify himself in a civil case is a question within the discretion of the trial judge, and the judge's ruling on that issue will not be disturbed on appeal absent a showing of an abuse of that discretion. Colo. State Bd. of Agric. v. First Nat'l Bank, 671 P.2d 1331 (Colo. App. 1983).

Trial court's denial of motion for recusal constitutes an abuse of discretion and is reversible error when there was, at least, an appearance of bias or prejudice due to the existence of a professional relationship between the trial judge and an expert witness for defendants. Hammons v. Birket, 759 P.2d 783 (Colo. App. 1988).

It is judge's duty to pass only upon legal sufficiency of facts alleged in affidavit and when motion and supporting affidavits allege facts which demonstrate that judge had a "bent of mind", refusal of judge to disqualify himself constitutes abuse of discretion. Goebel v. Benton, 830 P.2d 995 (Colo. 1992).

Appearance of impropriety, not actual prejudice, is sufficient to warrant recusal. Where recusal is sought based upon the relationship of the judge to another person, it is the closeness of the relationship and its bearing on the underlying case that determines whether disqualification is necessary. People ex rel. A.G., 264 P.3d 615 (Colo. App. 2010), rev'd on other grounds, 262 P.3d 646 (Colo. 2011).

This rule does not require a hearing on a motion for change of judge on the grounds of prejudice. Brouwer v. District Court, 169 Colo. 303, 455 P.2d 207 (1969).

The parties do not require an opportunity to introduce evidence in support of a motion to

have the trial judge disqualified. Kovacheff v. Langhart, 147 Colo. 339, 363 P.2d 702 (1961).

Nor does it require notice. There is no abuse of discretion in calling the motion to disqualify the trial judge up for hearing without notice where the parties to the action, and their attorneys, were present in response to the trial setting, and trial could not proceed until the motion was disposed of. The motion was directed against the judge, was self-explanatory, and notice to the parties could not have afforded the court any better opportunity to rule upon it. Brackett v. Cleveland, 147 Colo. 328, 363 P.2d 1050 (1961).

This rule does not fix the time when a motion should be filed. Aaberg v. District Court, 136 Colo. 525, 319 P.2d 491 (1957).

A motion to disqualify a trial judge should be filed promptly when grounds therefor are known and prior to taking any other steps in the case. Aaberg v. District Court, 136 Colo. 525, 319 P.2d 491 (1957); Dominic Leone Constr. Co. v. District Court, 150 Colo. 47, 370 P.2d 759 (1962).

Where defendant waited two years before filing a motion for recusal based on the judge's comments, motion was untimely. Estate of Binford v. Gibson, 839 P.2d 508 (Colo. App. 1992).

Where plaintiff waited until one year of legal proceedings had occurred before seeking recusal on grounds of comments made in an earlier case, motion was untimely. Holland v. Bd. of County Comm'rs, 883 P.2d 500 (Colo. App. 1994).

Petitioner did not waive right to file a motion to disqualify judge when petitioner waited two months after the grounds for disqualification were known to file his motion. Johnson v. District Court, 574 P.2d 952 (Colo. 1984).

Court may deny motion to recuse if it is untimely. People ex rel. A.G., 264 P.3d 615 (Colo. App. 2010), rev'd on other grounds, 262 P.3d 646 (Colo. 2011).

Without an assertion of actual prejudice, counsel's failure to timely move for disqualification cannot be the basis of a valid claim for ineffective assistance of counsel. A party must show actual prejudice on the part of the judge, in that the result of the proceeding would have been different. People ex rel. A.G., 262 P.3d 646 (Colo. 2011).

Mother's allegation of prejudice was based upon the appearance of impropriety created by the judge's clerk's relationship to a material witness for the government. The mere allegation of prejudice is insufficient to satisfy the element of prejudice necessary to show that counsel's errors deprived the party of a fair trial. People ex rel. A.G., 262 P.3d 646 (Colo. 2011).

Appearance for purpose other than to question authority waives objection. Where a party seeks to disqualify a judge for bias and prejudice, and at the same time asks for affirmative relief by motion for a change of venue, appearance before such judge for any other purpose than to question his authority to act, waives the right to object to his authority. Aaberg v. District Court, 136 Colo. 525, 319 P.2d 491 (1957).

Failure to comply with rule bars objections to judge on review. Where a party has failed to comply with this rule, the reviewing court will not entertain objections to a trial judge sitting in judgment of the acts of its own public administrator, which are not properly preserved in the proceeding below. Jones v. Estate of Lambourn, 159 Colo. 246, 411 P.2d 11 (1966).

Filing of motion to disqualify a trial judge suspends all other proceedings in the case until ruling is made thereon. Dominic Leone Constr. Co. v. District Court, 150 Colo. 47, 370 P.2d 759 (1962); Brouwer v. District Court, 169 Colo. 303, 455 P.2d 207 (1969).

A motion to disqualify the judge has the effect, as a matter of law, of suspending any further proceedings until the judge rules on the motion to disqualify. City of Trinidad v. District Court, 196 Colo. 106, 581 P.2d 304 (1978).

Judge is obligated to review motion. Because a motion to disqualify a judge has been made, judge is obligated to review the motion and decide its sufficiency, and judge does not have the authority to determine any other substantive matter pending before the court, including a motion for change of venue. Johnson v. District Court, 674 P.2d 952 (Colo. 1984).

Writ of mandamus proper for failure to rule on disqualification motion. The trial judge must initially rule on the disqualification motion, and if he fails to rule, a writ in the nature of mandamus is a proper remedy. City of Trinidad v. District Court, 196 Colo. 106, 581 P.2d 304 (1978).

Motion does not deprive court of jurisdiction. Where the trial court ruled upon a motion for change of judge, it did not lose jurisdiction to proceed. Brouwer v. District Court, 169 Colo. 303, 455 P.2d 207 (1969).

Procedural requirements for judge to disqualify himself. The power of a judge to disqualify himself may be exercised even though the proper procedural steps leading to disqualification have not been pursued by any party to the litigation. Beckord v. District Court, 698 P.2d 1323 (Colo. 1985).

Where the plaintiff failed to object to the appointment of a judge within the appropriate time period, the objection will be deemed waived and the plaintiff will be estopped to object. In re Fifield, 776 P.2d 1167 (Colo. App. 1989).

Adjudicating board abused its discretion by concluding that complainant waived his right to raise the issue of disqualification on the basis of implied waiver by conduct when unequivocal evidence of the intent to waive his right was absent. Venard v. Dept. of Corr., 72 P.3d 446 (Colo. App. 2003).

Mere friendship of a judge with an officer of a corporate party does not warrant disqualification unless the nature of the friendship creates an appearance of impropriety. Pierce v. United Bank of Denver, 780 P.2d 6 (Colo. App. 1989).

Once judge disqualifies himself from a case, he is without jurisdiction to rule on motions filed by the parties which involve an exercise of judicial discretion. Beckord v. District Court, 698 P.2d 1323 (Colo. 1985).

Judge should not appoint his own successor. When a judge is charged with bias and prejudice and sustains a motion so charging, or steps aside without ruling on the motion, proper procedure requires that he not select his successor or assign the case to another judge, but that he proceed in accordance with this rule. Aaberg v. District Court, 136 Colo. 525, 319 P.2d 491 (1957).

Proceeding with hearing without objection waives objection. Proceeding with a preliminary injunction hearing without objection, after being informed by the court that defense counsel had been appointed to a district commission for the evaluation of the performance of judges pursuant to § 13-5.5-104, is a waiver of the right to object. Bishop & Co. v. Cuomo, 799 P.2d 444 (Colo. App. 1990).

Purpose of disqualification requirement is to prevent a party from being forced to litigate a matter before a judge with a "bent of mind." Goebel v. Benton, 830 P.2d 995 (Colo. 1992).

Applied in In re Johnson, 40 Colo. App. 250, 576 P.2d 188 (1977); Marks v. District Court, 643 P.2d 741 (Colo. 1982).

II. ILLUSTRATIVE CASES.

Filing of complaint with qualifications commission insufficient. To allow a litigant to file a letter critical of a trial judge or to inform the judge of the filing of a complaint with the judicial qualifications commission and later assert the judge's knowledge of the complaint as a basis for disqualification would encourage impermissible judge-shopping. In re Mann, 655 P.2d 814 (Colo. 1982).

Assistance of judge in preparation of arbitrator's findings not prejudicial. The participation of the trial judge in the preparation of the arbitrator's findings after reference of case did not disqualify him from rendering judgment, where it did not appear that such participation had been to the extent of creating prejudice in examining and determining issues of law which might be involved. Zelinger v. Mellwin Constr. Co., 123 Colo. 149, 225 P.2d 844 (1950).

Continuing jurisdiction over attack of decree is not sufficient ground. In a proceeding to attack an adoption decree before the same judge who granted the decree, the suggestion in a motion to disqualify the judge that he will undoubtedly be called as a witness is not ground for disqualification, since, in a matter of adoption proceedings, the judge who entered the adoption decree had a continuing jurisdiction and was the proper one to review or consider that judgment or decree when it was attacked. Kubat v. Kubat, 124 Colo. 491, 238 P.2d 897 (1951).

The initiation of an ex parte communication by a judge with a party in a dependency hearing regarding the adequacy of her attorney's representation was improper, but judge would not be disqualified where disqualification motion and affidavits failed to allege facts from which it might be inferred that the ex parte communication demonstrated a bias against the party or her attorney. S.S. v. Wakefield, 764 P.2d 70 (Colo. 1988).

Where the trial judge owned controlling shares of stock in a bank in which the plaintiff maintained substantial deposits, his pecuniary interest in the outcome of the litigation was such that he should have disqualified himself. Zoline v. Telluride Lodge Ass'n., 732 P.2d 635 (Colo. 1987).

Purchase of water from corporate defendant is not disqualifying interest. A motion to disqualify a trial judge on the ground of prejudice because the defendants in the case are socially and politically influential and because the judge is a water user of the corporate defendant, presents no sound basis for disqualification, where the company is a mutual nonprofit corporation and where no pecuniary advantage could possibly accrue to the trial court by his action. Fehr v. Hadden, 134 Colo. 102, 300 P.2d 533 (1956).

Previous service of judge as county attorney unrelated to action. No showing has been made that in his duty as county attorney 17 years prior to the institution of this action, the trial judge was in any manner concerned with the question of title to this property, or that the defendant's right to a fair and impartial hearing was in any manner affected by the refusal of the trial judge to disqualify himself. The trial judge was correct in refusing to disqualify himself. Bd. of County Comm'rs v. Blanning, 29 Colo. App. 61, 479 P.2d 404 (1970).

Similarly, where judge appointed as attorney to represent inductees in quiet title action. In the absence of more positive representation than is usually performed by an attorney appointed to represent persons in or about to be inducted into military service in a quiet title action, it is questionable whether the mere ap-

pointment of an attorney and his subsequent approval of a quiet title decree disqualifies him later as judge to determine whether the decree is "res judicata" in another proceeding in which some of the parties are the same. Martinez v. Casey, 178 Colo. 62, 495 P.2d 216 (1972).

Partiality or appearance of bias or prejudice. Judge should have disqualified himself when affidavits filed reported actual events and statements which, if true, evidence partiality or the appearance of bias or prejudice against the petitioner on the part of the judge. Johnson v. District Court, 674 P.2d 952 (Colo. 1984).

Judge should have disqualified herself when she allowed marked personal feelings toward the contempt defendant to affect her judgment in the proceedings and after she referred the case to the district attorney for potential criminal prosecution. In re Estate of Elliott, 993 P.2d 474 (Colo. 2000).

Judge's Catholic faith insufficient to support a reasonable inference that he was biased and should recuse himself from case under this rule. A judge's particular religious affiliation, even though the same as that of the father in dissolution of marriage case and of the special advocate, did not create sufficient appearance of bias or bent of mind to require recusal. In re McSoud, 131 P.3d 1208 (Colo. App. 2006).

Appearance of impropriety was created by administrative adjudicator's position as a direct adversary of complainant's counsel in a similar, previous personnel matter. Thus, it was an abuse of discretion for board to allow administrative adjudicator to sit in on case. Venard v. Dept. of Corr., 72 P.3d 446 (Colo. App. 2003).

No appearance of impropriety was found and trial court's decision not to grant relief from summary judgment was proper. Giralt v. Vail Village Inn Assocs., 759 P.2d 801 (Colo. App. 1988), cert. denied, 488 U.S. 1042, 109 S. Ct. 868, 102 L. Ed. 2d 991 (1989).

Affidavit insufficient. Litinsky v. Querard, 683 P.2d 816 (Colo. App. 1984).

Refusal of judge to disqualify himself was error. Geer v. Hall, 138 Colo. 384, 333 P.2d 1040 (1959).

For actions of judge effectively disqualifying himself from case, see Beckord v. District Court, 698 P.2d 1323 (Colo. 1985).

Refusal of judge to disqualify himself was error where judge's ex parte communication with party significantly involved in provision of health care services to mentally ill, an issue of critical significance to judge's ultimate ruling on adequacy of state's remedial plan. Goebel v. Benton, 830 P.2d 995 (Colo. 1992).

The fact that the defendant had brought a civil action against the judge complaining of judicial conduct and defendant's conclusory statements that the judge was biased were insufficient to show that recusal was required. Moody v. Corsentino, 843 P.2d 1355 (Colo. 1993).

Legal rulings against a party on issues appropriately before the judge are not grounds for recusal, nor does the judge's direction to the clerk not to accept fax filings from the party support a reasonable inference of bias. Holland v. Bd. of County Comm'rs, 883 P.2d 500 (Colo. App. 1994).

Imposition of discovery sanctions did not indicate bias where issues were appropriately before the judge and findings were based on the motions filed and the arguments of counsel. M Life Ins. Co. v. Sapers & Wallack Ins. Agency, Inc., 40 P.3d 3 (Colo. App. 2001).

Trial court judge erred by determining the relationship between his court clerk and the witness did not warrant judge's recusal. Where court clerk's daughter, as caseworker, was material witness in the case, absent waiver, judge abused his discretion by not recusing from the case. Judge's relationship with clerk and her relationship to witness created the appearance of impropriety. People ex rel. A.G., 264 P.3d 615 (Colo. App. 2010), rev'd on other grounds, 262 P.3d 646 (Colo. 2011).

Rule 98. Place of Trial

(a) Venue for Real Property, Franchises, and Utilities. All actions affecting real property, franchises, or utilities shall be tried in the county in which the subject of the action, or a substantial part thereof, is situated.

(b) Venue for Recovery of Penalty, etc. Actions upon the following claims shall be tried in the county where the claim, or some part thereof, arose:

(1) For the recovery of a penalty or forfeiture imposed by statute, except that when it is imposed for an offense committed on a lake, river, or other stream of water, situated in two or more counties, the action may be brought in any county bordering on such lake, river, or stream and opposite the place where the offense was committed;

(2) Against a public officer or person specially appointed to execute his duties, for an act done by him in virtue of his office, or against a person who by his command, or in his aid, does anything touching the duties of such officer, or for a failure to perform any act or duty which he is by law required to perform.

(c) Venue for Tort, Contract, and Other Actions. (1) Except as provided in

sections (a), (b), and (c)(2) through (6) of this Rule, an action shall be tried in the county in which the defendants, or any of them, may reside at the commencement of the action, or in the county where the plaintiff resides when service is made on the defendant in such county; or if the defendant is a nonresident of this state, the same may be tried in any county in which the defendant may be found in this state, or in the county designated in the complaint, and if any defendant is about to depart from the state, such action may be tried in any county where plaintiff resides, or where defendant may be found and service had.

(2) Except as provided in subsection (3) of this section, an action on book account or for goods sold and delivered may also be tried in the county where the plaintiff resides or where the goods were sold; an action upon contract may also be tried in the county where the same was to be performed.

(3) (A) For the purposes of this Rule, a consumer contract is any sale, lease, or loan in which (i) the buyer, lessee, or debtor is a person other than an organization; (ii) the goods are purchased or leased, the services are obtained, or the debt is incurred, primarily for a personal, family, or household purpose; and (iii) the initial amount due under the contract, the total amount initially payable under the lease, or the initial principal does not exceed twenty-five thousand dollars.

(B) An action on a consumer contract shall be tried (i) in the county in which the contract was signed or entered into by any defendant; or (ii) in the county in which any defendant resided at the time the contract was entered into; or (iii) in the county in which any defendant resides at the time the action is commenced. If the defendant is a nonresident of this state, the same may be tried in any county in which the defendant may be found in this state, or in the county designated in the complaint, and if any defendant is about to depart from the state, such action may be tried in any county where plaintiff resides, or where defendant may be found and service had.

(C) In any action on a consumer contract if the plaintiff fails to state facts in the complaint or by affidavit showing that the action has been commenced in the proper county as described in this Rule, or if it appears from the stated facts that venue is improper, the court may, upon its own motion or upon motion of any party, dismiss any such action without prejudice; however, if appropriate facts appear in the record, the court shall transfer the action to an appropriate county. Any provision or authorization in any consumer contract purporting to waive any rights under subsection (3) of section (c) of this Rule is void.

(D) Any debt collector covered by the provisions of the Federal "Fair Debt Collection Practices Act" shall comply with the provisions of said Act set forth in 15 U.S.C. 1692(i) concerning legal actions by debt collectors, notwithstanding any provision of this Rule.

(4) An action upon a contract for services may also be tried in the county in which the services were to be performed.

(5) An action for tort may also be tried in the county where the tort was committed.

(6) An action in interpleader may also be tried in any county where a claimant resides.

(d) **Venue for Injunction to Stay Proceedings.** When any injunction shall be granted to stay a suit or judgment, the proceeding shall be had in the county where the judgment was obtained or the suit is pending.

(e) **Motion to Change Venue; When Presented; Waiver; Effect of Filing.** (1) Except for actions under section (c)(3), (f)(2), or (g) of this Rule, a motion to change venue shall be filed within the time permitted for the filing of motions under the defenses numbered (1) to (4) of section (b) of Rule 12, and if any such motion, or any other motion permitted by Rule 12, is filed within said time, simultaneously therewith. Unless so filed, the right to have venue changed is waived. A motion under sections (c)(3), (f)(2), or (g) of this Rule, shall be filed prior to the time a case is set for trial, or the right to have venue changed on said grounds is waived, unless the court, in its discretion, upon motion filed or of its own motion, finds that a change of venue should be ordered.

(2) If a motion to change venue is filed within the time permitted by section (a) of Rule 12 for the filing of a motion under the defenses numbered (1) to (4) of section (b) of Rule 12, the filing of such motion by a party under the provisions of subsection (1) of this section (e) alters his time to file his responsive pleading as follows: If the motion is overruled the responsive pleading shall be filed within 14 days thereafter unless a different

time is fixed by the court, and if it is allowed the responsive pleading shall be filed within 14 days after the action has been docketed in the court to which the action is removed unless that court fixes a different time.

(3) Except as otherwise provided in an order allowing a motion to change venue, earlier ex parte and other orders affecting an action, or the parties thereto, shall remain in effect, subject to change or modification by order of the court to which the action is removed.

(f) Causes of Change. The court may, on good cause shown, change the place of trial in the following cases: (1) When the county designated in the complaint is not the proper county; (2) When the convenience of witnesses and the ends of justice would be promoted by the change.

(g) Change from County. If either party fears that he will not receive a fair trial in the county in which the action is pending, because the adverse party has an undue influence over the minds of the inhabitants thereof, or that they are prejudiced against him so that he cannot expect a fair trial, he may file a motion supported by an affidavit for a change of venue. The opposite party may file a counter motion and affidavit. If the motion is sustained the venue shall be changed.

(h) Transfers Where Concurrent Jurisdiction. All actions or proceedings in which district and county courts have concurrent jurisdiction, may, by stipulation of the parties and order of the court, be transferred by either court to such other court of the same county. Upon transfer, the court to which such cause is removed shall have and exercise the same jurisdiction as if originally commenced therein.

(i) Place Changed if All Parties Agree. When all parties assent, or when all parties who have entered their appearance assent and the remaining nonappearing parties are in default, the place of trial of an action in a district court may be changed to any other county in the district. The judgment entered therein, if any, shall be transmitted to the clerk of the district court of the original county for filing and recording in his office.

(j) Parties Must Agree on Change. Where there are two or more plaintiffs or defendants, the place of trial shall not be changed unless the motion is made by or with the consent of all the plaintiffs or defendants, as the case may be.

(k) Only One Change; No Waiver. In case the place of trial is changed the party securing the same shall not be permitted to apply for another change upon the same ground. A party does not waive his right to change of judge or place of trial if his objection thereto is made in apt time.

Source: (e)(2) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Cross references: For change of venue in criminal cases, see Crim. P. 21; for change of judge, see C.R.C.P. 97; for transfer of venue of multiple proceedings under the "Colorado Probate Code", see § 15-10-303, C.R.S.; for types of pleadings, see C.R.C.P. 7(a).

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For an article on change of venue in actions involving performance of contracts, see 16 Dicta 13 (1939). For article, "Rules Committee Proposes Changes in Civil Procedure", see 21 Dicta 159 (1944). For article, "Notes on Proposed Amendments to Colorado Rules of Civil Procedure", see 27 Dicta 165 (1950). For article, "Amendments to the Colorado Rules of Civil Procedure", see 28 Dicta 242 (1951). For article, "One Year Review of Civil Procedure and Appeals", see 38 Dicta 133 (1961). For article, "One Year Review of Civil Procedure and Appeals", see 40 Den. L. Ctr. J. 66 (1963). For note, "One Year Review of Civil Procedure", see 41 Den. L. Ctr. J. 67 (1964).

This rule determines place of trial or venue in courts of record of general jurisdiction. Slinkard v. Jordan, 131 Colo. 144, 279 P.2d 1054 (1955).

Statute fixing place where an action must be brought does not control place of trial. People ex rel. Bear Creek Dev. Corp. v. District Court, 78 Colo. 526, 242 P. 997 (1925) (decided under § 25 et seq. of the former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941).

Bringing an action and trying it are two different matters. People ex rel. Bear Creek Dev. Corp. v. District Court, 78 Colo. 526, 242 P. 997 (1925); Caldwell v. District Court, 128 Colo. 498, 266 P.2d 771 (1953).

Where a statutory remedy provides for a jury trial and there are no change of venue provisions provided for in that statute, then the procedure to obtain a change of venue is governed by this rule of civil procedure. Brisbin v. Schauer, 176 Colo. 550, 492 P.2d 835 (1971).

The substance, not the form, of the action must control in ascertaining the proper venue. Jameson v. District Court, 115 Colo. 298, 172 P.2d 449 (1946).

In ascertaining the venue of an injunctive proceeding, the court should probe for the primary purpose of the suit. City & County of Denver v. Glendale Water & San. Dist., 152 Colo. 39, 380 P.2d 553 (1963).

Dismissal on basis of forum non conveniens limited. The power of a Colorado court to dismiss an action on the basis of forum non conveniens is severely limited. State Dept. of Hwys. v. District Court, 635 P.2d 889 (Colo. 1981).

Change of venue absent affidavit or hearing is abuse of discretion. The court abused its discretion when it ordered a change of venue in the absence of a supporting affidavit or an evidentiary hearing. Ranger Ins. Co. v. District Court, 647 P.2d 1229 (Colo. 1982).

Improper venue not a jurisdictional defect which can be raised for the first time on appeal. Where trial court made an express finding of proper venue and defendant did not contest venue at trial, appellate court refused to reverse on grounds of improper venue. Sisneros v. First Nat. Bank of Denver, 689 P.2d 1178 (Colo. App. 1984).

Denying such change of venue because remedy is sought pursuant to "habeas corpus" is incorrect. A trial court incorrectly bases its denial of a motion for change of venue on the belief that a change of venue is not available because the remedy sought arises pursuant to a writ of "habeas corpus". Brisbin v. Schauer, 176 Colo. 550, 492 P.2d 835 (1971).

This rule governs venue in habeas corpus proceedings. Evans v. District Court, 194 Colo. 299, 572 P.2d 811 (1977).

This rule does not apply to workers' compensation division-sponsored independent medical examination proceedings. Kennedy v. Indus. Claim Appeals Office, 100 P.3d 949 (Colo. App. 2004).

Venue subservient to jurisdiction, so trial court not deprived of subject matter jurisdiction by purported transfer to a foreign nation of an action involving property located in that nation. Sanctuary House, Inc. v. Krause, 177 P.3d 1256 (Colo. 2008).

Applied in In re Femmer, 39 Colo. App. 277, 568 P.2d 81 (1977); Gonzales v. District Court, 629 P.2d 1074 (Colo. 1981); In re U.M. v. District Court, 631 P.2d 165 (Colo. 1981); First Nat'l Bank v. District Court, 653 P.2d 1123 (Colo. 1982); Hollemon v. Murray, 666 P.2d 1107 (Colo. App. 1982).

II. VENUE FOR PROPERTY, FRANCHISES, AND UTILITIES.

Annotator's note. Since section (a) of this rule is similar to § 26 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

The substance of the action, not the form, controls in determining the question of venue under section (a). Colo. Nat'l Bank v. District Court, 189 Colo. 522, 542 P.2d 853 (1975); Bd. of County Comm'rs v. District Court, 632 P.2d 1017 (Colo. 1981).

This section deals with a specified class of cases. Welborn v. Bucci, 95 Colo. 478, 37 P.2d 399 (1934).

Form of relief not determinative. Although the complaint prayed for a variety of relief, both legal and equitable, where the substance of the action directly affected the ownership of a ranch and sought to have declared the respective rights and interests of the petitioners and respondent in the ranch, the action should be tried where the ranch is located. Colo. Nat'l Bank v.

District Court, 189 Colo. 522, 542 P.2d 853 (1975).

Action in personam is not an action dealing with property within the contemplation of section (a) of this rule. Denver Bd. of Water Comm'rs v. Bd. of County Comm'rs, 187 Colo. 113, 528 P.2d 1305 (1974); Bd. of County Comm'rs v. District Court, 632 P.2d 1017 (Colo. 1981).

Its provisions are subject to the power of the court to change the place of trial as elsewhere provided. Denver & R. G. R. R. v. Cahill, 8 Colo. App. 158, 45 P. 285 (1896).

It has reference exclusively to actions in rem, where specific property is to be directly affected. Kirby v. Union Pac. Ry., 51 Colo. 509, 119 P. 1042, 1913B Ann. Cas. 461 (1911).

This provision is applicable to county courts as well as to district courts. Fletcher v. Stowell, 17 Colo. 94, 28 P. 326 (1891).

This provision is not restricted to real property. Jameson v. District Court, 115 Colo. 298, 172 P.2d 449 (1946).

It concerns actions affecting specific property and does not control in an action in which there is no issue as to title, lien, injury, quality, or possession, but which is concerned only with recovery of the purchase price. Craft v. Stumpf, 115 Colo. 181, 170 P.2d 779 (1946).

Language of this section is mandatory. Insofar as the designation of the venue is concerned, the language used in this section is mandatory. Pearse v. Bordeleau, 3 Colo. App. 351, 33 P. 140 (1893).

The word "affect", as used in this rule, is as broad a term as "to determine a right or interest in". Jameson v. District Court, 115 Colo. 298, 172 P.2d 449 (1946).

An action does not "affect" a utility under this section when the defendants are being sued, not as a utility, but in their proprietary or quasi-private capacities as parties to a contract; as such, petitioners are not entitled to relief under this section. City of Cripple Creek v. Johns, 177 Colo. 443, 494 P.2d 823 (1972).

This section deals with the situation where the lawsuit directly affects the construction or operation of the utility itself. City of Cripple Creek v. Johns, 177 Colo. 443, 494 P.2d 823 (1972).

Rule eliminates issue of where greater portion of property is found. Since an action may be brought in the county where a substantial portion of the property is located, the difficult question of where the greater portion of franchise is located is eliminated. People ex rel. City & County of Denver v. District Court, 80 Colo. 538, 253 P. 24 (1927).

Section applies to municipal corporations. The fact that defendant irrigation district happens to be a quasi-municipal or municipal corporation cannot abrogate the provision of this section as to venue. Bd. of County Comm'rs v. Bd. of County Comm'rs, 3 Colo. App. 137, 32 P. 346 (1893); Bd. of County Comm'rs v. Bd. of County Comm'rs, 2 Colo. App. 412, 31 P. 183 (1892); North Sterling Irrigation Dist. v. Dickman, 66 Colo. 8, 178 P. 559 (1919).

Section 36-1-128, concerning venue for suits by the state board of land commissioners, does not conflict with this rule requiring all actions affecting property to be tried in the county in which the subject of the action or a substantial part thereof is situated. Dallas v. Fitzsimmons, 137 Colo. 196, 323 P.2d 274 (1958).

Section controls an action against an irrigation district. An action for an injury to lands by seepage from the ditch of an irrigation district is properly brought in the county in which the lands are situated. North Sterling Irrigation Dist. v. Dickman, 66 Colo. 8, 178 P. 559 (1919).

A sanitation district is a municipal utility, and being such, it should be sued in the county in which it was located. City & County of Denver v. Glendale Water & San. Dist., 152 Colo. 39, 380 P.2d 553 (1963).

Section contrives an action to cancel real estate mortgage. An action to cancel a real estate mortgage indemnifying a surety against loss on a contractor's bond, under this provision, was triable in the county where the property was situated, although the responsibility of the contractor was a question to be determined in another county. Allen v. Sterling, 76 Colo. 122, 230 P. 113 (1924).

An action to terminate lease and recover possession of real estate, upon the ground that covenants of the lease have been violated, is an action "affecting" real estate and is properly brought in the county in which the said real estate is located. Gordon Inv. Co. v. Jones, 123 Colo. 253, 227 P.2d 336 (1951).

Claim to quiet title to property. The proper venue for the claim to quiet the title to the property was laid in the county where it is located. Twin Lakes Reservoir & Canal Co. v. Bond, 156 Colo. 433, 399 P.2d 793 (1965).

Actions to determine county boundaries. The venue of an action to determine county boundaries is controlled by this section. People ex rel. Bd. of Comm'rs v. District Court, 66 Colo. 40, 179 P. 875 (1919).

Action on land use regulation not within scope of section (a). Where the relief sought is directed to the validity of county land use regulations and there is no issue as to title, lien, injury, quality or possession, property is not affected within the meaning of section (a). Bd. of County Comm'rs v. District Court, 632 P.2d 1017 (Colo. 1981).

In case when requested relief is directed to the validity and operative effect of H.B. 1041 land use regulations passed by county, there is no issue as to the title, lien, injury, quality, or possession of the property, franchises, or

utilities within the meaning of section (a). Controlling venue issue turns on the residence of the governmental body that adopted the challenged land use regulations. Here, Pueblo county board passed the amended regulations in its official capacity, and the regulations address facilities planned to be located in Pueblo county and impacts that may occur there. That the city's planning for project features and water delivery in El Paso county may ultimately be impacted by such regulation does not mandate venue in El Paso county district court. Substance of city's complaint addresses the validity and enforceability of the Pueblo county board's adoption of the challenged H.B. 1041 regulation. Thus, venue is proper only in the Pueblo county district court under section (b)(2). City of Colo. Springs v. Bd. of County Comm'rs, 147 P.3d 1 (Colo. 2006).

Likewise actions concerning water rights. An action to quiet title to a water right is triable in the county in which the water right is situated. People ex rel. City & County of Denver v. District Court, 80 Colo. 538, 253 P. 24 (1927).

A water right can be said to be "situated" under this section only at the point of diversion or at the place of use. Field v. Kincaid, 67 Colo. 20, 184 P. 832 (1919).

Actions for injury due to flooding. In view of this provision, an action for damages resulting from flooding plaintiff's land is triable in the county in which the subject of the action is situated. Twin Lakes Reservoir & Canal Co. v. Sill, 104 Colo. 215, 89 P.2d 1012 (1939).

An action to rescind a contract to sell timber is in substance an action to determine title to the timber, and thus must be tried in the county in which the timber or a substantial part of it is located. Jameson v. District Court, 115 Colo. 298, 172 P.2d 449 (1946).

Transitory, in personam actions are not subject to this section. This section does not apply to an action to restrain interference with the business of a railway company by unlawfully dealing in its nontransferable tickets. Such an action is a transitory action in personam. Kirby v. Union Pac. Ry., 51 Colo. 509, 119 P. 1042 (1911).

Railroad tickets do not have the characteristics of property as that term is used in this subdivision. At most a railroad ticket is mere evidence of a contract, a mere token to show that the person properly in possession of it has paid his fare. Kirby v. Union Pac. Ry., 51 Colo. 509, 119 P. 1042 (1911).

This section does not apply to an action on an oral contract for leasing sheep. This section dealing with specified classes of cases does not apply to an action on an oral contract for the leasing of sheep. Welborn v. Bucci, 95 Colo. 478, 37 P.2d 399 (1934).

Section not applicable to foreclosure proceedings. There is no requirement that foreclosure proceedings be filed in the county where the property affected is located. Hastings v. Security Thrift & Mtg. Co., 145 Colo. 36, 357 P.2d 919 (1960).

An action to recover the reasonable value of furniture, fixtures, and equipment of a restaurant and liquor sales business sold to defendant was not an action affecting property within section (a) of this rule. Craft v. Stumpf, 115 Colo. 181, 170 P.2d 779 (1946).

A dissolution of marriage action is not an action "affecting real property, franchises, or utilities" within the meaning of section (a). Brownell v. District Court ex rel. County of Larimer, 670 P.2d 762 (Colo. 1983).

Where defendants made no showing that ownership of land was disputed and did not seek any remedies pertaining directly to the property, the action was not an action "affecting real property". Sanctuary House, Inc. v. Krause, 177 P.3d 1256 (Colo. 2008).

III. VENUE FOR RECOVERY OF PENALTY.

Annotator's note. Since section (b) of this rule is similar to § 28 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

This section deals with a specified class of cases. Welborn v. Bucci, 95 Colo. 478, 37 P.2d 399 (1934).

Its provisions are subject to the power of the court to change the place of trial as elsewhere provided. Denver & R. G. R. R. v. Cahill, 8 Colo. App. 158, 45 P. 285 (1896).

Consent of all defendants is not required for a motion to change venue under section (b)(2). 7 Utes v. District Court, 702 P.2d 262 (Colo. 1985).

An action to recover a penalty, whether it be one ex contractu or ex delicto, comes under the provisions of this section. Woodworth v. Henderson, 28 Colo. 381, 65 P. 25 (1901).

Claims for injunctive relief against public officers arise, within the meaning of section (b) of this rule, in the county in which the public body has its official residence and from which any action by the board pursuant to the injunction must emanate. Denver Bd. of Water Comm'rs v. Bd. of County Comm'rs, 187 Colo. 113, 528 P.2d 1305 (1974).

The mere fact that public officers were named defendants, does not constitute an action against public officers within the meaning of section (b)(2). 7 Utes v. District Court, 702 P.2d 262 (Colo. 1985).

Section (b)(2) controls venue for all actions against public officers for acts done or the failure to perform acts in public office. Execu-

tive Dir. v. District Ct. for Boulder County, 923 P.2d 885 (Colo. 1996).

The language of section (b)(2) indicates that it is the official act, or failure to act, by the public officer that gives rise to the cause of action and establishes venue. Executive Dir. v. District Ct. for Boulder County, 923 P.2d 885 (Colo. 1996).

An action to set aside an order of a public official is sufficiently similar to an action for injunctive relief against public officers to be governed by the same venue rules. Farmers Cafe v. State Dept. of Rev., 752 P.2d 1064 (Colo. App. 1988).

"Some part" of plaintiffs' 42 U.S.C. § 1983 claim against public officers in Fremont county did not arise in Boulder county by virtue of plaintiffs' phone call from Boulder county, where the basis of plaintiffs' claim was that such public officers deprived plaintiffs by refusing visitation of prisoners at the department of corrections facility in Fremont county, not the visitation arrangement itself. It was the DOC's refusal in Fremont county to allow visitation that gave rise to the plaintiffs' claim and establishes venue in this case. Executive Dir. v. District Ct. for Boulder County, 923 P.2d 885 (Colo. 1996).

Section 18-4-405 establishes a statutory penalty requiring the case to be tried in the county where the claim arose. Ehrlich Feedlot, Inc. v. Oldenburg, 140 P.3d 265 (Colo. App. 2006).

An action to recover damages for personal injury is not an action to recover a penalty. An action to recover damages for personal injuries is not to recover a penalty simply because punitive damages were asked and awarded. Such an action is to recover compensatory damages; exemplary damages are only an incident, not the basis, of the cause of action. Robbins v. McAlister, 91 Colo. 505, 16 P.2d 431 (1932).

In case involving determination of proper venue for lawsuit concerning validity of H.B. 1041 land use regulations passed by county, venue is proper under section (b)(2) where the actions of the governing board giving rise to the dispute took place. Regardless of the potential impact outside the county, a claim involving the validity and effectiveness of regulations passed by a governing board must be heard in the county where the board acted to pass those regulations. Controlling venue issue turns on the residence of the governmental body that adopted the challenged land use regulations. Here, substance of city's complaint is directed at the official actions of the Pueblo county board, and the primary purpose of the lawsuit is to determine the validity of those actions as they apply to the city's water supply and storage project. Because issue here is the validity and enforceability of land use regulations adopted by Pueblo county board, venue is proper in Pueblo county where challenged official actions occurred. City of Colo. Springs v. Bd. of County Comm'rs, 147 P.3d 1 (Colo. 2006).

IV. VENUE FOR TORT, CONTRACT, AND OTHER ACTIONS.

A. In General.

Annotator's note. Since section (c) of this rule is similar to § 29 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Purpose of section. The general assembly by these provisions intended to limit the right to bring actions in any court having competent jurisdiction and imposed a limitation as to the forum in which the action should be commenced. People ex rel. Lackey v. District Court, 30 Colo. 123, 69 P. 597 (1902).

The first sentence of this section is construed as a general rule, which is modified in particular instances by the succeeding sentences. Brewer v. Gordon, 27 Colo. 111, 59 P. 404 (1899).

General rule. The general rule is that personal actions, such as actions for breach of warranty, shall be tried in the county in which the defendants, or any of them, reside at the time of the commencement of the action, or in the county where plaintiff resides when service is made on the defendant in such county, unless the case is brought within some of the exceptions of this section. Lamar Alfalfa Milling Co. v. Bishop, 80 Colo. 369, 250 P. 689 (1926).

Section (c) applies only if sections (a) and (b) are not controlling. Denver Bd. of Water Comm'rs v. Bd. of County Comm'rs, 187 Colo. 113, 528 P.2d 1305 (1974).

Section (c)(1) does not apply to motions made under subsection (b)(2). 7 Utes v. District Court, 702 P.2d 262 (Colo. 1985).

Section provides more than one proper county. The counties designated in the first sentence of this section are proper counties for the trial of all cases except those enumerated in the two preceding sections; but where the action is for goods sold and delivered, or upon a contract, or upon a note or bill of exchange, or for a tort, the county where the goods were sold, or the contract was to be performed, or the bill of exchange was made payable, or the tort was committed, is also a proper county for trial. Denver & R. G. R. R. v. Cahill, 8 Colo. App. 158, 45 P. 285 (1896).

Where trial may be lawfully had in either of two counties under this section, the selection rests with the plaintiff. Welborn v. Bucci, 95 Colo. 478, 37 P.2d 399 (1934).

Nonresidence of defendant is no objection to court's jurisdiction. Nonresidence of the defendant within the territorial jurisdiction of the court is no objection to the jurisdiction of the court of the cause, if actual jurisdiction of the person of such defendant is obtained by service of process within the territorial jurisdiction of such courts. Weiner v. Rumble, 11 Colo. 607, 19 P. 760 (1888).

Nonresident may be sued in county designated by complaint. In a suit for breach of contract, where the defendant is a nonresident, the proper county in which to institute the action is that "designated in the complaint". Great Am. Ins. Co. v. Scott, 89 Colo. 99, 299 P. 1051 (1931).

Where the defendant is a nonresident of Colorado, the action may be tried in the county designated in the complaint. International Serv. Ins. Co. v. Ross, 169 Colo. 451, 457 P.2d 917 (1969).

Once the district court determined that a change of venue was warranted under subsection (c), it has no jurisdiction over the cause of action except to order the change of venue. Millet v. District Court of El Paso County, 951 P.2d 476 (Colo. 1998).

Applied in City & County of Denver v. Glendale Water & San. Dist., 152 Colo. 39, 380 P.2d 553 (1963).

B. Actions on Contracts.

General rule. Actions on contracts are triable in the county in which the defendants or any of them reside at the commencement of the action, or in the county where the plaintiff resides, when service is had on the defendants in such county, or in the county where the contract is to be performed. Coulter v. Bank of Clear Creek County, 18 Colo. App. 444, 72 P. 602 (1903).

Contract action relating to real property. A contract action, seeking only damages and not claiming title to any property, is properly brought in Colorado even though the real property involved is located in Kansas. Centennial Petroleum, Inc. v. Carter, 529 F. Supp. 563 (D. Colo. 1982).

Action may be tried in county where contract is to be performed. One of the exceptions to the general rule of place of trial is that actions on contracts may be tried in the county in which the contract is to be performed, where by its terms it is to be performed at a particular place. Lamar Alfalfa Milling Co. v. Bishop, 80 Colo. 369, 250 P. 689 (1926).

This exception applies only where the contract is, by express terms, to be performed at a certain place. People ex rel. Bd. of Dirs. of Sch. Dist. No. 1 v. District Court, 66 Colo. 330, 182 P. 7 (1919); People ex rel. Tripp v. Fremont County Court, 72 Colo. 395, 211 P. 102 (1922).

The words in this section, "the county in which the contract was to be performed", refer to contracts which by their terms are to be performed at a particular place. Lamar Alfalfa Milling Co. v. Bishop, 80 Colo. 369, 250 P. 689 (1926); Kimberlin v. Rutliff, 93 Colo. 99, 23 P.2d 583 (1933).

Where a contract is silent as to place of performance the provision relative to the right of trial in the county where the contract is to be performed is not applicable. People ex rel. Burton v. District Court, 74 Colo. 121, 218 P. 1047 (1923); Kimberlin v. Rutliff, 93 Colo. 99, 23 P.2d 583 (1933).

Where there is no place of performance expressed in a contract, no change of venue can be granted on that ground. Enyart v. Orr, 78 Colo. 6, 238 P. 29 (1925).

Contract did not specify place of performance. The fact that a contract of guaranty was executed and dated in the county where suit was brought upon it does not make it a contract to be performed in that county so as to deprive the defendants of the right to remove the cause for trial to the county of their residence. Smith v. Post Printing & Publishing Co., 17 Colo. App. 238, 68 P. 119 (1902).

An indemnity bond given to a sheriff to indemnify him against damage for seizing personal property under a writ of attachment, which contains no provision making it payable in any particular county, is not a contract to be performed in the county wherein the attachment is levied within the meaning of this section providing that actions upon contracts may be tried in the county in which the contract was to be performed. Brewer v. Gordon, 27 Colo. 111, 59 P. 404 (1899).

Where place of performance of contract was changed by assignment of promissory note to California company, and payer was directed to mail its payments to San Diego rather than to Denver as originally stated in the note, venue was not proper in Denver. Trial court should have transferred case to Boulder county, where defendants resided. Resolution Trust Corp. v. Parker, 824 P.2d 102 (Colo. App. 1991).

The place where a cause of action for a breach of contract arises is generally — almost universally — the place where the contract is to be performed. Grimes Co. v. Nelson, 94 Colo. 487, 31 P.2d 488 (1934).

In determining the place of trial of an action for breach of warranty the question is, where were defendants required to perform the things they were to do under the contract. What plaintiff was to do, is not in the case. Lamar Alfalfa Milling Co. v. Bishop, 80 Colo. 369, 250 P. 689 (1926).

Action may be brought in county of defendant's residence. Personal actions on contracts which are silent as to place of performance, are triable in the county of defendant's residence.

Kimberlin v. Rutliff, 93 Colo. 99, 23 P.2d 583 (1933).

In an action on contract, no place of performance being expressly specified, the action should be tried in the county where defendant resides unless the case is brought within some of the exceptions of the rule. People ex rel. Burton v. District Court, 74 Colo. 121, 218 P. 1047 (1923).

Where the terms of the contract were not sufficient to indicate an intent to perform in the county of the plaintiff's residence the defendant was entitled to change of venue to its place of residence. Maxwell-Chamberlain Motor Co. v. Piatt, 65 Colo. 140, 173 P. 867 (1918).

An action upon a contract against a school district must be tried in the county of that district, unless the case is within one of the exceptions provided for in this section. People ex rel. Bd. of Dirs. of Sch. Dist. No. 1 v. District Court, 66 Colo. 330, 182 P. 7 (1919).

An action for breach of contract, which is silent as to the place of performance, must be regarded as a personal one and triable in the county of defendant's residence. Cliff v. Gleason, 142 Colo. 500, 351 P.2d 394 (1960).

Where it was sufficiently shown that the county in which the action was brought was the county in which the contract was to be performed, and was therefore the proper county for trial, the motion for change was correctly denied. Coulter v. Bank of Clear Creek County, 18 Colo. App. 444, 72 P. 602 (1903).

Generally, unless service is made in the county of plaintiff's residence, trial shall be in the county of defendant's residence. Regardless of residence and place of service, actions upon contract may be tried in the county in which the contract is to be performed. Grimes Co. v. Nelson, 94 Colo. 487, 31 P.2d 488 (1934); E. F. Gobatti Eng'r & Mach. Corp. v. Oliver Well Works, Inc., 111 Colo. 193, 139 P.2d 269 (1943).

Where, under the terms of an agency contract, plaintiff was required to and did confine his business activities within the limits of a specified county, his action was properly instituted in such county, and there was no error in the refusal of the court to change the venue to another county wherein the principal maintained its offices and where it was served with summons. Navy Gas & Supply Co. v. Schoech, 105 Colo. 374, 98 P.2d 860 (1940).

This rule permits actions on contract to be tried in the county where the contract is to be performed. Cliff v. Gleason, 142 Colo. 500, 351 P.2d 394 (1960).

Where a contract is entered into, and payment of the fee is to be made in Denver, the action is properly tried in Denver. Bamford v. Cope, 31 Colo. App. 161, 499 P.2d 639 (1972).

Under this section an action upon contract may be instituted and prosecuted in the county where the contract was to be performed. Even though defendant resides in another county he is not entitled to a change of venue. Gould v. Mathes, 55 Colo. 384, 135 P. 780 (1913).

This section does not make the trial mandatory in the county where the contract is to be performed. City of Cripple Creek v. Johns, 177 Colo. 443, 494 P.2d 823 (1972).

Rather, it merely makes such venue permissive by providing that the action may also be tried in the county in which the contract is to be performed at the election of the plaintiff. City of Cripple Creek v. Johns, 177 Colo. 443, 494 P.2d 823 (1972).

An action for breach of contract in which there are several defendants is properly brought in the county where one such defendant resides. City of Cripple Creek v. Johns, 177 Colo. 443, 494 P.2d 823 (1972).

Debt presumed payable where creditor resides. In an action on contract for the payment of money advanced by a bank, no other place of payment being stipulated, the debt is presumed to be payable at the bank, and the action was properly brought in the county of the creditor's residence under this section. People ex rel. Columbine Mercantile Co. v. District Court, 70 Colo. 540, 203 P. 268 (1921); Chutkow v. Wagman Realty & Ins. Co., 80 Colo. 11, 248 P. 1014 (1926).

Where the contract is silent as to the place of payment, the debtor is obliged to seek the creditor in the county of residence and his usual place of business or abode and make payment there. Unless an insurance policy contains a provision definitely fixing the place of payment elsewhere, the county of plaintiff's residence is a proper place for the trial of an action to collect thereon. Progressive Mut. Ins. Co. v. Mihoover, 87 Colo. 64, 284 P. 1025 (1930).

A breach of the contract does not abrogate this section as to the place of trial of an action thereon, nor spell anything as to what the contract says as to place of performance. Lamar Alfalfa Milling Co. v. Bishop, 80 Colo. 369, 250 P. 689 (1926).

Signers of bond must be sued in county of their residence where bond is silent as to place of payment. The signers of a bond must be sued in the county of their residence, or where some of them reside, unless the bond itself specifically provides that the place of performance is elsewhere. Brewer v. Gordon, 27 Colo. 111, 59 P. 404 (1899).

C. Tort Actions.

The general rule is that personal actions may be tried in either the county in which the defendant resides, or any of them reside, or in the county where the plaintiff resides when service is made on the defendant's in

such county. Denver Air Center v. District Court, 839 P.2d 1182 (Colo. 1992).

Venue requirements must be satisfied for all defendants where the defendants did not act in concert or engage in the same tortious act. Spencer v. Sytsma, 67 P.3d 1 (Colo. 2003).

Rule authorizes prosecution of action in county in which defendant has its principle place of business and in which it was served with process. Combined Com. Corp. v. Pub. Serv. Co., 865 P.2d 893 (Colo. App. 1993).

Section provides equally proper counties. In an action for a tort, the county where the defendant resides, and the county where the plaintiff resides and the defendant is served, and the county where the tort was committed, are equally proper counties for trial; and if the action is commenced in any one of those counties, the place of trial cannot be changed on the ground that the county designated is not the proper county. Denver & R. G. R. R. v. Cahill, 8 Colo. App. 158, 45 P. 285 (1896); Carlson v. Rensink, 65 Colo. 11, 173 P. 542 (1918).

Plaintiff must bring case within exception for place of tort to prevent change to defendant's residence. In an action for tort brought against a defendant in another county where the summons was served in the county in which defendant lived, it was incumbent upon plaintiff in resisting a motion for a change of venue to bring the case within the exception to this section that actions for torts can be brought in the county in which the tort was committed. Byram v. Piggot, 38 Colo. 70, 89 P. 809 (1906).

Where an action was brought in Logan county by a resident of that county against a resident of Weld county to recover damages for a tort committed in Morgan county, with service of summons in Logan county, a motion for change of place of trial from Logan county to Weld county was properly denied. Robbins v. McAlister, 91 Colo. 505, 16 P.2d 431 (1932).

Exemplary damages have no bearing upon question of venue. Where a plaintiff asks for both compensatory and exemplary damages in a tort action, exemplary damages is only an incident, not the basis, of the cause of action, and has no bearing upon the question of venue. Robbins v. McAlister, 91 Colo. 505, 16 P.2d 431 (1932).

Action for breach of warranty. In an action for the breach of the warranty where fraudulent misrepresentations inducing purchase were alleged and plaintiffs resided in Lincoln county, the action was properly brought in Lincoln county, both because that was the county where the contract was to be performed, and because of the character of the action as one of tort; and defendant was not entitled as of right to change the venue to the county of its residence. Denver Horse Importing Co. v. Schafer, 58 Colo. 376, 147 P. 367 (1915).

Action for conversion of machinery. In an action by a lessee of a mine against his lessors for damages for an alleged conversion of machinery and appliances, where the complaint charged the wrongful conversion by defendant of personal property belonging to plaintiff, the cause is properly brought in the county where defendants or any of them reside. Updegraff v. Lesem, 15 Colo. App. 297, 62 P. 342 (1900).

Action by receivers. The court's power of control in receivership proceedings does not deprive a stranger who claims by paramount title, of the right to have the suit or proceedings instituted by the receiver to try the question of title, determined as are other actions under the rules of civil procedure, in the appropriate court of the county where the defendant resides, and where process is served upon him, where the tort was committed in the county of the defendant's residence. Pomeranz v. Nat'l Beet Harvester Co., 82 Colo. 482, 261 P. 861 (1927).

D. Other Actions.

The word "goods", as used in section (c) of this rule, should not be restricted to merchandise sold in course of trade. The word should be given the broad meaning ordinarily ascribed to it and be held to include furniture and equipment. Craft v. Stumpf, 115 Colo. 181, 170 P.2d 779 (1946).

Action of guaranty distinguished from action for goods sold and delivered. An action by a publishing company against a party who contracted for a route for the circulation and sale of its paper and against other parties who guaranteed the contract of the circulator is an action upon the guaranty contract, and not an action for goods sold and delivered, and the provision authorizing an action for goods sold and delivered to be brought in the county where the plaintiff resides or where the goods were sold does not apply. Smith v. Post Printing & Publishing Co., 17 Colo. App. 238, 68 P. 119 (1902).

Action on partnership account may be brought in county where plaintiff resides. This section expressly authorizes an action by one partner against his copartner for the balance found due upon a settlement of the partnership affairs to be brought in the county where the plaintiff resides. Bean v. Gregg, 7 Colo. 499, 4 P. 903 (1884).

Actions on notes are triable in county where made payable. This section expressly provides that all cases, unless otherwise provided, shall be tried in the county of defendant's residence, unless service of summons is made upon defendant in the county where plaintiff resides, with an exception, among others, that actions upon notes or bills of exchange may be tried in the county where the same are

made payable. Ashton v. Garretson, 37 Colo. 90, 85 P. 831 (1906).

This section applies to actions for divorce. The provisions of this section that in certain circumstances civil actions shall be tried in the county of the defendant's residence applies to actions for divorce. People ex rel. Lackey v. District Court, 30 Colo. 123, 69 P. 597 (1902).

This rule governs venue in dissolution of marriage proceedings. Brownell v. District Court ex rel. County of Larimer, 670 P.2d 762 (Colo. 1983).

On the question of venue in divorce actions, this section is controlling, notwithstanding statutory provisions concerning divorce actions and kindred matters. People ex rel. Stanko v. Routt County Court, 110 Colo. 428, 135 P.2d 232 (1943).

Petitioner and respondent in dissolution of marriage proceeding are equivalent of plaintiff and defendant. For the purpose of the venue requirements in this rule, the petitioner and respondent in a dissolution of marriage proceeding are the equivalent of a plaintiff and defendant, respectively. Brownell v. District Court ex rel. County of Larimer, 670 P.2d 762 (Colo. 1983).

The divorce act must be read in connection with this and following sections. In view of the fact that the divorce act provides the rules of civil procedure shall apply, except as expressly modified by its own provisions, the mandate of the act with respect to where actions for divorce shall be brought must be read in connection with this and the following section. People ex rel. Lackey v. District Court, 30 Colo. 123, 69 P. 597 (1902).

Residence of corporation is place where principal office is to be kept. The residence of a corporation is the place where, by the certificate of incorporation, its principal office is to be kept. Woods Gold Mining Co. v. Royston, 46 Colo. 191, 103 P. 291 (1909).

Thus, an action begun in the Mesa county of plaintiff's residence against a corporation resident of another county, summons in which is served in a third county, where the corporation carries on business, must, on proper application, be removed to the county in which the defendant has its residence. The fact that the corporation filed its certificate of incorporation in the county of its business, and failed to file one in the county where its office was to be kept, is immaterial. Woods Gold Mining Co. v. Royston, 46 Colo. 191, 103 P. 291 (1909).

A creditor of a corporation cannot take advantage of its failure to file the certificate of incorporation in the county where its principal office is to be kept, in order to prosecute an action against it in another county. Woods Gold Mining Co. v. Royston, 46 Colo. 191, 103 P. 291 (1909).

Action against foreign corporation. A corporation organized under the laws of New York was conducting business in Colorado, maintaining its principal office in the city of Denver. In an action instituted in another county, the process in which was served in Denver, it applied for a change of venue to the county of Denver, on the ground that its residence was in that county. Under this section the motion was properly denied, as the corporation was a resident of New York and a nonresident of Colorado within the meaning of this section. New York Life Ins. Co. v. Pike, 51 Colo. 238, 117 P. 899 (1911).

Undesignated action. An action for damnification brought by a mortgagor against an assuming grantee who failed to pay the mortgage debt, thus forcing the mortgagor to pay, is one of the undesignated actions under section (c), and a motion for change of venue to the county of defendant's residence was properly granted. Cave v. Belisle, 117 Colo. 180, 184 P.2d 869 (1947).

V. VENUE FOR INJUNCTION TO STAY PROCEEDINGS.

Annotator's note. Since section (d) of this rule is similar to § 162 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant case construction of that section has been included in the annotations to this rule.

This section does not specify where action must be brought. This section, even giving to it the most strict and limited construction permissible, simply specifies, like the provision upon places of trial, the county in which the action may or shall be tried, subject to change of the place of trial, and not where it must or shall be brought. If commenced in another county, it is not a jurisdictional or fatal defect. Smith v. Morrill, 12 Colo. App. 233, 55 P. 824 (1898).

Proceedings after complaint and order tried in county of judgment. By the terms of this section, the proceedings to enjoin must be had in the county where the judgment was rendered. The proceedings referred to could be only those subsequent to the mere commencement of the suit by the filing of a complaint and to the issuance of a temporary restraining order. Smith v. Morrill, 12 Colo. App. 233, 55 P. 824 (1898).

Privilege of conducting proceedings where judgment rendered may be waived. The district court has jurisdiction to entertain an application for writ of injunction to restrain the enforcement of an invalid judgment rendered in another county, and in the absence of an application for change of venue seasonably made the parties waive their privilege to have the proceedings conducted in the county where the

judgment was rendered. Smith v. Morrill, 12 Colo. App. 233, 55 P. 824 (1898).

VI. MOTION TO CHANGE VENUE.

Annotator's note. Since section (e) of this rule is similar to § 25 et seq. of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing those sections have been included in the annotations to this rule.

Doctrine of forum non conveniens has only limited application in Colorado courts, and except in most unusual circumstances the choice of a Colorado forum by a resident plaintiff will not be disturbed. McDonnell-Douglas Corp. v. Lohn, 192 Colo. 200, 557 P.2d 373 (1976).

The doctrine of forum non conveniens has little place in Colorado courts. Kelce v. Touche Ross & Co., 192 Colo. 202, 557 P.2d 374 (1976).

Venue motions to be filed together. Section (e)(1), of this rule, when read together C.R.C.P. 12, requires that all venue motions, except those based on sections (c)(3), (f)(2), and (g) of this rule, must be filed together. Bd. of Land Comm'rs v. District Court, 191 Colo. 185, 551 P.2d 700 (1976).

Where both parties to a dissolution case reside in a county outside of the judicial district where the case is filed, a directive or rule of court could properly authorize that court on its own motion to change venue, unless for good cause shown by the parties, or either of them, venue should be retained by the court in which the case is filed. Walsmith v. Lilly, 194 Colo. 270, 571 P.2d 1107 (1977).

Right to change venue waived by failure to make motion to change at proper time. Kirby v. Union Pac. Ry., 51 Colo. 509, 119 P. 1042 (1911).

The right of a defendant to a change of a place of trial upon the ground of residence is a personal privilege which may be waived by not applying in apt time. People ex rel. Lackey v. District Court, 30 Colo. 123, 69 P. 597 (1902); Burton v. Graham, 36 Colo. 199, 84 P. 978 (1906).

If, after a change of venue is granted, the resisting party elects to proceed to trial without further objection, he thereby waives any error in granting the change of venue. Smith v. Huber, 666 P.2d 1122 (Colo. App. 1983).

Change of venue not restricted by time of filing or consent of all parties. A discretionary change of venue under section (f)(2) is not restricted by the time of filing or by the necessity for the consent of all parties to the request. Tillery v. District Court, 692 P.2d 1079 (Colo. 1984).

Where enlargement of time not obtained. By failing to file motions for change of venue within 20 days after service of the summons and complaint as required by this rule, then, by not having obtained enlargement of the time from the court, the right to file over objection is lost. Town of Grand Lake v. District Court, 180 Colo. 272, 504 P.2d 666 (1972).

VII. CAUSES OF CHANGE.

A. In General.

Annotator's note. Since setion (f) of this rule is similar to § 31 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

The duty of changing the place of trial is not devolved upon the court of its own motion. Fletcher v. Stowell, 17 Colo. 94, 28 P. 326 (1891).

Presumption is that suit is brought in proper county. It will be presumed that the county in which the suit was brought is the proper county for trial unless there should be a disclosure of something to the contrary; and the court commences the consideration of an application for a change of venue with the assumption of the existence of the necessary conditions requiring the retention of the case in that county, except insofar as the contrary may appear from the application. Adamson v. Bergen, 15 Colo. App. 396, 62 P. 629 (1900).

The change of venue is required to be made only "on good cause shown". These words plainly imply that a party considering himself aggrieved by the bringing of the action in a wrong county, or considering himself likely to be prejudiced by the trial thereof in the county where the action is pending, must apply to the court and show good cause therefor, in order to have the place of trial changed. Fletcher v. Stowell, 17 Colo. 94, 28 P. 326 (1891).

Inconvenience and expense not sufficient to change forum. Inconvenience and expense are inherent in all litigation and are insufficient to oust a resident plaintiff from his chosen forum. McDonnell-Douglas Corp. v. Lohn, 192 Colo. 200, 557 P.2d 373 (1976); Kelce v. Touche Ross & Co., 192 Colo. 202, 557 P.2d 374 (1976).

Burden of proof on motion to change venue is on party seeking change, but the party opposing must balance the showing made by the moving party. Cliff v. Gleason, 142 Colo. 500, 351 P.2d 394 (1960); Sampson v. District Court, 197 Colo. 158, 590 P.2d 958 (1979).

The burden of proof on a motion for change of venue is upon the party seeking the change. Ranger Ins. Co. v. District Court, 647 P.2d 1229 (Colo. 1982).

The substance, not the form, of the action must control in determining a motion for

change of venue. Caldwell v. District Court, 128 Colo. 498, 266 P.2d 771 (1953); Bd. of County Comm'rs v. District Court, 632 P.2d 1017 (Colo. 1981).

Right to change of venue depends on conditions existing at the time of demand, and must be determined by conditions at the time the party claiming the right first appears in the action. Cliff v. Gleason, 142 Colo. 500, 351 P.2d 394 (1960).

Absent most unusual circumstances, choice of forum of resident plaintiff will not be disturbed. Kelce v. Touche Ross & Co., 192 Colo. 202, 557 P.2d 374 (1976).

Venue of joined claim should not be changed. Where the venue of one claim for relief is properly laid in the county in which it is brought, a court should not, except under extraordinary circumstances, change the venue of another claim properly joined with the first claim. Twin Lakes Reservoir & Canal Co. v. Bond, 156 Colo. 433, 399 P.2d 793 (1965).

Statute on place where trial must be brought is consistent with right of change. There is nothing in the statutory provisions concerning eminent domain proceedings inconsistent with the right of change of venue. The action must be brought in the county of the plaintiff municipality, but bringing an action and trying it are two different things. The statute as to place of trial means what it says, and its provisions are not jurisdictional. An action may be brought in a county where, if objection were made, it could not be tried. People ex rel. Bear Creek Dev. Corp. v. District Court, 78 Colo. 526, 242 P. 997 (1925).

The right to have the place of trial changed because the action is brought in an improper county is not jurisdictional. Kirby v. Union Pac. Ry., 51 Colo. 509, 119 P. 1042 (1911); Slinkard v. Jordan, 131 Colo. 144, 279 P.2d 1054 (1955).

Bringing an action in improper county is not a jurisdictional or fatal defect. If it were so regarded, a plea in abatement or to the jurisdiction of the court would be the proper remedy. Instead of this, this section expressly provides for a change of the place of trial. Fletcher v. Stowell, 17 Colo. 94, 28 P. 326 (1891).

The jurisdiction of courts of record is coextensive with the state, and where an action is brought in a county other than that in which it should be tried, the defendant's only remedy, if he objects to the venue, lies in an application to remove the case to the proper county. Denver & R. G. R. R. v. Cahill, 8 Colo. App. 158, 45 P. 285 (1896).

If an action for injunction under section (d) of this rule is commenced in another county from where it may be tried, it is not a jurisdictional or fatal defect. Smith v. Morrill, 12 Colo. App. 233, 55 P. 824 (1898).

The fact that an action is brought in a county other than the one in which the real property is situate does not affect the jurisdiction of the court to hear and determine the case unless the defendant moved to change the place of trial. Burton v. Graham, 36 Colo. 199, 84 P. 978 (1906).

The right is a mere personal privilege. Fletcher v. Stowell, 17 Colo. 94, 28 P. 326 (1891); Smith v. People, 2 Colo. App. 99, 29 P. 924 (1892); Pearse v. Bordeleau, 3 Colo. App. 351, 33 P. 140 (1893); Smith v. Morrill, 12 Colo. App. 233, 55 P. 824 (1898); Burton v. Graham, 36 Colo. 199, 84 P. 978 (1906); Kirby v. Union Pac. Ry., 51 Colo. 509, 119 P. 1042 (1911); Slinkard v. Jordan, 131 Colo. 144, 279 P.2d 1054 (1955).

The provision in section (c) that an action on a promissory note may be tried in the county where the same is made payable does not give a defendant sued elsewhere an absolute right to a change of venue, but, at best, only a privilege that may be waived. Reed v. First Nat'l Bank, 23 Colo. 380, 48 P. 507 (1897).

The right may be waived. Fletcher v. Stowell, 17 Colo. 94, 28 P. 326 (1891); Smith v. People, 2 Colo. App. 99, 29 P. 924 (1892); Reed v. First Nat'l Bank, 23 Colo. 380, 48 P. 507 (1897); Smith v. Morrill, 12 Colo. App. 233, 55 P. 824 (1898); People ex rel. Lackey v. District Court, 30 Colo. 123, 69 P. 597 (1902); Burton v. Graham, 36 Colo. 199, 84 P. 978 (1906); Kirby v. Union Pac. Ry., 51 Colo. 509, 119 P. 1042 (1911); Slinkard v. Jordan, 131 Colo. 144, 279 P.2d 1054 (1955).

Privilege waived by failure to appear. Fletcher v. Stowell, 17 Colo. 94, 28 P. 326 (1891).

Waiver through failure to apply for a change of venue to proper county. Forbes v. Bd. of County Comm'rs, 23 Colo. 344, 47 P. 388 (1896).

The defendant entered a general appearance, indicating no intention whatever to exercise his right to have the place of trial changed, taking no steps to bring that matter to the attention of the court until 80 days thereafter, indicating submission of the case in all its phases to the court in which the action was brought. Hence, the defendant waived his right to a change of the place of trial. Burton v. Graham, 36 Colo. 199, 84 P. 978 (1906).

If the right to a change of venue is waived, it is not error for the trial court to refuse to change the place of trial. Burton v. Graham, 36 Colo. 199, 84 P. 978 (1906).

Right is not waived by answer and trial. Where a motion for change of venue filed by a defendant is denied, he may thereafter file an answer and proceed to trial without waiving the question of error based upon the denial of said motion, or the right, if any, to a change of venue. Colo. State Bd. of Exam'rs of Architects

v. District Court, 126 Colo. 340, 249 P.2d 146 (1952).

Erroneous denial of motion may require reversal of judgment. The party who resists a motion for change of venue, to which his opponent is clearly entitled as a matter of right, does so at his peril. If the motion erroneously is denied and the moving party suffers adverse judgment, a reversal of the judgment with direction to change the venue would certainly follow. Colo. State Bd. of Exam'rs of Architects v. District Court, 126 Colo. 340, 249 P.2d 146 (1952); Denver & Rio Grande W. R. R. v. District Court, 141 Colo. 208, 347 P.2d 495 (1959).

Error in granting change of venue may be waived. Where plaintiffs, without objection, went to trial, they invested the court with full jurisdiction to proceed therein, waived the error in granting the change of venue, and cannot now be heard to urge that objection. Raymond v. Harrison, 27 Colo. App. 484, 150 P. 727 (1915).

Where a judge in vacation of his own motion ordered a cause transferred to the district court of another county, and the court to which the transfer was made had jurisdiction of the subject matter, and when the cause was called for trial the plaintiff appeared and consented to proceed with the trial, he waived objection to the order of the court transferring the case. Cheney v. Crandell, 28 Colo. 383, 65 P. 56 (1901).

A district court is without jurisdiction to transfer a cause involving a receivership while the case is pending in the supreme court. George Sparling Coal Co. v. Colo. Pulp & Paper Co., 88 Colo. 523, 299 P. 41 (1931).

Applied in Britto v. District Court, 176 Colo. 197, 489 P.2d 1304 (1971).

B. Sufficiency of Pleading.

A change of venue is not required under this section where no compelling reason has been shown to interfere with the discretion of the trial judge. City of Cripple Creek v. Johns, 177 Colo. 443, 494 P.2d 823 (1972).

Affidavits in support of motions for change of venue should state facts. Enyart v. Orr, 78 Colo. 6, 238 P. 29 (1925).

Application should negate every favorable hypothesis. An application to change the trial of a cause from one county to another should negate every hypothesis in favor of the county in which the action was commenced. Adamson v. Bergen, 15 Colo. App. 396, 62 P. 629 (1900).

Motion must negate allegation that contract was to be performed where action was brought. Where a complaint alleges that the contract upon which recovery is sought was to be performed in the county in which the action is brought, a motion to change the place of trial on the ground that defendant resides in another county and was served with summons there, and which fails to negate the allegation of the complaint that the contract was to be performed in the county where the action is brought is insufficient and is properly denied. Peabody v. Oleson, 15 Colo. App. 346, 62 P. 234 (1900); E. F. Gobatti Eng'r & Machinery Corp. v. Oliver Well Works, Inc., 111 Colo. 193, 139 P.2d 269 (1943).

In an action for the price of apples alleged to have been sold and delivered in the county in which the action was brought, an application for change of place of trial on the ground of the residence of defendant in another county, which fails to negate the allegation that the apples were sold and delivered in the county in which suit was brought was insufficient and was properly denied. Adamson v. Bergen, 15 Colo. App. 396, 62 P. 629 (1900).

Where plaintiff met the defendant's affidavit in support of a motion to change venue to county of defendant's residence with an affidavit alleging that the note was by its terms payable in the county where the action was brought, which is a proper county under section (c), and these statements were not controverted, the application to change the place of trial to the county of defendant's residence was properly denied. Coulter v. Bank of Clear Creek County, 18 Colo. App. 444, 72 P. 602 (1903).

Or that all defendants reside in county where action is brought. In an action against two defendants, an application to change the venue to another county on the ground that one of the defendants resides in the county to which the change is sought is insufficient unless it also negates the residence of the other defendant in the county in which the action is brought. Adamson v. Bergen, 15 Colo. App. 396, 62 P. 629 (1900).

To sustain a motion for change of place of trial for actions brought under section (c) of this rule, it must appear that no defendants reside where the suit is brought, where the motion is made on the ground that some of the defendants reside in another county. People ex rel. Tripp v. Fremont County Court, 72 Colo. 395, 211 P. 102 (1922).

It need not negate all exceptions in section (c). Upon motion to change the place of trial of a cause on the ground that defendant resides and was served with summons in the county to which the change was sought, it is not necessary that the application should negate all the exceptions provided in section (c) whereby such change is not required, if the complaint affirmatively shows that the cause does not come within any of the exceptions. Smith v. Post Printing & Publishing Co., 17 Colo. App. 238, 68 P. 119 (1902).

Application consistent with assumed jurisdiction fails. Application for change will be denied if the supposition of the jurisdiction of the court in which an action is brought is con-

sistent with the statements made in the application. People ex rel. Columbine Mercantile Co. v. District Court, 70 Colo. 540, 203 P. 268 (1921).

In an action against two defendants, an application to change the place of trial which alleged that one of the defendants resided in the county to which the change was sought, and that the other defendant was not within the state, was insufficient, as an allegation that one of the defendants was not within the state at the time the application was made did not negate the fact of his residence in the county in which the action was brought, but was entirely consistent with such residence. Adamson v. Bergen, 15 Colo. App. 396, 62 P. 629 (1900).

There was no error in denying a motion for change of venue on the ground that all proper defendants were nonresidents of the county, where from the allegations of the complaint it appeared that the one defendant who resided in the county where the action was commenced was alleged to be a party to the contract and was therefore a proper party to the suit. Newland v. Frost, 83 Colo. 207, 263 P. 715 (1928).

C. When County Is Improper.

Right to change place of trial is controlled by this section. The right to change the place of trial of an action against a county is controlled by this section, which necessarily requires the change of the place of trial to the county designated as the place of trial by statute. Forbes v. Bd. of County Comm'rs, 23 Colo. 344, 47 P. 388 (1896).

Venue in improper county will be changed on motion. Where the action is not brought in the proper county, the venue will be changed to the county where the cause is triable on application of the defendant. Coulter v. Bank of Clear Creek County, 18 Colo. App. 444, 72 P. 602 (1903).

When an action is brought in a county other than that in which it should be tried, the defendant may avail himself of his right to change the venue to the proper county. Ashton v. Garretson, 37 Colo. 90, 85 P. 831 (1906).

Upon sufficient application, the duty to change venue is mandatory. While the action may be brought in any county, at the election of the plaintiff, upon sufficient application by the defendant, made within the proper time, to change the place of trial of the cause on the ground that the county designated in the complaint is not the proper county, the duty of making the change becomes mandatory upon the court. Denver & R. G. R. R. v. Cahill, 8 Colo. App. 158, 45 P. 285 (1896).

Upon a proper showing that an action has been brought in a county other than that in which it should be tried, the duty of the court to grant the change is mandatory. Ashton v. Garretson, 37 Colo. 90, 85 P. 831 (1906).

The right of a defendant to a change of place of trial upon the ground of residence is one which, when the showing is in compliance with the rules, the court to which it is addressed must grant without discretion, unless it has been waived. People ex rel. Lackey v. District Court, 30 Colo. 123, 69 P. 597 (1902).

Where it is clear from the face of the pleading that the substance of an action is that of an action affecting not only a substantial part of the property which finally became the subject of the action, but all of the property, and that that property was located in a certain county, it is mandatory upon the trial court to grant the motion for change of venue as provided in this rule. Caldwell v. District Court, 128 Colo. 498, 266 P.2d 771 (1953).

A proper application for a change of venue from an improper county, timely made, leaves the trial court no alternative but to grant such application. City & County of Denver v. Glendale Water & San. Dist., 152 Colo. 39, 380 P.2d 553 (1963); Bd. of County Comm'rs v. District Court, 632 P.2d 1017 (Colo. 1981).

The court's jurisdiction is divested except for the purpose of making the order of removal to the proper county. Denver & New Orleans Constr. Co. v. Stout, 8 Colo. 61, 5 P. 627 (1884); Fletcher v. Stowell, 17 Colo. 94, 28 P. 326 (1891); Pearse v. Bordeleau, 3 Colo. App. 351, 33 P. 140 (1893); Denver & R. G. R. R. v. Cahill, 8 Colo. App. 158, 45 P. 285 (1896); Brewer v. Gordon, 27 Colo. 111, 59 P. 404 (1899); Ashton v. Garretson, 37 Colo. 90, 85 P. 831 (1906); Woods Gold Mining Co. v. Royston, 46 Colo. 191, 103 P. 291 (1909); People ex rel. Columbine Mercantile Co. v. District Court, 70 Colo. 540, 203 P. 268 (1921); Lamar Alfalfa Milling Co. v. Bishop, 80 Colo. 369, 250 P. 689 (1926); Bd. of County Comm'rs v. District Court, 632 P.2d 1017 (Colo. 1981).

When a party requests a change of venue upon a ground which entitles it to the change as a matter of right, the trial court loses all jurisdiction except to order the change. Ranger Ins. Co. v. District Court, 647 P.2d 1229 (Colo. 1982).

If an action involving real estate is brought in the wrong county, the court cannot retain jurisdiction after motion in apt time by the defendant to change the place of trial to the county in which it ought to have been commenced. Smith v. People, 2 Colo. App. 99, 29 P. 924 (1892).

Where an application for a change of place of trial is made by a defendant based upon a ground which entitles him to the change as a matter of right, the court is ousted of jurisdiction to proceed further with the cause other than to enter the order of removal. People ex rel. Lackey v. District Court, 30 Colo. 123, 69 P. 597 (1902).

When an application, sufficient in form, uncontradicted, and supported by allegations in the plaintiff's complaint itself, is made for a change of place of trial, the court has jurisdiction of the cause only for purpose of removal to the proper county. Cliff v. Gleason, 142 Colo. 500, 351 P.2d 394 (1960).

The court's retention of the case after motion for change constitutes reversible error. Byram v. Piggot, 38 Colo. 70, 89 P. 809 (1906).

All subsequent proceedings therein are void. Brewer v. Gordon, 27 Colo. 111, 59 P. 404 (1899); Woodworth v. Henderson, 28 Colo. 381, 65 P. 25 (1901); Cliff v. Gleason, 142 Colo. 500, 351 P.2d 394 (1960).

Further proceedings in a trial court after an erroneous denial of a proper motion for change of venue are a nullity and void. Bd. of County Comm'rs v. District Court, 632 P.2d 1017 (Colo. 1981).

The county court having lost jurisdiction of the cause by reason of a proper application for a change of place of trial, the authority of the district court, when the cause came to it by appeal, extended no further upon the resubmission of the motion than to order a change of venue to the proper county. Failing to do that, all of its acts in entertaining and determining motions and rendering final judgment are absolutely void. Pearse v. Bordeleau, 3 Colo. App. 351, 33 P. 140 (1893).

Prohibition lies to prevent court from proceeding further. Where a defendant in a divorce suit made application for a change of place of trial to the county of his residence under circumstances which entitled him to the change as a matter of right, and the application was denied, the supreme court will issue a writ of prohibition to prevent the court denying the change from proceeding further in the cause and directing that all proceedings had in excess of jurisdiction be quashed and that an order be entered removing the cause to the proper county, notwithstanding the fact that the erroneous action of the court in denying the change of venue was reviewable on appeal or writ of error. People ex rel. Lackey v. District Court, 30 Colo. 123, 69 P. 597 (1902).

In an action in one county by a firm of architects against a school district of a second county for services rendered in the building of a school house, the contract not specifying the place of performance or payment, a motion for a change of venue having been denied by the district court, prohibition was granted. People ex rel. Bd. of Dirs. of Sch. Dist. No. 1 v. District Court, 66 Colo. 330, 182 P. 7 (1919).

In an action on contract where no place of performance is specified, it appearing that defendant was entitled to have the case tried in the county of his residence, prohibition is allowed against trial in another county. People ex rel. Burton v. District Court, 74 Colo. 121, 218 P. 1047 (1923).

Where the venue is proper in either of two counties, then a change of venue cannot properly be granted from either unless some other provision requiring the change arises. City of Cripple Creek v. Johns, 177 Colo. 443, 494 P.2d 823 (1972).

Where an action on an accident insurance policy might be commenced under section (c) either in the county of the defendant's residence, when service is had there, or in the county where the contract was to be performed, either county was the proper one, and from neither can a change of venue be properly granted. Progressive Mut. Ins. Co. v. Mihoover, 87 Colo. 64, 284 P. 1025 (1930).

In an action for a tort, the county where the defendant resides, and the county where the plaintiff resides and the defendant is served, and the county where the tort was committed, are equally proper counties for trial; and if the action is commenced in any one of those counties, the place of trial cannot be changed on the ground that the county designated is not the proper county. Denver & R. G. R. R. v. Cahill, 8 Colo. App. 158, 45 P. 285 (1896); Carlson v. Rensink, 65 Colo. 11, 173 P. 542 (1918).

The provision in section (c) that suit may be brought on a contract where it is to be performed does not give the defendant, if served with summons elsewhere, an absolute right to a change of venue to the county in which it is to be performed; for, notwithstanding this provision, an action on such contract may be tried in the county in which the defendant resides at the commencement of the action, or in the county where the plaintiff resides when service is made on the defendant in such county. Bales v. Cannon, 42 Colo. 275, 94 P. 21 (1908).

Although proper for the plaintiff to bring the action in the county of defendant's residence, he was not obliged to do so. He had a right to bring it in the county where the contract was to be performed under section (c) of this rule, and having done so, there was no error in denying the motion for a change of venue. Gould v. Mathes, 55 Colo. 384, 135 P. 780 (1913).

Under section (c) of this rule, in an action for the price of goods sold, it is the privilege of the plaintiff to designate the county of his residence as the place of trial. An application for a change of venue, in such case, solely upon the ground that such county is not the proper county, should be denied. Raymond v. Harrison, 27 Colo. App. 484, 150 P. 727 (1915).

Where the plaintiffs claimed under a decree adjudicating water rights first entered in one county, and the defendants under a decree entered in a second county, the subject matter of the action was situated in both counties, both counties were proper for venue under section (a) of this rule, and the defendant's petition for

change of the place of trial was properly denied. Field v. Kincaid, 67 Colo. 20, 184 P. 832 (1919).

Refusal to order change was error. Where an action involving the title to real estate was brought in a different county from the one in which the land was located, it was reversible error to refuse to change the place of trial to the county where the land was located, upon motion seasonably made by defendant. Campbell v. Equitable Sec. Co., 12 Colo. App. 544, 56 P. 88 (1899).

When a defendant files a motion for a change of venue on the grounds that neither the plaintiff nor the Colorado defendants reside in the county in which the action was filed and that the tort underlying the action did not occur there, it was error not to grant the defendant's motion. Denver Air Center v. District Court, 839 P.2d 1182 (Colo. 1992).

Proper to refuse change of venue. In an action by a lessee of a mine against his lessors for damage for an alleged conversion of machinery and appliances placed by the lessee for the purpose of working the mine, where the complaint charged the wrongful conversion by defendants of personal property belonging to plaintiff, the venue will not be changed to the county in which the mine is located on the ground that it involved an interest in real estate, since if it should be determined that the subject matter of the action is real estate, no recovery could be had under the complaint. Updegraff v. Lesem, 15 Colo. App. 297, 62 P. 342 (1900).

D. When Convenience and Justice Are Promoted.

Section (f)(2) is directed to a change of venue which contemplates that venue is properly placed in the court in which the motion is filed. Brownell v. District Court ex rel. County of Larimer, 670 P.2d 762 (Colo. 1983).

Change for convenience or justice is discretionary. A motion to change the place of trial, on grounds of convenience or justice, is addressed to the sound discretion of the court. De Wein v. Osborn, 12 Colo. 407, 21 P. 189 (1888); Denver & R. G. R. R. v. Cahill, 8 Colo. App. 158, 45 P. 285 (1896); Enyart v. Orr, 78 Colo. 6, 238 P. 29 (1925); Lamar Alfalfa Milling Co. v. Bishop, 80 Colo. 369, 250 P. 689 (1926).

A motion to change venue based on the convenience of the parties lies in the sound discretion of the trial court. Bd. of Land Comm'rs v. District Court, 191 Colo. 185, 551 P.2d 700 (1976).

A motion for change of venue on the ground of convenience of witnesses is addressed to the sound discretion of the trial court, whose decision will be accepted as final on review unless an abuse of discretion is apparent. Evans v. District Court, 194 Colo. 299, 572 P.2d 811 (1977); Sampson v. District Court, 197 Colo. 158, 590 P.2d 958 (1979); In re Agner, 659 P.2d 53 (Colo. App. 1982); Weston v. Mincomp Corp., 698 P.2d 274 (Colo. App. 1985).

An application for a change of venue in a will contest, for the convenience of witnesses, is within the discretion of the trial court. Miller v. Weston, 25 Colo. App. 231, 138 P. 424 (1914), aff'd, 67 Colo. 534, 189 P. 610 (1920).

A motion for change of venue for the convenience of the witnesses in a divorce proceeding is addressed to the sound discretion of the trial court. Bacher v. District Court, 186 Colo. 314, 527 P.2d 56 (1974).

Burden of proof on motion to change venue for convenience. While the movant, under section (f), must show, through affidavit or evidence, the identity of the witnesses, the nature, materiality and admissibility of their testimony, and how the witnesses would be better accommodated by the requested change in venue, the party opposing the change must at least balance the showing made by the moving party; otherwise, the motion should be granted. State Dept. of Highways, v. District Court, 635 P.2d 889 (Colo. 1981).

The decision of the court on the question will be accepted upon review as final. De Wein v. Osborn, 12 Colo. 407, 21 P. 189 (1888); Denver & R. G. R. R. v. Cahill, 8 Colo. App. 158, 45 P. 285 (1896); Enyart v. Orr, 78 Colo. 6, 238 P. 29 (1925); Great Am. Ins. Co. v. Scott, 89 Colo. 99, 299 P. 1051 (1931); Keohane v. Wilkerson, 859 P.2d 291 (Colo. App. 1993), aff'd, 882 P.2d 1293 (Colo. 1994).

Unless an abuse of discretion is apparent. De Wein v. Osborn, 12 Colo. 407, 21 P. 189 (1888); Denver & R. G. R. R. v. Cahill, 8 Colo. App. 158, 45 P. 285 (1896); Enyart v. Orr, 78 Colo. 6, 238 P. 29 (1925); Great Am. Ins. Co. v. Scott, 89 Colo. 99, 299 P. 1051 (1931); Keohane v. Wilkerson, 859 P.2d 291 (Colo. App. 1993), aff'd, 882 P.2d 1293 (Colo. 1994).

The determination of the trial court will not be disturbed if no abuse of the discretion appears. Miller v. Weston, 25 Colo. App. 231, 138 P. 424 (1914), aff'd, 67 Colo. 534, 189 P. 610 (1920).

It is unlike the cases where the ground alleged is one of absolute right. Enyart v. Orr, 78 Colo. 6, 238 P. 29 (1925).

The filing of this motion does not deprive the court of jurisdiction except to order the change. Enyart v. Orr, 78 Colo. 6, 238 P. 29 (1925).

Section (f)(2) requires showing of identity, testimony, and accommodation. When a motion for a change of venue is made under section (f)(2), the movant must show, through affidavit or evidence, the identity of the witnesses, the nature, materiality and admissibility of their testimony, and how the witnesses would be bet-

ter accommodated by the requested change in venue. Sampson v. District Court, 197 Colo. 158, 590 P.2d 958 (1979); Tillery v. District Court, 692 P.2d 1079 (Colo. 1984).

The court must of necessity rely largely on the good faith of the affidavits or other evidence of what the testimony at the trial will be. Enyart v. Orr, 78 Colo. 6, 238 P. 29 (1925).

Application properly denied. There was no abuse of discretion or error in denying the application for a change of venue demanded upon the ground of the convenience of witnesses where it appeared from the affidavits filed that the expense and inconvenience to plaintiff occasioned by the change and consequent delay would have been great, and where it appeared also that no sufficient excuse was given for not interposing the motion at an earlier moment. Bean v. Gregg, 7 Colo. 499, 4 P. 903 (1884).

The allegation that the convenience of witnesses, and the ends of justice, would be subserved by the change of venue was not supported where the defendant in his affidavit named 11 witnesses who were stated to be able to prove that the plaintiff fairly lost the race and wager on which he put up the money in the complaint mentioned, which matter was not and could not become an issue in the case, and evidence of it, if offered, would not have been admissible. Corson v. Neatheny, 9 Colo. 212, 11 P. 82 (1886).

Retention of court file by original court. In a case in which the change of venue is discretionary with the original court, the original court should retain the court file for ten days to allow for reconsideration of the order changing venue, before forwarding the file to the receiving court. After ten days, the original court loses jurisdiction to reconsider its order changing venue. Therefore, a motion for the original court to reconsider or vacate its initial discretionary order must be filed during the ten days before the original court forwards the case file to the receiving court. Tillery v. District Court, 692 P.2d 1079 (Colo. 1984).

The existence of prejudice justifying a change of venue is a question of fact within the discretion of the trial court. The movant bears the burden of establishing such prejudice by affidavit or evidence. Keohane v. Wilkerson, 859 P.2d 291 (Colo. App. 1993), aff'd, 882 P.2d 1293 (Colo. 1994).

Although all parties did not stipulate to the change of venue, the facts stipulated to by a majority of the defendants provided sufficient good cause for change. Moreover, defendants did not allege prejudice to their substantial rights, so procedural flaws, if any, would constitute harmless error. Keohane v. Wilkerson, 859 P.2d 291 (Colo. App. 1993), aff'd, 882 P.2d 1293 (Colo. 1994).

VIII. CHANGE FROM COUNTY.

Annotator's note. Since section (g) of this rule, is similar to §§ 31 through 33 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing those sections have been included in the annotations to this rule.

Where a jury trial is granted, the right to a fair and impartial jury is a constitutional right which can never be abrogated. Brisbin v. Schauer, 176 Colo. 550, 492 P.2d 835 (1971).

If a community is prejudiced against a citizen, or if other circumstances are likely to deny him a fair and impartial jury trial, then a change of venue must be granted. Brisbin v. Schauer, 176 Colo. 550, 492 P.2d 835 (1971).

The burden of establishing that undue prejudice in the community exists is on the party seeking the change. Powell v. City of Ouray, 32 Colo. App. 44, 507 P.2d 1101 (1973).

Whether community prejudice against a party exists is a question of fact that may be developed at "voir dire". Powell v. City of Ouray, 32 Colo. App. 44, 507 P.2d 1101 (1973).

Feeling of inhabitants immaterial where trial is by court. The fact that the issues between defendants and the landowners are of such magnitude that strong local feeling and bitter prejudices will be engendered is of no consequence, the cause being a chancery cause, triable to the court. If the trial judge should imbibe any of the local feeling, a change of venue could be granted, or the judge of another district called in. People ex rel. Walpert v. Rogers, 12 Colo. 278, 20 P. 702 (1888).

Petition should set out facts. In a petition for change of venue, in respect to the prejudice of inhabitants of the county, sufficient facts, beyond the bare allegation of prejudice, should be set out by the petitioner, from which the court may be able to judge of the probable truth or falsity of the averments. De Walt v. Hartzell, 7 Colo. 601, 4 P. 1201 (1884).

Denial of motion was not abuse of discretion. Where an application for a change of venue on the ground of prejudice of the inhabitants of the county was supported by the affidavits of the applicant and six residents of the county, and counter affidavits were filed by 10 citizens of the county who stated that they had never heard of the controversy between the parties and denied that the inhabitants of the county were prejudiced, it was not an abuse of discretion of the trial court to deny the application. Doll v. Stewart, 30 Colo. 320, 70 P. 326 (1902).

Denial of motion for change of venue on the ground of prejudice of the inhabitants was not prejudical error. Western Wood Prods. v. Tittle, 79 Colo. 473, 246 P. 791 (1926).

This rule presupposes that the action is pending in the county where venue for trial is properly laid. Evans v. District Court, 194 Colo. 299, 572 P.2d 811 (1977).

It is for the trial court to consider the facts and grant or deny the motion for change of venue. Powell v. City of Ouray, 32 Colo. App. 44, 507 P.2d 1101 (1973).

Where a motion for change of venue is not supported by an affidavit as required, it is properly denied as not complying with this rule. Powell v. City of Ouray, 32 Colo. App. 44, 507 P.2d 1101 (1973).

Section is mandatory only when party brings case within provisions. This section providing for a change of venue where the inhabitants of the county wherein the action is pending are prejudiced against the applicant is only mandatory upon the court where the party applying has brought himself within its provisions. Roberts v. People, 9 Colo. 458, 13 P. 630 (1886).

This is true although no counter affidavits are filed. Daugherty v. People, 78 Colo. 43, 239 P. 14 (1925).

Motion directed to discretion of court. The granting or refusing a motion for change of venue on the ground of prejudice of the inhabitants is within the sound discretion of the trial court. Doll v. Stewart, 30 Colo. 320, 70 P. 326 (1902); Fitzhugh v. Nicholas, 20 Colo. App. 234, 77 P. 1092 (1904); Nordloh v. Packard, 45 Colo. 515, 101 P. 787 (1909).

Ruling is reviewable for manifest abuse of discretion. Unless there is a manifest abuse of such discretionary power, the action of the trial court in refusing such application is not reviewable. Power v. People, 17 Colo. 178, 28 P. 1121 (1892); Michael v. Mills, 22 Colo. 439, 45 P. 429 (1896); Doll v. Stewart, 30 Colo. 320, 70 P. 326 (1902); Powell v. City of Ouray, 32 Colo. App. 44, 507 P.2d 1101 (1973).

Matters not per se contemptuous may be set forth in a petition for a change of venue without subjecting the petitioner to punishment for contempt. Mullin v. People, 15 Colo. 437, 24 P. 880 (1890).

IX. TRANSFERS WHERE CONCURRENT JURISDICTION.

Where a cause of which the district court would have had original jurisdiction is brought to it by appeal from the county court, and the parties proceed to trial without objection predicated upon the absence of jurisdiction in the county court, all defects in the jurisdiction of the county court are waived. Brown's Estate v. Stair, 25 Colo. App. 140, 136 P. 1003 (1913).

Transferor court can still accept notices and filings. Since after the change of venue order in the case of filing of an answer or of a notice to dismiss the power of the court to act is not invoked, the clerk of the transferor court can accept notices and filings. Alexander v. Morrison-Knudsen Co., 166 Colo. 118, 444 P.2d 397 (1968), cert. denied, 393 U.S. 1063, 89 S. Ct. 715, 21 L. Ed. 2d 706 (1969).

X. PLACE CHANGED IF ALL PARTIES AGREE.

A subsequent intervenor must abide with a change of venue agreed upon by original parties to an action. North Kiowa-Bijou Mgt. Dist. v. Ground Water Comm'n, 180 Colo. 314, 505 P.2d 377 (1973).

Location of default hearing proper. An action filed in the county having proper venue, where the defendant was in default, could be heard in an adjoining county for the convenience of the court and of counsel under the provisions of section (i), and the default judgment entered subsequent to this hearing was neither irregular, erroneous, nor void. Orebaugh v. Diskocil, 145 Colo. 484, 359 P.2d 671 (1961).

XI. PARTIES MUST AGREE ON CHANGE.

Consent is not a mere acquiescence; it is not a vacant or neutral attitude, it is affirmative in its nature. Kirchhof v. Sheets, 118 Colo. 244, 194 P.2d 320 (1948).

Statement that venue is immaterial does not constitute consent to change. A motion for change of venue is properly overruled when made by one defendant, when another defendant states that venue is immaterial, since this statement does not constitute consent to the codefendant's motion. Kirchhof v. Sheets, 118 Colo. 244, 194 P.2d 320 (1948).

Action by two of five defendants in filing answers to the complaint clearly demonstrated their acquiescence in the choice of venue by petitioner and such action foreclosed any favorable consideration of the request by the remaining defendants for a change of venue. Howard v. District Court, 678 P.2d 1020 (Colo. 1984).

XII. ONLY ONE CHANGE; NO WAIVER.

This section has no application in an action for divorce. People ex rel. Stanko v. Routt County Court, 110 Colo. 428, 135 P.2d 232 (1943).

Change based on error of court does not violate section. There was no violation of section (k) of this rule, which allows only one change of venue on a particular ground, where further change of venue was ordered based on error of court. Liber v. Flor, 160 Colo. 7, 415 P.2d 332 (1966).

What is considered "apt time" must be determined by the circumstances of each particular case in which the question arises. It would be impossible to formulate a rule which would serve as a guide in all cases. People ex rel. Lackey v. District Court, 30 Colo. 123, 69 P. 597 (1902); Burton v. Graham, 36 Colo. 199, 84 P. 978 (1906).

Application for the change of the venue was not in apt time. Miller v. Weston, 25 Colo. App. 231, 138 P. 424 (1914), aff'd, 67 Colo. 534, 189 P. 610 (1920).

Rule 99. No Rule

CHAPTER 12

Elections

CHAPTER 12

ELECTIONS

Rule 100. Contested Elections

(a) Statement of Contest; Where Filed. Any qualified elector wishing to contest the election of any person to the office of presidential elector, supreme court justice, court of appeals judge, district, or county judge, shall within 35 days after the canvass of the secretary of state, in case of a presidential elector, supreme court justice, court of appeals judge, or district judge, file in the office of the secretary of state a written statement of his intention to contest; and where the contest is for the office of county judge, such statement shall be filed in the office of the county clerk of the proper county within 35 days after the canvass by the county board of canvassers, which statement shall set forth: (1) The name of the contestor; (2) the name of the contestee; (3) the office; (4) the time of the election; (5) the particular cause of contest. The statement shall be verified by the affidavit of the contesting party.

(b) Trial. The contestor, or some one in behalf of the person for whose benefit the contest is made, shall, within 35 days after the filing of the statement of contest, file a complaint in the office of the clerk of the supreme court, if the contest relates to a presidential elector or supreme court justice, or in the office of the clerk of the court of appeals, if the contest relates to a court of appeals judge, or in the office of the clerk of the district court in the proper county, if the contest relates to a district or county judge. Upon the filing of such complaint the clerk shall issue summons. When the case is at issue, the court shall hear and determine the same in a summary manner, without the intervention of a jury.

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

Editor's note: Judges of courts of record, except Denver county judges, are appointed to office pursuant to section 20 of article VI and are elected pursuant to section 25 of article VI of the state constitution.

Cross references: For election contests, see part 2 of article 11 of title 1, C.R.S.; for canvassing of votes, see article 10 of title 1, C.R.S.

ANNOTATION

Annotator's note. Since section (b) of this rule supplanted rule 87 of the former Supreme Court Rules, cases construing that rule have been included in the annotations to this rule.

Election contests, for whatever office, necessarily are and must be summary. Gunson v. Baldauf, 88 Colo. 436, 297 P. 516 (1931).

The method of procedure to be followed depends upon the office sought to be contested. Gunson v. Baldauf, 88 Colo. 436, 297 P. 516 (1931).

The sufficiency of a complaint may be questioned by motion. Gunson v. Baldauf, 88 Colo. 436, 297 P. 516 (1931).

The incorporation of the notice of contest in contestor's petition, without further allegation of facts, does not constitute a statement of the grounds of contest as required by this rule and by logical pleading. Sparks v. Eldred, 78 Colo. 55, 239 P. 730 (1925).

CHAPTER 13

Seizure of Person or Property

CHAPTER 13

SEIZURE OF PERSON OR PROPERTY

Rule 101. Arrest and Exemplary Damages

Repealed May 29, 1986, effective January 1, 1987.

Rule 102. Attachments

(a) Before Judgment. Any party, at the time of filing a claim, in an action on contract, express or implied, or in an action to recover damages for tort committed against the person or property of a resident of this state, or at any time after the filing but before judgment, may have nonexempt property of the party against whom the claim is asserted (hereinafter defendant), attached by an *ex parte* order of court in the manner and on the grounds prescribed in this Rule, unless the defendant shall give good and sufficient security as required by section (f) of this Rule. No *ex parte* attachments before judgment shall be permitted other than those specified in this Rule.

(b) Affidavit. No writ of attachment shall issue unless the party asserting the claim (hereinafter plaintiff), his agent or attorney, or some credible person for him shall file in the court in which the action is brought an affidavit setting forth that the defendant is indebted to the plaintiff, or that the defendant is liable in damages to the plaintiff for a tort committed against the person or property of a resident of this state, stating the nature and amount of such indebtedness or claim for damages and setting forth facts showing one or more of the causes of attachment of section (c) of this Rule.

(c) Causes. No writ of attachment shall issue unless it be shown by affidavit or testimony in specific factual detail, within the personal knowledge of an affiant or witness, that there is a reasonable probability that any of the following causes exist:

(1) The defendant is a foreign corporation without a certificate of authority to do business in this state.

(2) The defendant has for more than four months been absent from the state, or the whereabouts of the defendant are unknown, or the defendant is a nonresident of this state, and all reasonable efforts to obtain in personam jurisdiction over the defendant have failed. Plaintiff must show what efforts have been made to obtain jurisdiction over the defendant.

(3) The defendant conceals himself or stands in defiance of an officer, so that process of law cannot be served upon him.

(4) The defendant is presently about to remove his property or effects, or a material part thereof, from this state with intent to defraud, delay, or hinder one or more of his creditors, or to render process of execution unavailing if judgment is obtained.

(5) The defendant has fraudulently conveyed, transferred, or assigned his property or effects, or a material part thereof, so as to hinder or delay one or more of his creditors, or to render process or execution unavailing if judgment is obtained.

(6) The defendant has fraudulently concealed, removed, or disposed of his property or effects, or a material part thereof, so as to hinder or delay one or more of his creditors, or to render process of execution unavailing if judgment is obtained.

(7) The defendant is presently about to fraudulently convey, transfer, or assign his property or effects, or a material part thereof, so as to hinder or delay one or more of his creditors, or to render process of execution unavailing if judgment is obtained.

(8) The defendant is presently about to fraudulently conceal, remove, or dispose of his property or effects, or a material part thereof, so as to hinder or delay one or more of his creditors, or to render process of execution unavailing if judgment is obtained.

(9) The defendant has departed or is presently about to depart from this state, with the intention of having his property or effects, or a material part thereof, removed from the state.

(d) Plaintiff to Give Bond. Before the issuance of a writ of attachment the plaintiff shall furnish a bond that complies with the requirements of C.R.C.P. 121, § 1-23, in an amount set by the court in its discretion, not exceeding double the amount claimed, to the effect that if the defendant recover judgment, or if the court shall finally decide that the plaintiff was not entitled to an attachment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages defendant may sustain by reason of the wrongful suing out of the attachment. The defendant may require the sureties to satisfy the court that each, for himself, is worth the amount for which he has become surety over and above his just debts and liabilities, in property located in this state and not by law exempt from execution.

(e) Court Issues Writ of Attachment. After the affidavit and bond are filed as aforesaid and testimony had as the court may require, the court may issue a writ of attachment, directed to the sheriff of a specified county, commanding him to attach the lands, tenements, goods, chattels, rights, credits, moneys, and effects of said defendant, of every kind, or so much thereof as will be sufficient to satisfy the claim sworn to, regardless of whose hands or possession in which the same may be found.

(f) Contents of Writ and Notice. The writ shall direct the sheriff to serve a copy of the writ on the defendant if found in the county, and to attach and keep safely all the property of the defendant within the county, not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's claim, the amount of which shall be stated in conformity with the affidavit. The writ shall also inform the defendant of his right to traverse and to have a hearing to contest the attachment. If the defendant's property is or may be located in more than one county, additional or alias writs may be issued contemporaneously. If the defendant deposit the amount of money claimed by the plaintiff or give and furnish security by an undertaking, approved by the sheriff, of a corporate surety company or of at least two sureties in an amount sufficient to satisfy such claim, the sheriff shall take such money or undertaking in lieu of the property. Alias writs may issue at any time to the sheriffs of different counties.

(g) Service; How Made. The writ of attachment shall be served in like manner and under the same conditions as are provided in these rules for the service of process. Service shall be deemed completed upon the expiration of the same period as is provided for service of process.

(h) Execution of Writ. The sheriff to whom the writ is directed and delivered shall execute the same without delay as follows:

(1) Real property standing upon the records of the county in the name of the defendant shall be attached by filing a copy of the writ, together with a description of the property attached, with the recorder of the county.

(2) Real property, or any interest therein belonging to the defendant, and held by any person, or standing upon the records of the county in the name of any other person but belonging to the defendant, shall be attached by leaving with such person or his agent, if either be found in the county, a copy of the writ and a notice that such real property (giving a description thereof), and any interest therein belonging to the defendant, are attached pursuant to such writ, and filing a copy of such writ and notice with the recorder of the county.

(3) Personal property shall be attached by taking it into custody.

(i) Return of Writ. The sheriff shall return the writ of attachment within 21 days after its receipt, with a certificate of his proceedings endorsed thereon, or attached thereto, making a full inventory of the property attached as a part of his return upon the writ.

(j) Execution of Writ on Sunday or Legal Holiday. If an affidavit or testimony is received stating that it is necessary to execute the writ of attachment on Sunday or on a legal holiday, to secure property sufficient to satisfy the judgment to be obtained, and if the court is so satisfied, the court shall endorse on the writ an order to the officer directing the writ to be executed on such day.

(k) No Final Judgment Until 35 Days After Levy.

(1) **Creditors.** No final judgment shall be rendered in a cause wherein an attachment writ has been issued and a levy made thereunder, until the expiration of 35 days after such levy has been made; and any creditor of the defendant making and filing within said

35-day period an affidavit and undertaking, as hereinbefore required of the plaintiff, together with his complaint setting forth his claim against the defendant, shall be made a party plaintiff and have like remedies against the defendant to secure his claim, as the law gives to the original plaintiff.

(2) **Judgment Creditors.** Any other creditor whose claim has been reduced to judgment in this state may upon motion filed within said 35 days be made a party and have like remedies against the attached property. Such judgment creditor shall not be required to make or file an affidavit, undertaking or complaint, or have summons issue, provided, that any such judgment creditor may be required to prove to the satisfaction of the court that his judgment is bona fide and not in fraud of the rights of other creditors.

(l) Dismissal by One Creditor Does Not Affect Others. After any additional creditor has been made a party to the action, as hereinbefore provided, a dismissal by the first or any subsequent attaching creditor of his cause of action, or proceedings in attachment, shall not operate as a dismissal of the attachment proceedings as to any other attaching creditor; but the remaining creditors may proceed to final judgment therein the same as though no such dismissal had been made.

(m) Final Judgment Prorated; When Creditors Preferred. The final judgment in said action shall be a several judgment, wherein each creditor named as plaintiff shall have and recover of the defendant the amount of his claim or demand, as found by the court to be due, together with his costs; and the money realized from the attachment proceedings, after paying all costs taxed in the attachment action, shall be paid to the participating creditors in proportion to the amounts of their several judgments; and any surplus moneys, if any, shall be paid to the defendant by order of the court, upon proof thereof. Provided, when the property is attached while the defendant is removing the same or after the same has been removed from the county, and the same is overtaken and returned, or while same is secreted by the defendant, or put out of his hands, for the purpose of defrauding his creditors, the court may allow the creditor or creditors through whose diligence the same shall have been secured a priority over other attachments or judgment creditors.

(n) Traverse of Affidavit. (1) The defendant may, at any time before trial, by affidavit, traverse and put in issue the matters alleged in the affidavit, testimony, or other evidence upon which the attachment is based and if the plaintiff shall establish the reasonable probability that any one of the causes alleged in the affidavit exists, said attachment shall be sustained, otherwise the same shall be dissolved. A hearing on the defendant's traverse shall be held within 7 days from the filing of the traverse and upon no less than two business days' notice to the plaintiff. If the debt for which the action is brought is not due and for that reason the attachment is not sustained, the action shall be dismissed; but if the debt is due, but the attachment nevertheless is not sustained, the action may proceed to judgment after the attachment is dissolved, as in other actions where no attachment is issued.

(2) A plaintiff who fails to prevail at the hearing provided by this section is liable to the defendant for any damages sustained as a result of the issuance of process, costs, and reasonable attorney's fees. A claim for damages under this subsection may be brought as part of the existing action, and the defendant shall be permitted to amend his answer and any counterclaim for this purpose.

(o) Amendment of Affidavit. If at the hearing of issues formed by the traverse it shall appear that the evidence introduced does not prove the cause or causes alleged in the affidavits, but the evidence does tend to prove another cause of attachment in existence at the time of the issuance of the writ, then on motion the affidavits may be amended to conform to proof the same as pleadings are allowed to be amended in cases of variance.

(p) Intervention; Damages. Any third person claiming any of the property attached, or any lien thereon or interest therein, may intervene under the provisions of Rule 24, and in case of a judgment in his favor may also recover such damages as he may have suffered by reason of the attachment of the property.

(q) Perishable Property May Be Sold. Where property taken by writ of execution or attachment, or seized under order of court, is in danger of serious and immediate decay or waste, or likely to depreciate rapidly in value pending the determination of the issues, or, where the keeping of it will be attended with great expense, any party to the action may

apply to the court, upon due notice, for a sale thereof, and, thereupon the court may, in its discretion, order the property sold in the manner provided for in said order and the proceeds of said sale shall, thereupon, be deposited with the clerk to abide the further order of the court.

(r) Application of Proceeds; Satisfaction of Judgment. If judgment is recovered by the plaintiff or any intervenor, on order of court, all funds previously deposited with the clerk, or in the hands of the sheriff, shall be first applied thereto. If any balance remain due, execution shall issue and be delivered to the sheriff who shall sell so much of the attached property as may be sufficient to satisfy the judgment. Sales shall be conducted as in cases of sales on execution. If there is a personal judgment and after such sale the same is not satisfied in full, the sheriff shall thereupon collect the balance as upon an execution in other cases.

(s) Balance Due; Surplus. Whenever the judgment shall have been paid, the sheriff, upon demand, shall deliver over to the defendant the attached property remaining in his hands, and any proceeds of the property attached unapplied on the judgment.

(t) Procedure When Judgment is For Defendant. If the defendant recover judgment against the plaintiff, any undertaking received in the action, all the proceeds of sales, all money collected by the sheriff, and all the property attached remaining in the sheriff's hands shall be delivered to the defendant, the writ of attachment shall be discharged, and the property released therefrom.

(u) Defendant May Release Property; Bond. The defendant may at any time before judgment have released to him any money in the hands of the clerk or any property in the hands of the sheriff, by virtue of any writ of attachment, by executing the undertaking provided in section (v) of this Rule. All the proceeds of sales, all money collected by the sheriff, and all the property attached remaining in the sheriff's hands shall thereupon be released from the attachment and delivered to the defendant upon the delivery and approval of the undertaking.

(v) Conditions of Bond; Liability of Sheriff. Before releasing the attached property to the defendant, the sheriff shall require and approve an undertaking executed by the defendant to the plaintiff either of a corporate surety company or with at least two sureties in such sum as may be fixed by the sheriff in not less than the value of the property, to the effect that in case the plaintiff recover judgment in the action, and the attachment is not dissolved, defendant will, on demand, redeliver such attached property so released to the proper officer, to be applied to the payment of the judgment, and that in default thereof the defendant and sureties will pay to the plaintiff the full value of the property so released. If a sheriff shall release any property held by him under any writ of attachment without taking a sufficient bond, he and his sureties shall be liable to the plaintiff for the damages sustained thereby.

(w) Application to Discharge Attachment. The defendant may also, at any time before trial, move that the attachment be discharged, on the ground that the writ was improperly issued, for any reason appearing upon the face of the papers and proceedings in the action. If on such application it shall satisfactorily appear that the writ of attachment was improperly issued, it shall be discharged.

(x) New Bond; When Ordered; Failure to Furnish. If at any time where an attachment has been issued it shall appear to the court that the undertaking is insufficient, the court shall order another undertaking, and if the plaintiff fails to comply with such order within 21 days after the same shall be made, all or any writs of attachment issued therein shall be quashed. The additional undertaking shall be executed in the same manner as the original, and the sureties therein shall be jointly and severally liable with those in the original undertaking.

(y) New Trial; Appeal and Writs of Certiorari. Motions for new trial may be made in the same time and manner, and shall be allowed in attachment proceedings, as in other actions. Appeals from the county court to the district court and writs of certiorari may be taken and prosecuted from any final judgment or order in such proceedings as in other civil cases. Any order by which an attachment is released or sustained is a final judgment.

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

Cross references: For exemption of certain properties and funds from attachment, see § 8-42-124 (workers' compensation insurance), § 10-7-205 (group life insurance policies), § 10-14-503 (benefits from fraternal benefit societies), § 13-54-102 (miscellaneous property), § 13-54-104 (wages), §§ 31-30.5-208 and 31-31-203 (police officers' and firefighters' pension plans), § 38-22-106 (certain liens), and § 38-41-201 (homesteads), C.R.S.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, "Seizure of Person or Property: Rules 101-104", see 23 Rocky Mt. L. Rev. 603 (1951). For article, "One Year Review of Civil Procedure and Appeals", see 37 Dicta 21 (1960). For article, "One Year Review of Civil Procedure and Appeals", see 38 Dicta 133 (1961). For article, "One Year Review of Property", see 40 Den. L. Ctr. J. 181 (1963). For article, "Federal Practice and Procedure", see 57 Den. L.J. 263 (1980).

Constitutionality. Attachment procedure specified in this rule comports with the requirements of the due process clause of the fourteenth amendment. Bernhardt v. Commodity Option Co., 187 Colo. 89, 528 P.2d 919 (1974), cert. denied, 421 U.S. 1004, 95 S. Ct. 2406, 44 L. Ed. 2d 673 (1975).

1975 modified rule not retroactive. In view of the substantial modifications made to this rule by its repeal and reenactment and in view of the fact that the supreme court has not indicated otherwise, the new rule has no retroactive effect. Inwood Indus., Inc. v. Priestley, 37 Colo. App. 78, 545 P.2d 732 (1975), aff'd, 191 Colo. 543, 560 P.2d 822 (1976).

But the supreme court neither approved nor disapproved of this holding and, therefore, the holding of the court of appeals has no precedential effect. Inwood Indus., Inc. v. Priestley, 191 Colo. 543, 560 P.2d 822 (1976).

Remedy of attachment was unknown at common law and existed only by reason of statute or rules of procedure enacted pursuant to statutory authority. Rocky Mt. Oil Co. v. Central Nat'l Bank, 29 Colo. 129, 67 P. 153 (1901); Worchester v. State Farm Mut. Auto. Ins. Co., 172 Colo. 352, 473 P.2d 711 (1970).

It is in derogation of the common law and must be strictly followed. Any failure to conform to prescribed procedures, all being necessary and mandatory, is fatal and the writ is of no validity. Weiss v. Ahrens, 24 Colo. App. 531, 135 P. 987 (1913); Jayne v. Peck, 155 Colo. 513, 395 P.2d 603 (1964); Rencher v. District Court, 160 Colo. 523, 418 P.2d 289 (1966).

It is a special remedy at law, except in some states where it is authorized in chancery. Dygert v. Clem, 26 Colo. App. 286, 143 P. 823 (1914).

This rule controls as there is no statute empowering attachment in Colorado. Crist v. United Underwriters, Ltd., 230 F. Supp. 136 (D. Colo. 1964), aff'd, 343 F.2d 902 (10th Cir. 1965).

Insurer's obligation to defend and indemnify a nonresident insured defendant is nonexempt property subject to attachment for the purposes of establishing quasi in rem jurisdiction. Baker v. Young, 798 P.2d 889 (Colo. 1990).

Personal liability cannot be imposed upon defendant's insured through a quasi in rem action against the insurance policy. Synan v. Haya, 15 P.3d 1117 (Colo. App. 2000).

Plaintiff did not sustain his burden of proof that defendant intended to hinder him from collecting on a judgment, when defendant demonstrated he had sufficient funds to pay a judgment excluding proceeds from the pending sale. Haney v. Castle Meadows, Inc., 816 F. Supp. 655 (D. Colo. 1993).

Applied in In re Harms, 7 Bankr. 398 (Bankr. D. Colo. 1980); In re Tarletz, 27 Bankr. 787 (Bankr. D. Colo. 1983); Crow-Watson Props., Inc. v. Carrier, 719 P.2d 365 (Colo. App. 1986).

II. AFFIDAVIT.

The 1975 revised rule requires that the affidavit set forth specific facts supporting the grounds of attachment. Inwood Indus., Inc. v. Priestley, 37 Colo. App. 78, 545 P.2d 732 (1975), aff'd, 191 Colo. 543, 560 P.2d 822 (1976).

A sufficient affidavit is a jurisdictional requirement and a court has no authority to issue a writ of attachment without it. Mentzer v. Ellison, 7 Colo. App. 315, 43 P. 464 (1896); Axelson v. Columbine Laundry Co., 81 Colo. 254, 254 P. 990 (1927); Markle v. Dearmin, 117 Colo. 45, 184 P.2d 495 (1947).

The affidavit must state the grounds for attachment positively. Colo. Vanadium Corp. v. Western Colo. Power Co., 73 Colo. 24, 213 P. 122 (1923).

An affidavit for attachment which alleges that the defendant is indebted for "goods, wares, and merchandise sold by the plaintiff to the defendant", states the nature of the action sufficiently. Plummer v. Struby-Estabrooke Mercantile Co., 23 Colo. 190, 47 P. 294 (1896).

But an affidavit stating that "the debt is for farm products, house rent, household furniture", and other necessaries for the debtor and his family does not state grounds for attachment under this rule. Markle v. Dearmin, 117 Colo. 45, 184 P.2d 495 (1947).

This requirement is not satisfied by allegations on information and belief merely. Colo. Vanadium Corp. v. Western Colo. Power Co., 73 Colo. 24, 213 P. 122 (1924).

An affidavit which fails to state definitely the nature of the demand is defective. Leppel v. Beck, 2 Colo. App. 390, 31 P. 185 (1892).

But not so defective as to render the proceeding absolutely void because of section (q) (now section (o)) of this rule permitting amendment. Leppel v. Beck, 2 Colo. App. 390, 31 P. 185 (1892).

Affidavit must contain an allegation of indebtedness and also one or more grounds of attachment. It is indispensable that the affidavit for attachment contain an allegation of indebtedness from the defendant, and also some one or more of the grounds upon which the statute authorizes an attachment. If either allegation is absent from the affidavit, there is no power to issue the writ. Axelson v. Columbine Laundry Co., 81 Colo. 254, 254 P. 990 (1927); Gibson v. Gagnon, 82 Colo. 108, 257 P. 348 (1927).

It cannot be attacked by a third person in a collateral proceeding. Where the affidavit is not attacked by the defendant in the attachment proceedings, nor does the record disclose that he contemplated interposing any defense whatever to the proceedings, the affidavit cannot be attacked by a third party in a collateral proceeding but must be raised between the parties to the suit. Leppel v. Beck, 2 Colo. App. 390, 31 P. 185 (1892).

Nor can it be attacked for the first time in an appellate court. Rice v. Hauptman, 2 Colo. App. 565, 31 P. 862 (1892).

The burden is upon plaintiff to prove by a preponderance of the evidence the allegations in the affidavit. First Nat'l Bank v. Poor, 94 Colo. 314, 29 P.2d 713 (1934).

The affidavit stands as a pleading, not alone in cases commenced originally by attachment, but where sued out in aid of an action the affidavit answers to the complaint in that proceeding, and hence is so far a pleading that it is properly brought up by the record without being included in the statement required by the code. Goss v. Bd. of Comm'rs, 4 Colo. 468 (1878).

A material allegation in an allegation must be taken to be true unless denied. Wehle v. Kerbs, 6 Colo. 167 (1882).

III. CAUSES.

A. In General.

The words, "in an action", used in this section are not used to denote an action pending, but rather as introductory to the words describing the kind of action, to wit, "an action on contract, express or implied", in which the plaintiff may have the property of the defendant attached. So the words, "at the time of issuing the summons", in this section, meant precisely what they said as to the time when the writ of attachment might issue. When we consider that the chief utility of an attachment consists in the writ being served in time to prevent a delinquent debtor from placing his property beyond the reach of the creditor, it would be unfortunate, indeed, if the writ could not issue until the debtor should have notice of the proceedings by the service of the summons. Schuster v. Rader, 13 Colo. 329, 22 P. 505 (1889).

Whether one seeks restitution or damages does not change the underlying basis for his action, whether contract or tort. Crist v. United Underwriters, Ltd., 230 F. Supp. 136 (D. Colo. 1964), aff'd, 343 F.2d 902 (10th Cir. 1965).

This rule refers only to those contracts existing within the intention of the parties making them. Crist v. United Underwriters, Ltd., 230 F. Supp. 136 (D. Colo. 1964), aff'd, 343 F.2d 902 (10th Cir. 1965).

The phrase "implied contract" within the meaning of this rule is not inclusive of contracts implied in law. Crist v. United Underwriters, Ltd., 230 F. Supp. 136 (D. Colo. 1964), aff'd, 343 F.2d 902 (10th Cir. 1965).

When the cause of attachment is that the action is for the price of value of an article or thing sold and delivered, which, according to the contract of sale, was to be paid for on delivery, there must be a concurrence of three facts in addition to that of indebtedness: (1) The thing must have been delivered, (2) there must have been no credit given, and (3) the contract to pay on delivery must be unconditional. If there has been a credit of ever so short a time beyond the delivery, or if the payment depends upon any condition whatever, as a demand, the contract does not come within the operation of the statute. Miller v. Godfrey & Co., 1 Colo. App. 177, 27 P. 1016 (1891).

An attaching creditor does not occupy the status of a bona fide purchaser for value, and attachment can only operate upon the right and title of a debtor existing at the time of the levy. Nisbet v. Federal Title & Trust Co., 229 F. 644

(8th Cir.), cert. denied, 241 U.S. 669, 36 S. Ct. 553, 60 L. Ed. 1229 (1916).

Private right of action arising under section 10(b) of the Securities Exchange Act of 1934 cannot be characterized as one "on contract". Crist v. United Underwriters, Ltd., 230 F. Supp. 136 (D. Colo. 1964), aff'd, 343 F.2d 902 (10th Cir. 1965).

B. Grounds.

Grounds for attachment changed. The grounds for attachment under the former rule, namely, that defendant refused to pay the value of goods upon delivery, has been eliminated from the revised rule. Inwood Indus., Inc. v. Priestley, 37 Colo. App. 78, 545 P.2d 732 (1975), aff'd, 191 Colo. 543, 560 P.2d 822 (1976).

Action by resident defendant will not sustain attachment before judgment. Crist v. United Underwriters, Ltd., 230 F. Supp. 136 (D. Colo. 1964), aff'd, 343 F.2d 902 (10th Cir. 1965).

Temporary absence from state. A finding of the trial court that a defendant in an attachment suit was a resident of the state so as to defeat an attachment based on the ground of nonresidence is supported by evidence which shows that defendant had been a resident of the state for a number of years, that he had gone out of the state and was absent from the state when the attachment was sued out, and where defendant and his wife testified that he had only temporarily left the state to accept a three-months job of work, leaving his household goods in the state. Newlon-Hart Grocer Co. v. Peet, 18 Colo. App. 147, 70 P. 446 (1902).

Intent may be proved by circumstances as well as by direct evidence. First Nat'l Bank v. Poor, 94 Colo. 314, 29 P.2d 713 (1934).

The question of intent is for the jury to determine. First Nat'l Bank v. Poor, 94 Colo. 314, 29 P.2d 713 (1934).

Where intent is doubtful, it is proper to receive testimony of person making the conveyance. Where the fraudulent intent is not a conclusive legal presumption from the facts, the party who made the conveyance is a competent witness as to what his purpose actually was. If, from the evidence, the intent is doubtful, as he is the only person who could know with certainty, what, in fact, it was, it is proper to interrogate him in relation to it, and a refusal to permit him to answer the question would be error. Curran v. Rothschild, 14 Colo. App. 497, 60 P. 1111 (1900).

Testimony not proper where the intent appears upon the face of the transaction. Where the intent of the party appears upon the face of the transaction, or where the undisputed facts are irreconcilable with a lawful purpose, his testimony as to what his motives really were would be without effect and should not be received. Curran v. Rothschild, 14 Colo. App. 497, 60 P. 1111 (1900).

Fraudulent intent should not be equated with secretive actions for purposes of section (c). Chaffin, Inc. v. Wallain, 689 P.2d 684 (Colo. App. 1984).

The giving of a mortgage was not sufficient of itself to prove an intent on the part of the defendants to hinder or delay the plaintiff in the collection of its debt. Such intent must be apparent from all the facts and circumstances in evidence before an attachment can be sustained on the ground alleged. If a mortgage is given with such intent, the property of the mortgagor is subject to attachment, even though the mortgagor had no purpose eventually to defeat the creditor in the collection of his demand, and even though the debt secured by the mortgage is a valid and subsisting liability. First Nat'l Bank v. Poor, 94 Colo. 314, 29 P.2d 713 (1934).

Where the transaction results in the hindering or delaying of creditors, it is for the court to say whether it was fraudulent or not. When a party has intentionally executed an assignment or conveyance of his property, which must hinder or defraud his creditors of their just demands, the question whether the conveyance is fraudulent or not necessarily becomes a question of law, and not of fact. Curran v. Rothschild, 14 Colo. App. 497, 60 P. 1111 (1900).

It is not necessary to show that transfer was made with a dishonest motive. To justify an attachment on the ground that the debtor has transferred his property so as to hinder or delay his creditors, it is not necessary to show that the transfer was made with a dishonest motive or with a purpose to cheat creditors and deprive them of the power ever to realize on their claims. If a debtor assigns or transfers his property for the purpose of hindering or delaying his creditors in the collection of their claims, his act is fradulent within the meaning of the law and will justify an attachment although he may intend that eventually the proceeds of the property shall be applied to the payment of their claims, and honestly believes that by preventing them from sacrificing his property they will ultimately realize more money. Curran v. Rothschild, 14 Colo. App. 497, 60 P. 1111 (1900); Kalberer v. Wilmore, 65 Colo. 411, 177 P. 147 (1918).

An honest transfer of property by a husband to his wife in satisfaction of a prior obligation cannot be made on the basis of a proceeding in attachment. City of Loveland v. Kearney, 14 Colo. App. 463, 60 P. 584 (1900).

Attachment lies for goods or money embezzled or stolen, or obtained by other species of frauds. Harden Farms, Inc. v. Amato, 160 F. Supp. 401 (D. Colo. 1958).

The wrongful conversion of funds by an officer constitutes fraudulently contracting an obligation which will sustain an attachment. Harden Farms, Inc. v. Amato, 160 F. Supp. 401 (D. Colo. 1958).

Misappropriation by an agent of a principal's money in a fraudulent way results in a breach of duty subjecting the agent to an action either ex delicto or assumpsit. In such a case the party injured may elect to sue upon the implied contract and waive the action ex delicto. Harden Farms, Inc. v. Amato, 160 F. Supp. 401 (D. Colo. 1958).

IV. THE WRIT.

A. In General.

The 1975 revised rule would invalidate the writ obtained by plaintiff because it was issued by the clerk of the district court and not by the court itself, and because the writ failed to advise defendant of his right to traverse. Inwood Indus., Inc. v. Priestley, 37 Colo. App. 78, 545 P.2d 732 (1975), aff'd, 191 Colo. 543, 560 P.2d 822 (1976).

A failure to pursue the requirements of the rule is almost universally held fatal to a levy. Graham v. Reno, 5 Colo. App. 330, 38 P. 835 (1894).

Where lien is preserved and continued in force. Where a writ of attachment was levied on real estate of a debtor and judgment entered without service of either the attachment writ or summons, but afterwards, on discovering the error, the judgment was set aside and a new judgment entered, after personal service of an alias summons and of a copy of the attachment writ, the lien acquired at the commencement of the action by the levy of the writ was preserved and continued in force. Raynolds v. Ray, 12 Colo. 108, 20 P. 4 (1888).

B. Service.

Where possible personal service must be made before the court acquires jurisdiction. The mere levy of an attachment does not give the court jurisdiction to determine the question of indebtedness and condemn the attached property to pay the same. Where a defendant resides in this state, and there is no question but that he can be personally served, the service is complete when a copy of the writ is served upon him, and the property levied upon. Then, and not until then, does the court acquire jurisdiction to finally hear and determine the same. Thompson v. White, 25 Colo. 226, 54 P. 718 (1898).

Where there was no personal service on the defendant, the mere levy of an attachment did not give the court jurisdiction to determine the question of indebtedness and condemn the attached property to pay the same. Great W. Mining Co. v. Woodmas of Alston Mining Co., 12 Colo. 46, 20 P. 771 (1888).

Service by publication is permissible under section (g), which incorporates applicable rules for service of process. Hancock v. Boulder County Pub. Trustee, 920 P.2d 854 (Colo. App. 1995).

Jurisdiction of persons acquired by service of process or by appearance and of the property by attachment. If, when property is attached, there is no service of summons upon the defendant and no appearance by him to the action, the proceeding is purely in rem. The jurisdiction of the court is confined to the property attached, and, if the attachment fails, there is nothing for the court to adjudicate. It can render no judgment of any kind. If the defendant is served with summons, or appears to the action, the proceeding is both in personam and in rem. The court has jurisdiction of the person by virtue of service of its process, or of appearance; and of the property by virtue of the attachment. But the court acquired no jurisdiction of the property merely by virtue of its jurisdiction of the person. Mentzer v. Ellison, 7 Colo. App. 315, 43 P. 464 (1896).

Service of writ is required to enable the debtor to deposit the money sued for and prevent the lien. The service of the attachment writ is required for the purpose of enabling the debtor to deposit the money sued for, and thus prevent the lien from taking effect; or, if the lien already exists, thus to secure its dissolution; and also to enable him, in case he shall see fit so to do, to traverse and put in issue the matters stated in the affidavit of attachment. In a majority of cases, the levy of the writ will either precede or be made simultaneously with the service thereof. In some cases, the officer may serve the writ before he makes the levy, and in such cases the section provides that, if the amount of the claim be deposited, the levy shall not be made. Raynolds v. Ray, 12 Colo. 108, 20 P. 4 (1888).

The lien does not become effective until the writ is properly and completely served. By filing a copy of the writ of attachment, together with a description of the property to be attached, with the recorder of the county, a valid levy is made, and a valid lien upon the property is thereby created. By the levy under a writ of attachment before the service thereof, the plaintiff acquires a provisional lien upon the property levied on; but, before a valid judgment can be rendered by which the attachment lien is preserved and made effective, there must be proper service of the summons and the writ of attachment. Thompson v. White, 25 Colo. 226, 54 P. 718 (1898).

In the absence of a general appearance by defendant, an attachment lien does not become valid and effective and enforceable until the

attachment writ is properly and completely served. Thompson v. White, 25 Colo. 226, 54 P. 718 (1898).

Proper service includes delivery of a copy of the writ to defendant and filing a copy with the recorder; and no judgment establishing the lien, or ordering a sale of the property, is valid without such service, or without a general appearance, if that does away with the necessity for service. Thompson v. White, 25 Colo. 226, 54 P. 718 (1898).

Mere filing of certificate is ineffective as to subsequent purchasers. Under this section a writ of attachment is not effectually levied upon lands unless a copy of the writ, with a description of the lands taken, is filed with a recorder in the county. The mere filing of a certificate of the levy is without effect as to subsequent purchasers. Weiss v. Ahrens, 24 Colo. App. 531, 135 P. 987 (1913).

Where defendant dies before copy of writ delivered to him. In an action against a resident defendant where an attachment had been levied upon real estate by filing a copy of the writ together with a description of the property with the recorder, but the defendant died before a copy of the writ was delivered to him, the attachment lien could not be perfected by service upon the executrix of the deceased defendant, nor by her general appearance in the action. Thompson v. White, 25 Colo. 226, 54 P. 718 (1898).

A writ directed to the sheriff of a county cannot be executed by the sheriff of any other county, and cannot be executed by the sheriff to whom it is issued outside of his own county. McArthur v. Boynton, 19 Colo. App. 234, 74 P. 540 (1903).

Dismissal of the action error. Where a motion of a defendant raises only the question of the sufficiency of service in an attachment proceeding, dismissal of the action is error, since failure to obtain proper service does not warrant dismissal of a cause of action. Aero Spray, Inc. v. Ace Flying Serv., Inc., 139 Colo. 249, 338 P.2d 275 (1959).

C. Execution.

Execution of this writ serves as a lien on specified property throughout the duration of the litigation, thus securing for the plaintiff the practicality of benefiting from any judgment he might be awarded. Bernhardt v. Commodity Option Co., 187 Colo. 89, 528 P.2d 919 (1974), cert. denied, 421 U.S. 1004, 95 S. Ct. 2406, 44 L. Ed. 2d 673 (1975).

A valid levy of a writ of attachment may be made on real estate and a valid lien acquired by indorsing thereon a description of the property attached and filing a copy of such writ, so indorsed, in the recorder's office of the county wherein the real estate is situated. The levy of the writ creates a provisional lien; but, before a valid judgment can be rendered which will preserve and make the lien effective, there must be service of the writ and summons on the defendant. Raynolds v. Ray, 12 Colo. 108, 20 P. 4 (1888).

Personal property capable of manual delivery can be attached only by being taken into custody by the officer. An attempted levy of an attachment upon personal property, capable of manual delivery, where the property was left in the custody of the defendant, and was not separated from defendant's other property, was not such levy as would give the attaching creditor or the officer any right in the property. Gottlieb v. Barton, 13 Colo. App. 147, 57 P. 754 (1899); Nichols v. Chittenden, 14 Colo. App. 49, 59 P. 954 (1899).

This rule, C.R.C.P. 103, and § 4-8-112 may be harmonized so that stock certificates may be reached by a creditor either by actual physical seizure, by a writ of attachment, if actually seized, or by serving the person who possesses the certificate with a writ of garnishment. Moreland v. Alpert, 124 P.3d 896 (Colo. App. 2005).

Where failure to sue out writ is excusable. Where defendant and his wife both were nonresidents, absconders, and he was a fugitive from justice, and neither had an agent in Colorado on whom service or execution of the writ of attachment could be made, had a writ of attachment been sued out by the creditor, it was impossible to execute it as required by this section because all the required steps essential to a valid levy must be taken or no valid seizure can be made. Failure, therefore, of plaintiff to sue out a writ of attachment was excusable. No seizure or levy upon the property by or under an attachment was possible in this state, and the only remedy, if any, left to the creditor was that invoked by him, a creditor's suit, by which, in this state, as generally, an equitable lien may be procured, or an equitable levy made. Shuck v. Quackenbush, 75 Colo. 592, 227 P. 1041 (1924).

When sheriff's duties are terminated. This section provides that real estate "shall be attached by filing a copy of the writ, together with a description of the property attached with the recorder of the county". The sheriff's duties are terminated when those acts are performed and he can exercise no further agency or control. The lien created by the attachment, whatever may be its character, is in the attaching creditor, and he only can release or discharge it. Barton v. Continental Oil Co., 5 Colo. App. 341, 38 P. 432 (1894).

Wherever the wrongful levy of a writ is the gravamen of a suit, the burden must of necessity be with the plaintiff to show that in fact a levy was made, unless it concerns personalty, and there be some circumstances of disposses-

sion or disturbance of the owner's rights which will sustain a suit. Graham v. Reno, 5 Colo. App. 330, 38 P. 835 (1894).

An attack by a third person upon a void levy is not an attack upon the judgment. Where an insufficient and void levy of an attachment upon lands is made and the plaintiff in the action recovers judgment, and one not a party to that action institutes a suit in equity to set aside, as a cloud upon his title, such void and insufficient levy, the latter action is not an attack upon the judgment in the former. Weiss v. Ahrens, 24 Colo. App. 531, 135 P. 987 (1913).

Seizure of property of nonresident as a condition precedent to jurisdiction is a judicial requirement. The rule requiring the seizure of property within the state belonging to a nonresident defendant, as a condition precedent to the exercise of jurisdiction, is a judicial, and not a statutory requirement. Van Wagenen v. Carpenter, 27 Colo. 444, 61 P. 698 (1900).

Jurisdiction is aided by the same presumptions as in cases of personal service. The jurisdiction of a court of general jurisdiction in attachment proceedings is general, and its actions therein are aided by the same presumptions as in cases of personal service, and where jurisdiction is obtained in a case by attachment of the property of a nonresident, a judgment rendered therein and the property sold under a special execution, a sheriff's deed thereunder is sufficient to establish ownership in the purchaser. Van Wagenen v. Carpenter, 27 Colo. 444, 61 P. 698 (1900).

Upon a collateral attack, it will be conclusively presumed that everything necessary to be done was done, unless the contrary appears from the record. Van Wagenen v. Carpenter, 27 Colo. 444, 61 P. 698 (1900).

The return of the officer upon a writ of attachment is the record of the levy, and is the legal evidence of the fact that the levy was made. It cannot be proved by parol evidence. Gottlieb v. Barton, 13 Colo. App. 147, 57 P. 754 (1889).

Sheriff is not entitled to costs for making out the inventory. The making of an inventory of attached property is not a matter necessarily involving the expenditure of money out of pocket, and the sheriff is not entitled to costs therefor in addition to the statutory fees prescribed by statute for serving and otherwise executing attachment writs. Cramer v. Oppenstein, 16 Colo. 495, 27 P. 713 (1891).

V. NO FINAL JUDGMENT UNTIL 30 DAYS AFTER LEVY.

Purpose of provision. The plain purpose of this section is to permit creditors to prorate the proceeds of attached property, not to permit them to establish rights in a strange and unusual way. The provision simply makes it possible for all creditors to put themselves in a position of equality, in respect to the satisfaction, out of the property attached, of claims properly asserted and regularly adjudicated; and it is a matter of administrative policy and convenience that all creditors intervening are, upon application, named as plaintiffs in one general proceeding for the purpose of determining and adjudicating their respective rights. Trinidad Nat'l Bank v. Jamieson House Furnishing Co., 60 Colo. 356, 153 P. 441 (1915).

The "like remedies" secured to an intervening attachment creditor by this subdivision are no more or less than such means as were available to the original plaintiff to establish and secure his claim, that is to say, upon the filing of affidavit, undertaking and complaint, with application to be made a party plaintiff in the original proceeding, the intervening creditor merely places his claim, in point of time of action, and for the purpose of proration, upon an equal basis with that of the original plaintiff, and should enforce his rights by the same legal modes as were available to the one first to act, but it certainly was not intended thereby to put an intervening creditor in a better position than he who first attached, and the section grants no privilege which obviates taking the steps ordinarily requisite to jurisdiction in order to recover a valid judgment upon a claim properly established. Trinidad Nat'l Bank v. Jamieson House Furnishing Co., 60 Colo. 356, 153 P. 441 (1915).

Creditors making themselves co-plaintiffs cannot assert any right superior to that of their co-plaintiff. Where in an attachment suit other creditors come in and make themselves co-plaintiffs with the original plaintiff in the attachment suit for the purpose of pro rata distribution of the attached fund as provided in this subdivision, such creditors thereby preclude themselves from asserting any right in the case superior to that of their co-plaintiff. Rouse v. Wallace, 10 Colo. App. 93, 50 P. 366 (1897).

Where petition comes too late. Petition for intervention comes too late where, before it was presented, judgment had been entered, execution issued, and levy and sale had thereunder. Hartner v. Davis, 100 Colo. 464, 68 P.2d 456 (1937).

VI. TRAVERSE OF AFFIDAVIT.

The denial of grounds for attachment should be clear and specific. The plaintiffs set forth in the affidavits in aid of the writs of attachment the nature of the indebtedness, part of which was based on services rendered by the plaintiffs. A denial that the debt was owed was sufficient to put in issue the question whether services had been rendered for which payment was due at the time the services were rendered.

Barbary v. Benz, 169 Colo. 408, 457 P.2d 389 (1969).

The separate traversing affidavit is not a pleading so as to permit a traverse, by an officer of a corporation, upon information and belief. An officer or an attorney of a corporation, who undertakes to traverse an affidavit in attachment, is presumed to know what his corporation did and must make his affidavit positively. Colo. Vanadium Corp. v. Western Colo. Power Co., 73 Colo. 24, 213 P. 122 (1923).

When the grounds of an attachment have been traversed and there is no evidence to sustain any one of them, the attachment should be dissolved. Mount Lincoln Coal Co. v. Lane, 23 Colo. 121, 46 P. 632 (1896).

A traverse of an affidavit which does not deny the allegations as of the time stated in the affidavit is not good. Where traverse is in present tense in saying that the grounds of attachment are false but does not relate to the time in the past when the attachment was made, this section is not complied with. Colo. Vanadium Corp. v. Western Colo. Power Co., 73 Colo. 24, 213 P. 122 (1897).

The traverse affidavit must speak and deny as of the date on which the affidavits in support of attachment are filed in order to specifically put in issue the causes for attachment set forth in the affidavits. Barbary v. Benz, 169 Colo. 408, 457 P.2d 389 (1969).

In the absence of a traverse, the court is not required to investigate the truth of the affidavit. This section does not require an investigation of the truth of the allegations of the affidavit, or that the court shall make any finding or order concerning either the attachment or the property attached. These matters are merely incidental to the action and, there being no issue as to them, the court does not appear to have any duty appertaining thereto to perform. Brown v. Tucker, 7 Colo. 30, 1 P. 221 (1883).

Waiver of order dissolving attachment. Where defendant, having obtained an order dissolving an attachment, afterwards stipulated that the issues in the main cause, as well as those framed upon the traverse of the affidavit in attachment should be tried at the same time, he thereby waived the order dissolving the attachment, and all rights thereunder. Reyer v. Blaisdell, 26 Colo. App. 387, 143 P. 385 (1914).

If the prescribed procedure for release of attached property is not invoked, the levy remains in force. Collins v. Burns, 16 Colo. 7, 26 P. 145 (1891).

Lien becomes absolute if the ground for it is not successfully traversed. Under this rule an attachment plaintiff is in reality, and for many purposes, an incumbrancer. It is quite true the lien which he acquires is contingent rather than inchoate, and dependent not only upon a compliance with the rule which provides for its issue, but also upon the subsequent recovery of a judgment and proof of a cause of action on which he had a right to sue when he commenced his action. In this sense, it is contingent; in another, it is absolute, or becomes absolute, if the ground for it is not successfully traversed and the plaintiff ultimately succeeds. Day v. Madden, 9 Colo. App. 464, 48 P. 1053 (1897).

Where the statements of the affidavit are regularly traversed by the defendant without the court's attention being called to its supposed defects, and the issues are found against him upon the trial; or, if the amount of actual damage proved by the plaintiff be less than the amount averred in the affidavit, the judgment will not be reversed on such grounds. De Stafford v. Gartley, 15 Colo. 32, 24 P. 580 (1890).

VII. INTERVENTION.

This rule is not intended to put an intervening creditor in a better position than he who first attached, and the rule grants no privilege which obviates taking the steps ordinarily requisite to jurisdiction in order to recover a valid judgment upon a claim properly established. Consolidated Fin. Corp. v. Thorp, 168 Colo. 144, 450 P.2d 320 (1969).

Jurisdiction does not depend upon the record of the permission to intervene. Permission is presumed where nothing to the contrary appears and the court has assumed jurisdiction. Grove v. Foutch, 6 Colo. App. 357, 40 P. 852 (1895).

VIII. DEFENDANT MAY RELEASE PROPERTY; BOND.

Judgment against the attaching creditor releases the property, restores proceeds, if any, and dissolves the writ. Vigil v. Pacheco, 95 Colo. 405, 36 P.2d 766 (1934).

This rule authorizes parties whose property has been attached to obtain a bond releasing the property attached, but assuring the creditor if judgment is obtained, that the property will be returned to the sheriff for final action. Phoenix Assurance Co. v. Hughes, 367 F.2d 526 (10th Cir. 1966).

Bond releases property from officers' custody but does not dissolve the attachment lien. Chittenden v. Nichols, 31 Colo. 202, 72 P. 53 (1903).

Enforceable undertaking. An undertaking given by the defendant with sureties for the purpose of releasing money in the hands of a garnishee is enforceable where, by reason of its execution, the money was in fact paid over by the garnishee to the defendant. Schradsky v. Dunklee, 9 Colo. App. 394, 48 P. 666 (1897).

Where person is estopped from controverting validity of undertaking. When a person signs an incomplete undertaking and deliv-

ers the same to another for a particular purpose and with ostensible authority to fill in any needed matter to make it effective, and it is accepted in its completed form by the obligee, he is estopped from controverting its validity to the prejudice of the obligee. Palacios v. Brasher, 18 Colo. 593, 34 P. 251 (1893).

Property in the hands of the sheriff. The sheriff has no authority to accept an undertaking for the release of money garnisheed, nor to execute a release for money in the hands of a garnishee, such property not being "in the hands of the sheriff". Nevertheless, where parties, through the instrumentality of an undertaking executed by them, procure money from the garnishee, they having thus received the benefit of the undertaking, cannot be heard to deny its binding obligation upon themselves upon the happening of the contingencies therein provided for. Abbot v. Williams, 15 Colo. 512, 25 P. 450 (1890).

Lien not affected by redelivery bond. When property has been lawfully levied upon under proper process, and taken into possession by a sheriff, the lien thereby created is not affected by any subsequent levy or surrender of possession under a redelivery bond, but whatever becomes of the property after such levy, it is subject at all times to the lien created by the first levy. Curry v. Equitable Sur. Co., 27 Colo. App. 175, 148 P. 914 (1915).

This does not apply to money in the hands of a garnishee. Phoenix Assurance Co. v. Hughes, 367 F.2d 526 (10th Cir. 1966).

Neither officer nor plaintiff can refuse to accept property on account of damage. Where attached property has been released on a redelivery bond and the identical property is returned to the sheriff, it is the right of the bondsmen to have the property sold and the proceeds applied on the judgment and neither the officer nor the plaintiff can refuse to accept the return of the property on account of damage or diminution in value, nor is the plaintiff estopped by such acceptance to sue upon the bond for damage to the property resulting from use by the defendant after it has been released to him under the bond. Creswell v. Woodside, 15 Colo. App. 468, 63 P. 330 (1900).

Defective complaint. In a suit against the sureties on a redelivery bond given by defendant to plaintiff in an attachment suit to release the property attached, a complaint which fails to allege that demand was made on the defendant in the attachment suit for the return of the property released is fatally defective. It is not sufficient to allege that demand was made on the sureties in the bond. Murray v. Ginsberg, 10 Colo. App. 63, 48 P. 968 (1897).

Return of property in damaged condition constitutes a breach of the bond. Where property, released from an attachment under a forthcoming bond, is damaged from use by the defendant after the execution of the bond, its return to the officer in such damaged condition is not a return of substantially the same property and constitutes a breach of the bond. Creswell v. Woodside, 15 Colo. App. 468, 63 P. 330 (1900).

Measure of damages in such a case. In an action by an attachment plaintiff upon a redelivery bond where the property had been returned to the officer in a damaged condition resulting from use by the attachment defendant, the measure of plaintiff's damage was the diminution in value of the goods between the date of their release and the date of their return to the attaching officer, not to exceed the unpaid residue of the judgment. Creswell v. Woodside, 15 Colo. App. 468, 63 P. 330 (1900).

Where attached property has been released on a redelivery bond and after judgment sustaining the attachment the property is returned to the officer and the property is regularly and fairly sold as provided by statute and the proceeds applied on the judgment, as between the parties, the selling price is conclusive of the value thereof, and in an action by an attachment plaintiff upon a redelivery bond for damage to the property from use by the defendant after the execution of the bond, an instruction that undertakes to charge plaintiff with the value of the property returned regardless of the amount it brought at the sale is erroneous, and the fact that the plaintiff was the purchaser at the sale is of no significance. Creswell v. Woodside, 15 Colo. App. 408, 63 P. 330 (1900).

Bond not required to be executed under seal. A bond to release attached property is not required to be executed under seal, and if so executed the liability of the obligors is in no manner affected thereby. To authorize an agent to sign his principal's name to such bond, it is not necessary that such authority be under seal, and parol evidence is sufficient to establish such authority, or to establish a ratification of an unauthorized signing. Lynch v. Smyth, 25 Colo. 103, 54 P. 634 (1898).

Where attachment improperly issued. Looking to the affidavit and complaint, where there is no express or implied contract between the appellant and appellee, it follows that the attachment was improperly issued and should have been discharged under the motion. Goss v. Bd. of Comm'rs, 4 Colo. 468 (1878).

IX. NEW TRIAL; APPEAL.

An order in attachment proceedings dissolving the writ and releasing the property is a final judgment. Kopff v. Judd, 134 Colo. 330, 304 P.2d 623 (1956); Wilson v. Kirkbride, 899 P.2d 323 (Colo. App. 1995).

Time for filing notice of appeal began to run upon the denial of plaintiffs' rule 59 motion.

Wilson v. Kirkbride, 899 P.2d 323 (Colo. App. 1995).

When a final judgment is entered, party adversely affected who wishes to appeal must file a motion for new trial as prescribed under C.R.C.P. 59(f) just as in the review of any other final judgment. Kopff v. Judd, 134 Colo. 330, 304 P.2d 623 (1956).

Procedure. Steps necessary to effectively prosecute error to the usual judgment in civil actions also are essential to validate an appeal to a final judgment in attachment proceedings. Kopff v. Judd, 134 Colo. 330, 304 P.2d 623 (1956).

Where final judgment sustaining writ of attachment was not questioned in a prior proceeding on error, in which the judgment on the merits was reversed, and thus became a final judgment binding upon the parties, reversal did not reopen the question of the validity of the attachment proceedings. Burt Chevrolet, Inc. v. Barth, 144 Colo. 180, 355 P.2d 538 (1960).

Rule 103. Garnishment

This rule sets forth the exclusive process for garnishment. There shall be five (5) types of writs: (1) Writ of Continuing Garnishment, (2) Writ of Garnishment with Notice of Exemption and Pending Levy, (3) Writ of Garnishment for Support, (4) Writ of Garnishment — Judgment Debtor Other Than Natural Person, and (5) Writ of Garnishment in Aid of Writ of Attachment.

SECTION 1

WRIT OF CONTINUING GARNISHMENT (ON EARNINGS OF A NATURAL PERSON)

(a) Definitions.

(1) "Continuing garnishment" means the exclusive procedure for withholding the earnings of a judgment debtor for successive pay periods for payment of a judgment debt other than a judgment for support as provided in subsection (c) of this rule.

(2) "Earnings" shall be defined in section 13-54.5-101 (2), C.R.S., as applicable.

(b) Form of Writ of Continuing Garnishment and Related Forms. A writ of continuing garnishment shall be in the form and content of Appendix to Chapters 1 to 17, Form 26, C.R.C.P. It shall also include at least four (4) "Calculation of Amount of Exempt Earnings" forms to be in the form and content of Appendix to Chapters 1 to 17, Form 27, C.R.C.P. Objection to the calculation of exempt earnings shall be in the form and content of Appendix to Chapters 1 to 17, Form 28, C.R.C.P.

(c) When Writ of Continuing Garnishment Issues. After entry of judgment when a writ of execution can issue, a writ of continuing garnishment against earnings shall be issued by the clerk of the court upon request. Under a writ of continuing garnishment, a judgment creditor may garnish earnings except to the extent such earnings are exempt under law. Issuance of a writ of execution shall not be required.

(d) Service of Writ of Continuing Garnishment. A judgment creditor shall serve two (2) copies of the writ of continuing garnishment, together with a blank copy of C.R.C.P. Form 28, "Objection to the Calculation of the Amount of Exempt Earnings" (Appendix to Chapters 1 to 17, Form 28, C.R.C.P.), upon the garnishee, one copy of which the garnishee shall deliver to the judgment debtor as provided in subsection (h)(1) of this rule. Service of the writ shall be in accordance with C.R.C.P. 4, and the person who serves the writ shall note the date and time of such service on the return service. In any civil action, a judgment creditor shall serve no more than one writ of continuing garnishment upon any one garnishee for the same judgment debtor during the Effective Garnishment Period. This restriction shall not preclude the issuance of a subsequent writ within the Effective Garnishment Period.

(e) Jurisdiction. Service of a writ of continuing garnishment upon the garnishee shall give the court jurisdiction over the garnishee and any earnings of the judgment debtor within the control of the garnishee.

(f) Effective Garnishment Period.

(1) A writ of continuing garnishment shall be a lien and continuing levy against the nonexempt earnings of the judgment debtor until such time as earnings are no longer due,

the underlying judgment is vacated, modified or satisfied in full, the writ is dismissed, or for 91 days (13 weeks) following service of the writ, if the judgment was entered prior to August 8, 2001, and 182 days (26 weeks) following service of the writ if the judgment was entered on or after August 8, 2001, except when such writ is suspended pursuant to subsection (j) of this rule.

(2) When a writ of continuing garnishment is served upon a garnishee during the Effective Garnishment Period of a prior writ, it shall be effective for the Effective Garnishment Period following the Effective Garnishment Period of any prior writ.

(3) If a writ of garnishment for support pursuant to C.R.S. 14-14-105 is served during the effective period of a writ of continuing garnishment, the Effective Garnishment Period shall be tolled and all priorities preserved until the termination of the writ of garnishment for support.

(g) Exemptions. A garnishee shall not be required to deduct, set up or plead any exemption for or on behalf of a judgment debtor excepting as set forth in the writ.

(h) Delivery of Copy to Judgment Debtor.

(1) The garnishee shall deliver a copy of the writ of continuing garnishment, together with the calculation of the amount of exempt earnings and the blank copy of C.R.C.P. Form 28, "Objection to the Calculation of the Amount of Exempt Earnings" (Appendix to Chapters 1 to 17, Form 28, C.R.S.), to the judgment debtor at the time the judgment debtor receives earnings for the first pay period affected by such writ.

(2) For all subsequent pay periods affected by the writ, the garnishee shall deliver a copy of the calculation of the amount of exempt earnings to the judgment debtor at the time the judgment debtor receives earnings for that pay period.

(i) Objection to Calculation of Amount of Exempt Earnings. A judgment debtor may object to the calculation of exempt earnings. A judgment debtor's objection to calculation of exempt earnings shall be in accordance with Section 6 of this rule.

(j) Suspension. A writ of continuing garnishment may be suspended for a specified period of time by the judgment creditor upon agreement with the judgment debtor, which agreement shall be in writing and filed by the judgment creditor with the clerk of the court in which judgment was entered and a copy shall be delivered by the judgment creditor to the garnishee. No suspension shall extend the running of the Effective Garnishment Period nor affect priorities.

(k) Answer and Tender of Payment by Garnishee.

(1) The garnishee shall file the answer to the writ of continuing garnishment with the clerk of the court and send a copy to the judgment creditor no less than 7 nor more than 14 days following the time the judgment debtor receives earnings for the first pay period affected by such writ, or 42 days following the date such writ was served pursuant to section (1)(d) of this rule, whichever is less. However, if the judgment creditor is represented by an attorney, or is a collection agency licensed pursuant to section 12-14-101, et seq., C.R.S., the garnishee may be directed to pay any nonexempt earnings and deliver a calculation of the amount of exempt earnings to the attorney or the licensed collection agency.

(2) The garnishee shall pay any nonexempt earnings and deliver a calculation of the amount of exempt earnings to the clerk of the court which issued such writ no less than 7 nor more than 14 days following the time the judgment debtor receives earnings affected by such writ. However, if the answer and subsequent calculations are only mailed to an attorney or licensed collection agency under subsection (k)(1), the payment shall accompany the answer.

(3) Any writ of continuing garnishment served upon the garnishee while any previous writ is still in effect shall be answered by the garnishee with a statement that the garnishee has been previously served with one or more writs of continuing garnishment and/or writs of garnishment for support and specify the date on which such previously served writs are expected to terminate.

(l) Disbursement of Garnished Earnings.

(1) If no objection is filed by the judgment debtor within 7 days, the garnishee shall send the nonexempt earnings to the attorney, collection agency licensed pursuant to section 12-14-101, et seq., C.R.S., or court designated on the writ of continuing garnishment

(C.R.C.P. Form 26, page 1, paragraph e). The judgment creditor shall refund to the judgment debtor any disbursement in excess of the amount necessary to satisfy the judgment.

(2) If a written objection to the calculation of exempt earnings is filed with the clerk of the court, the garnishee shall send the garnished nonexempt earnings to the clerk of the court. The garnished nonexempt earnings shall be placed in the registry of the court pending further order of the court.

(m) Request for accounting of garnished funds by judgment debtor. Upon reasonable written request by a judgment debtor, the judgment creditor shall provide an accounting in writing of all funds received to the date of the request, including the balance due at the date of the request.

SECTION 2

WRIT OF GARNISHMENT (ON PERSONAL PROPERTY OTHER THAN EARNINGS OF A NATURAL PERSON) WITH NOTICE OF EXEMPTION AND PENDING LEVY

(a) Definition. "Writ of garnishment with notice of exemption and pending levy" means the exclusive procedure through which the personal property of any kind (other than earnings of a natural person) in the possession or control of a garnishee including the credits, debts, choses in action, or money owed to the judgment debtor, whether they are due at the time of the service of the writ or are to become due thereafter, is required to be held for payment of a judgment debt. For the purposes of this rule such writ is designated "writ with notice."

(b) Form of Writ With Notice and Claim of Exemption. A writ with notice shall be in the form and content of Appendix to Chapters 1 to 17, Form 29, C.R.C.P. A judgment debtor's written claim of exemption shall be in the form and content of Appendix to Chapters 1 to 17, Form 30, C.R.C.P.

(c) When Writ With Notice Issues. After entry of a judgment when a writ of execution may issue, a writ with notice shall be issued by the clerk of the court upon request. Under such writ any indebtedness, intangible personal property, or tangible personal property capable of manual delivery, other than earnings of a natural person, owed to, or owned by, the judgment debtor, and in the possession or control of the garnishee at the time of service of such writ upon the garnishee, shall be subject to the process of garnishment. Issuance of a writ of execution shall not be required before the issuance of a writ with notice.

(d) Service of Writ With Notice.

(1) Service of a writ with notice shall be made in accordance with C.R.C.P. 4.

(2) Following service of the writ with notice on the garnishee, a copy of the writ with notice, together with a blank copy of C.R.C.P. Form 30 "Claim of Exemption to Writ of Garnishment with Notice" (Appendix to Chapters 1 to 17, Form 30, C.R.C.P.), shall be served upon each judgment debtor whose property is subject to garnishment by such writ as soon thereafter as practicable. Such service shall be in accordance with C.R.S. 13-54.5-107 (2).

(e) Jurisdiction. Service of a writ with notice upon the garnishee shall give the court jurisdiction over the garnishee and any personal property of any description, owned by, or owed to the judgment debtor in the possession or control of the garnishee.

(f) Claim of Exemption. A judgment debtor's claim of exemption shall be in accordance with Section 6 of this rule.

(g) Court Order on Garnishment Answer.

(1) If an answer to a writ with notice shows the garnishee is indebted to the judgment debtor, the clerk shall enter judgment in favor of the judgment debtor and against the garnishee for the use of the judgment creditor in an amount not to exceed the total amount due and owing on the judgment and request such indebtedness paid into the registry of the court.

(2) No such judgment and request shall enter until the judgment creditor has made a proper showing that: (A) a copy of the writ with notice was properly served upon the

judgment debtor, and (B) no written claim of exemption was filed within 14 days after such service or a written claim of exemption was properly filed and the same was disallowed.

(3) If an answer to a writ with notice shows the garnishee to possess or control intangible personal property or personal property capable of manual delivery owned by the judgment debtor, the court shall order the garnishee to deliver such property to the sheriff to be sold as upon execution and the court may enter any order necessary to protect the interests of the parties. Any proceeds received by the sheriff upon such sale shall be paid to the registry of the court to be applied to the judgment debt, but any surplus of property or proceeds shall be delivered to the judgment debtor.

(4) No such order shall enter until the judgment creditor has made a proper showing that: (A) a copy of the writ with notice was properly served upon the judgment debtor, and (B) no written claim of exemption was filed within 14 days after such service or a written claim of exemption was properly filed with the court and the same was disallowed.

(h) Disbursement by Clerk of Court. The clerk of the court shall disburse funds to the judgment creditor without further application or order and enter the disbursement in the court records. The judgment creditor shall refund to the clerk of the court any disbursement in excess of the amount necessary to satisfy the judgment.

(i) Automatic Release of Garnishee. If a garnishee answers a writ with notice that the garnishee is indebted to the judgment debtor in an amount less than $50.00 and no traverse has been filed, the garnishee shall automatically be released from said writ if the garnishee shall not have been ordered to pay the indebtedness to the clerk of the court within six (6) months from the date of service of such writ.

SECTION 3

WRIT OF GARNISHMENT FOR SUPPORT

(a) Definitions.

(1) "Writ of garnishment for support" means the exclusive procedure for withholding the earnings of a judgment debtor for payment of a judgment debt for child support arrearages, maintenance when combined with child support, or child support debts, or maintenance.

(2) "Earnings" shall be as defined in Section 13-54.5-101 (2), C.R.S., as applicable.

COMMITTEE COMMENT

The Colorado Legislature amended Sections 13-54-104 and 13-54.5-101,C.R.S. (Section 7 of Chapter 65, Session Laws of Colorado 1991), which changed the definition of "earnings" applicable only to actions commenced on or after May 1, 1991. The amendment impacts the ability to garnish certain forms of income, depending upon when the original action was commenced. Sections 1 and 3 of the Rule and Forms 26 and 31 have been revised to deal with this legislative amendment.

(b) Form of Writ of Garnishment for Support. A writ of garnishment for support shall be in the form and content of Appendix to Chapters 1 to 17, Form 31, C.R.C.P. and shall include at least four (4) "Calculation of Amount of Exempt Earnings" forms which shall be in the form and content of Appendix to Chapters 1 to 17, Form 27, C.R.C.P.

(c) When Writ of Garnishment for Support Issues. Upon compliance with C.R.S. 14-10-122 (1)(c), a writ of garnishment for support shall be issued by the clerk of the court upon request. Under such writ a judgment creditor may garnish earnings except to the extent such are exempt under law. Issuance of a writ of execution shall not be required.

(d) Service of Writ of Garnishment for Support. Service of a writ of garnishment for support shall be in accordance with C.R.C.P. 4.

(e) Jurisdiction. Service of a writ of garnishment for support upon the garnishee shall give the court jurisdiction over the garnishee and any earnings of the judgment debtor within the control of the garnishee.

(f) Effective Garnishment Period and Priority.

(1) A writ of garnishment for support shall be continuing and shall require the garnishee to withhold, pursuant to law, the portion of earnings subject to garnishment at each succeeding earnings disbursement interval until the judgment is satisfied or the garnishment released by the court or released in writing by the judgment creditor.

(2) A writ of garnishment for support shall have priority over any writ of continuing garnishment notwithstanding the fact such other writ may have been served upon the garnishee previously.

(g) Answer and Tender of Payment by Garnishee.

(1) The garnishee shall answer the writ of garnishment for support no less than 7 nor more than 14 days following the time the judgment debtor receives earnings for the first pay period affected by such writ. If the judgment debtor is not employed by the garnishee at the time the writ is served, the garnishee shall answer the writ within 14 days from the service thereof.

(2) The garnishee shall pay any nonexempt earnings and deliver a calculation of the amount of exempt earnings, as directed in the writ of garnishment for support, to the family support registry, the clerk of the court which issued such writ, or to the judgment creditor no less than 7 nor more than 14 days following the time the judgment debtor receives earnings during the Effective Garnishment Period of such writ.

(h) Disbursement of Garnished Earnings. The family support registry or the clerk of the court shall disburse nonexempt earnings to the judgment creditor without further application or order and enter such disbursement in the court records. The judgment creditor shall refund to the clerk of the court any disbursement in excess of the amount necessary to satisfy the judgment.

SECTION 4

WRIT OF GARNISHMENT — JUDGMENT DEBTOR OTHER THAN NATURAL PERSON

(a) Definition. "Writ of garnishment — judgment debtor other than natural person" means the exclusive procedure through which personal property of any kind of a judgment debtor other than a natural person in the possession or control of the garnishee including the credits, debts, choses in action, or money owed to the judgment debtor, whether they are due at the time of the service of the writ or are to become due thereafter is required to be held by a garnishee for payment of a judgment debt. For purposes of this rule, such writ is designated "writ of garnishment — other than natural person."

(b) Form of Writ of Garnishment — Other Than Natural Person. A writ of garnishment under this Section shall be in the form and content of Appendix to Chapters 1 to 17, Form 32, C.R.C.P.

(c) When Writ of Garnishment — Other Than Natural Person Issues. When the judgment debtor is other than a natural person, after entry of a judgment, and when a writ of execution may issue, a writ of garnishment shall be issued by the clerk of the court upon request. Under such writ of garnishment, the judgment creditor may garnish personal property of any description owned by, or owed to, such judgment debtor and in the possession or control of the garnishee. Issuance of a writ of execution shall not be required.

(d) Service of Writ of Garnishment — Other Than Natural Person. Service of the writ of garnishment — other than natural person shall be made in accordance with C.R.C.P. 4. No service of the writ or other notice of levy need be made on the judgment debtor.

(e) Jurisdiction. Service of the writ of garnishment — other than natural person shall give the court jurisdiction over the garnishee and personal property of any description, owned by, or owed to, a judgment debtor who is other than a natural person, in the possession or control of the garnishee.

(f) Court Order on Garnishment Answer. When the judgment debtor is other that a natural person:

(1) If the answer to a writ of garnishment shows the garnishee is indebted to such judgment debtor, the clerk shall enter judgment in favor of such judgment debtor and

against the garnishee for the use of the judgment creditor for the amount of the indebtedness shown in such answer and order such amount paid into the registry of the court. In no event shall any judgment against the garnishee be more than the total amount due and owing on the judgment.

(2) If the answer to a writ of garnishment shows the garnishee to possess or control personal property of any description, owned by, or owed to, such judgment debtor, the court shall order the garnishee to deliver such property to the sheriff to be sold as upon execution and the court may enter any order necessary to protect the interests of the parties. Any proceeds received by the sheriff upon such sale shall be paid to the registry of the court to be applied to the judgment debt, but any surplus of property or proceeds shall be delivered to the judgment debtor.

(g) Disbursement by Clerk of Court. The clerk of the court shall disburse any funds in the registry of court to the judgment creditor without further application or order and enter such disbursement in the court records. The judgment creditor shall refund to the clerk of the court any disbursement in excess of the amount necessary to satisfy the judgment.

SECTION 5

WRIT OF GARNISHMENT IN AID OF WRIT OF ATTACHMENT

(a) Definition. "Writ of garnishment in aid of writ of attachment" means the exclusive procedure through which personal property of any kind of a defendant in an attachment action (other than earnings of a natural person) in the possession or control of the garnishee including the credits, debts, choses in action, or money owed to the judgment debtor, whether they are due at the time of the service of the writ or are to become due thereafter, is required to be held by a garnishee. For purposes of this rule, such writ is designated "writ of garnishment in aid of attachment."

(b) Form of Writ of Garnishment in Aid of Attachment and Form of Notice of Levy. A writ of garnishment in aid of attachment shall be in the form and content of Appendix to Chapters 1 to 17, Form 33, C.R.C.P. A Notice of Levy shall be in the form and content of Appendix to Chapters 1 to 17, Form 34, C.R.C.P.

(c) When Writ of Garnishment in Aid of Attachment Issues. At any time after the issuance of a writ of attachment in accordance with C.R.C.P. 102, a writ of garnishment shall be issued by the clerk of the court upon request. Under such writ of garnishment the plaintiff in attachment may garnish personal property of any description, except earnings of a natural person, owed to, or owned by, such defendant in attachment and in the possession or control of the garnishee.

(d) Service of Writ of Garnishment in Aid of Attachment. Service of the writ of garnishment in aid of attachment shall be made in accordance with C.R.C.P. 4. If the defendant in attachment is a natural person, service of a notice of levy shall be made as required by C.R.S. 13-55-102. If the defendant in attachment is other than a natural person, a notice of levy need not be served on the defendant in attachment.

(e) Jurisdiction. Service of the writ of garnishment in aid of attachment shall give the court jurisdiction over the garnishee and personal property of any description (except earnings of a natural person), owned by, or owed to, a defendant in attachment in the possession or control of the garnishee.

(f) Court Order on Garnishment Answer.

(1) When the defendant in attachment is an entity other than a natural person:

(A) If the answer to a writ of garnishment in aid of attachment shows the garnishee is indebted to such defendant in attachment, the clerk shall enter judgment in favor of such defendant in attachment and against the garnishee for the use of the plaintiff in attachment for the amount of the indebtedness shown in such answer and order such amount paid into the registry of the court. In no event shall any judgment against the garnishee be more than the total amount due and owing nor shall such judgment enter for the benefit of a plaintiff

in attachment until a judgment has been entered by the court against such defendant in attachment.

(B) If the answer to a writ of garnishment in aid of attachment shows the garnishee to possess or control personal property of any description, owned by, or owed to, such defendant in attachment, at any time after judgment has entered against such defendant in attachment, the court shall order the garnishee to deliver such property to the sheriff to be sold as upon execution and the court may enter any order necessary to protect the interests of the parties. Any proceeds received by the sheriff upon such sale shall be paid to the registry of the court to be applied to the judgment debt, but any surplus of property or proceeds shall be delivered to the judgment debtor/defendant in attachment.

(2) When the defendant in attachment is a natural person:

(A) If the answer to a writ of garnishment in aid of attachment shows the garnishee is indebted to such defendant in attachment, after judgment has entered against such defendant in attachment/judgment debtor upon a showing that such defendant in attachment has been served with a notice of levy as required by C.R.S. 13-55-102, the court shall enter judgment in favor of the defendant in attachment/judgment debtor and against the garnishee for the use of the plaintiff in attachment/judgment creditor for the amount of the indebtedness shown in such answer and order such amount paid into the registry of the court. In no event shall any judgment against the garnishee be more than the amount of the judgment against the defendant in attachment/judgment debtor.

(B) If the answer to a writ of garnishment in aid of attachment shows the garnishee to possess or control personal property owned by, or owed to, such defendant in attachment, after judgment has entered against such defendant in attachment/judgment debtor and upon a showing that such defendant in attachment has been served with a notice of levy as required by C.R.S. 13-55-102, the court shall order the garnishee to deliver the property to the sheriff to be sold as upon execution and the court may enter any order necessary to protect the interests of the parties. Any proceeds received by the sheriff upon such sale shall be paid to the registry of the court to be applied to the judgment debt but any surplus of property or proceeds shall be delivered to the defendant in attachment/judgment debtor.

(g) Disbursement by Clerk of Court. The clerk of the court shall disburse any funds in the registry of the court to the judgment creditor without further application or order and enter such disbursement in the court records. The judgment creditor shall refund to the clerk of the court any disbursement in excess of the amount necessary to satisfy the judgment.

SECTION 6

JUDGMENT DEBTOR'S OBJECTION — WRITTEN CLAIM OF EXEMPTION — HEARING

(a) Judgment Debtor's Objection to Calculation of Exempt Earnings Under Writ of Continuing Garnishment.

(1) If a judgment debtor objects to the initial or a subsequent calculation of the amount of exempt earnings, the judgment debtor shall have 7 days from the receipt of the copy of the writ of garnishment or calculation of the amount of exempt earnings for subsequent pay periods, within which to resolve the issue of such miscalculation by agreement with the garnishee.

(2) If the judgment debtor's objection is not resolved with the garnishee within 7 days upon good faith effort, the judgment debtor may file a written objection setting forth, with reasonable detail, the grounds for such objection. Such objection must be filed within 14 days from receipt of the copy of writ of garnishment or calculation of the amount of exempt earnings for subsequent pay periods.

(3) The written objection shall be filed with the clerk of the court by the judgment debtor in the form and content of Appendix to Chapters 1 to 17, Form 28, C.R.C.P.

(4) The judgment debtor shall, by certified mail, return receipt requested, immediately deliver a copy of such objection to the garnishee and the judgment creditor's attorney of record, or if none, to the judgment creditor. If the garnishee has been directed to transmit

the nonexempt earnings to an attorney or a collection agency licensed pursuant to section 12-14-101, et seq, C.R.S., then upon receipt of the objection, the garnishee shall transmit the nonexempt earnings to the clerk of the court.

(5) Upon the filing of a written objection, all proceedings with relation to the earnings of the judgment debtor in possession and control of the garnishee, the judgment creditor, the attorney for the judgment creditor, or in the registry of the court shall be stayed until the written objection is determined by the court.

(b) Judgment Debtor's Claim of Exemption Under a Writ With Notice.

(1) When a garnishee, pursuant to a writ with notice, holds any personal property of the judgment debtor, other than earnings, which the judgment debtor claims to be exempt, the judgment debtor, within 14 days after being served a copy of such writ as required by Section 2(d)(2) of this rule, shall make and file a written claim of exemption with the clerk of the court in which the judgment was entered.

(2) The claim of exemption to the writ of garnishment with notice shall be in the form and content of Appendix to Chapters 1 to 17, Form 30, C.R.C.P.

(3) The judgment debtor shall, by certified mail, return receipt requested, deliver a copy of the claim of exemption to the garnishee and the judgment creditor's attorney of record, or if none, to the judgment creditor.

(4) Upon the filing of a claim of exemption to a writ with notice, all proceedings with relation to property in the possession or control of the garnishee shall be stayed until such claim is determined by the court.

(c) Hearing on Objection or Claim of Exemption.

(1) Upon the filing of an objection pursuant to Section 6(a) of this rule or the filing of a claim of exemption pursuant to Section 6(b) of this rule, the court in which the judgment was entered shall set a time for hearing of such objection or claim of exemption which hearing shall not be more than 14 days after the filing of such objection or claim of exemption.

(2) When an objection or claim of exemption is filed, the clerk of the court shall immediately inform the judgment creditor, the judgment debtor and the garnishee, or their attorneys of record, by telephone, by mail, or in person, of the date and time of such hearing.

(3) The clerk of the court shall document in the court record that notice of the hearing has been given in the manner required by this rule. Said documentation in the court record shall constitute a sufficient return and prima facie evidence of such notice.

(4) The court in which judgment was entered shall conduct a hearing at which all interested parties may testify, and shall determine the validity of the objection or claim of exemption filed by the judgment debtor and shall enter a judgment in favor of the judgment debtor to the extent of the validity of the objection or claim of exemption, which judgment shall be a final judgment for the purpose of appellate review.

(5) If the court shall find the amount of exempt earnings to have been miscalculated or if said property is found to be exempt, the court shall order the clerk of the court to remit the amount of over-garnished earnings, or the garnishee to remit such exempt property to the clerk of the court for the use and benefit of the judgment debtor within three (3) business days.

(d) Objection or Claim of Exemption Within Six (6) Months.

(1) Notwithstanding the provisions of Section 6(a)(2) and Section 6(b)(1) of this rule, a judgment debtor failing to make and file a written objection or claim of exemption within the time therein provided, may, at any time within six (6) months from receipt of the copy of the writ with notice or a copy of the writ of continuing garnishment or the calculation of the amount of exempt earnings, move the court in which the judgment was entered to hear an objection or claim of exemption as to any earnings of property levied in garnishment which the judgment debtor claims to have been miscalculated or which the judgment debtor claims to be exempt.

(2) A hearing pursuant to this subsection shall be held only upon a verified showing, under oath, of good cause which shall include: mistake, accident, surprise, irregularity in proceedings, newly discovered evidence, events not in the control of the judgment debtor, or such other grounds as the court may allow, but in no event shall a hearing be held

pursuant to this subsection on grounds available to the judgment debtor as the basis of an objection or claim of exemption within the time periods provided in Section 6(a)(2) and Section 6(b)(1).

(3) At such hearing, if the judgment giving rise to such claim has been satisfied against property or earnings of the judgment debtor, the court shall hear and summarily try and determine whether the amount of the judgment debtor's earnings paid to the judgment creditor was correctly calculated and whether the judgment debtor's property sold as upon execution was exempt. If the court finds earnings to have been miscalculated of if property is found to be exempt, the court shall enter judgment in favor of the judgment debtor for the amount of the over-garnished earnings or such exempt property or the value thereof which judgment shall be satisfied by payment to the clerk of the court or the return of exempt property to the judgment debtor within three (3) business days.

(e) Reinstatement of Judgment Debt. If at any time the court orders a return of over-garnished earnings or exempt property or the value of such exempt property pursuant to Sections 6(c)(5) and 6(d)(3) of this rule, the court shall thereupon reinstate the judgment to the extent of the amount of such order.

SECTION 7

FAILURE OF GARNISHEE TO ANSWER (ALL FORMS OF GARNISHMENT)

(a) Default Entered by Clerk of Court.

(1) If a garnishee, having been served with any form of writ provided for by this rule, fails to answer or pay any nonexempt earnings as directed within the time required, the clerk of the court shall enter a default against such garnishee upon request.

(2) No default shall be entered in an attachment action against the garnishee until the expiration of 35 days after service of a writ of garnishment upon the garnishee.

(b) Procedure After Default of Garnishee Entered.

(1) After a default is entered, the judgment creditor, plaintiff in attachment or any intervenor in attachment, may proceed before the court to prove the liability of the garnishee to the judgment debtor or defendant in attachment.

(2) If a garnishee is under subpoena to appear before the court for a hearing to prove such liability and such subpoena shall have been issued and served in accordance with C.R.C.P. 45 and shall fail to appear, the court shall thereupon enter such sanctions as are just, including, but not limited to, contempt of court, issuance of a bench warrant, reasonable attorney fees and the cost and expense of the judgment creditor, plaintiff in attachment or intervenor in attachment.

(3) Upon hearing, if the court finds the garnishee liable to the judgment debtor or defendant in attachment or in the possession or control of personal property of the judgment debtor or defendant in attachment at the time of service of the writ:

(A) The court shall enter judgment in favor of the judgment debtor or defendant in attachment against the garnishee for the use and benefit of the judgment creditor, plaintiff in attachment or intervenor in attachment, if the garnishee was liable to the judgment debtor or defendant in attachment;

(B) The court shall order the garnishee to deliver the personal property to the sheriff to be sold as upon execution in the same manner as section 4(f)(2) of this rule, if the garnishee was in the possession or control of personal property of the judgment debtor or defendant in attachment and may enter any order necessary to protect the interests of the parties. Provided, however, in the event that the garnishee no longer has possession or control over the personal property, the court may either enter a judgment for the value of such property at the time of the service of the writ or enter any order necessary to protect the interests of the parties or both.

(4) At any hearing the court shall make such orders as to reasonable attorney's fees, costs and expense of the parties to such hearing, as are just.

SECTION 8

TRAVERSE OF ANSWER
(ALL FORMS OF GARNISHMENT)

(a) Time for Filing of Traverse. The judgment creditor, plaintiff in attachment or intervenor in attachment, may file a traverse of an answer to any form of writ provided by this rule provided such traverse is filed within the greater time period of 21 days from the date such answer should have been filed with the court or 21 days after such answer was filed with the court. The failure to timely file a traverse shall be deemed an acceptance of the answer as true.

(b) Procedure.

(1) Within the time provided, the judgment creditor, plaintiff in attachment, or intervenor in attachment, shall state, in verified form, the grounds of traverse and shall mail a copy of the same to the garnishee in accordance with C.R.C.P. 5.

(2) Upon application of the judgment creditor, plaintiff in attachment, or intervenor in attachment, the traverse shall be set for hearing before the court at which hearing the statements in the traverse shall be deemed admitted or denied.

(3) Upon hearing of the traverse, if the court finds the garnishee liable to the judgment debtor or defendant in the attachment or in the possession or control of personal property of the judgment debtor or defendant in attachment at the time of service of the writ:

(A) The court shall enter judgment in favor of the judgment debtor or defendant in attachment against the garnishee for the use and benefit of the judgment creditor, plaintiff in attachment or intervenor in attachment, if the garnishee was liable to the judgment debtor or defendant in attachment;

(B) The court shall order the garnishee to deliver the personal property to the sheriff to be sold as upon execution in the same manner as section 4(f)(2) of this rule, if the garnishee was in the possession or control of personal property of the judgment debtor or defendant in attachment and may enter any order necessary to protect the interests of the parties. Provided, however, in the event that the garnishee no longer has possession or control over the personal property, the court may either enter a judgment for the value of such property at the time of the service of the writ or enter any order necessary to protect the interests of the parties or both.

(4) If a garnishee is under subpoena to appear for a hearing upon a traverse and such subpoena shall have been issued and served in accordance with C.R.C.P. 45, and shall fail to appear, the court shall thereupon enter such sanctions as are just, including, but not limited to, contempt of court, issuance of a bench warrant, reasonable attorney fees and the cost and expense of the judgment creditor, plaintiff in attachment or intervenor in attachment.

(5) At any hearing upon a traverse, the court shall make such orders as to reasonable attorney fees, costs and expense of the parties to such hearing as are just.

SECTION 9

INTERVENTION
(ALL FORMS OF GARNISHMENT)

Any person who claims an interest in any personal property of any description of a judgment debtor or defendant in attachment which property is the subject of any answer made by a garnishee, may intervene as provided in C.R.C.P. 24 at any time prior to entry of judgment against the garnishee.

SECTION 10

SET-OFF BY GARNISHEE
(ALL FORMS OF GARNISHMENT)

Every garnishee shall be allowed to claim as a set-off and retain or deduct all demands or claims on the part of the garnishee against any party to the garnishment proceedings,

which the garnishee might have claimed if not summoned as a garnishee, whether such are payable or not at the time of service of any form or writ provided for by this rule.

SECTION 11

GARNISHEE NOT REQUIRED TO
DEFEND CLAIMS OF THIRD PERSONS
(ALL FORMS OF GARNISHMENT)

(a) Garnishee With Notice. A garnishee with notice of the claim of a third person in any property of any description of a judgment debtor or defendant in attachment which is the subject of any answer made by the garnishee in response to any form of writ provided for by this rule shall not be required to defend on account of such claim, but shall state in such answer that the garnishee is informed of such claim of a third person.

(b) Court to Issue Summons. When such an answer has been filed, the clerk of the court, upon application, shall issue a summons requiring such third person to appear within the time specified in C.R.C.P. 12 to answer, set up, and assert a claim or be barred thereafter.

(c) Delivery of Property by Garnishee.

(1) If the answer states that the garnishee is informed of the claim of a third person, the garnishee may at any time pay to the clerk of the court any garnished amount payable at the time of the service of any writ provided for by this rule, or deliver to the sheriff any property the garnishee is required to hold pursuant to any form of writ provided for in this rule.

(2) Upon service of the summons upon such third person pursuant to C.R.C.P. 4, the garnishee shall thereupon be released and discharged of any liability to any person on account of such indebtedness to the extent of any amount paid to the clerk of the court or any property delivered to the sheriff.

SECTION 12

RELEASE AND DISCHARGE OF GARNISHEE
(ALL FORMS OF GARNISHMENT)

(a) Effect of Judgment. A judgment against a garnishee shall release and discharge such garnishee from all claims or demands of the judgment debtor or defendant in attachment to the extent of all sums paid or property delivered by the garnishee pursuant to such judgment.

(b) Effect of Payment. Payment by a garnishee of any sums required to be remitted by such garnishee pursuant to Sections 1(k)(2) or 3(g)(2) of this rule shall release and discharge such garnishee from all claims or demands of the judgment debtor to the extent of all such sums paid.

(c) Release by Judgment Creditor or Plaintiff in Attachment. A judgment creditor or plaintiff in attachment may issue a written release of any writ provided by this rule. Such release shall state the effective date of the release and shall be promptly filed with the clerk of the court.

SECTION 13

GARNISHMENT OF PUBLIC BODY
(ALL FORMS OF GARNISHMENT)

Any writ provided for in this rule wherein a public body is designated as the garnishee, shall be served upon the officer of such body whose duty it is to issue warrants, checks or money to the judgment debtor or defendant in attachment, or, such officer as the public

body may have designated to accept service. Such officer need not include in any answer to such writ, as money owing, the amount of any warrant or check drawn and signed prior to the time of service of such writ.

EFFECTIVE DATE OF THIS RULE AND AMENDMENTS TO THIS RULE

Repealed October 31, 1991, effective November 1, 1991.

Source: Section 1(a)(2) and section 3(a)(2) amended, section 3(a)(2) committee comment added, and effective date repealed October 31, 1991, effective November 1, 1991; section 1(k)(1), (k)(2) and (l) amended and (m) added, section 6(a)(3), (a)(4), and (a)(5) amended, section 7(a)(1) amended, and section 12(b) amended and adopted October 30, 1997, effective January 1, 1998; entire section amended and adopted June 28, 2001, effective August 8, 2001; section 3(g) and (h) amended and adopted January 13, 2005, effective February 1, 2005; section 1(k)(1) and (k)(2) amended and effective November 18, 2010; section 1(f)(1), (k)(1), (k)(2), and (l)(1), section 2(g)(2) and (g)(4), section 3(g), section 6(a)(1), (a)(2), (b)(1), and (c)(1), section 7(a)(2), and section 8(a) amended and adopted December 14, 2011, effective July 1, 2012; section 2(g)(2) and (g)(4) corrected June 15, 2012, nunc pro tunc, December 14, 2011, effective July 1, 2012.

Cross references: For the minimum amount upon which garnishment shall issue, see § 13-52-108, C.R.S.; for group life insurance policy being exempt from garnishment, see § 10-7-205, C.R.S.; for fraternal benefit societies being exempt from garnishment, see § 10-14-503, C.R.S.; for provisions concerning service of process, see C.R.C.P. 4(e); for presentation of defenses, see C.R.C.P. 12; for intervention, see C.R.C.P. 24.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, "Seizure of Person or Property: Rules 101-104", see 23 Rocky Mt. L. Rev. 603 (1951). For article, "One Year Review of Civil Procedure and Appeals", see 39 Dicta 133 (1962).

Garnishment is a deprivation of defendant's property, or right to the use of his property. Bernhardt v. Commodity Option Co., 187 Colo. 89, 528 P.2d 919 (1974), cert. denied, 421 U.S. 1004, 95 S. Ct. 2406, 44 L. Ed. 2d 673 (1975).

The whole object of garnishment is to reach effects or credits in the garnishee's hands, and to subject them to the payment of such judgment as the plaintiff may recover against the defendant. It results necessarily that there can be no judgment against the garnishee until judgment against the defendant shall have been recovered. McPhee v. Gomer, 6 Colo. App. 461, 41 P. 836 (1895).

Garnishment is strictly a statutory remedy. Troy Laundry & Mach. Co. v. City & County of Denver, 11 Colo. App. 368, 53 P. 256 (1898); Black v. Plumb, 94 Colo. 318, 29 P.2d 708, 91 A.L.R. 133 (1934).

The remedy of garnishment was unknown at common law and exists only by reason of statute or rules of procedure enacted pursuant to statutory authority. Worchester v. State Farm Mut. Auto. Ins. Co., 172 Colo. 352, 473 P.2d 711 (1970).

Garnishment proceedings cannot be sustained if they go beyond statute. State v. Elkins, 84 Colo. 409, 270 P. 875 (1928).

Garnishment proceedings fall under the equity arm of a court, the purpose being to summarily reach ordinarily nonleviable evidences of debt, to prevent the loss or dissipation of such assets, to determine the ownership of such funds, and to provide for the equitable distribution thereof, such being triable by the court and not by a jury. Worchester v. State

Farm Mut. Auto. Ins. Co., 172 Colo. 352, 473 P.2d 711 (1970); Great Neck Plaza, L.P. v. Le Peep Restaurants, LLC, 37 P.3d 485 (Colo. App. 2001).

Writ of garnishment must be specific as to debtor. Berns, Clancy & Associates v. Bank of Boulder, 717 P.2d 1022 (Colo. App. 1986).

When garnishment proceeding considered "determined". A garnishment proceeding may not be considered "determined" until decisions regarding the rights of parties to the action can be made, and nothing but ministerial functions remain to be done. Nolan v. District Court, 195 Colo. 6, 575 P.2d 9 (1978); In re Seay, 97 Bankr. 41 (Bankr. D. Colo. 1989).

Until the time for filing an exemption under § 13-54-106 expires, the garnishment proceedings are not determined. Nolan v. District Court, 195 Colo. 6, 575 P.2d 9 (1978); In re Seay, 97 Bankr. 41 (Bankr. D. Colo. 1989).

This rule has no provision for release of cash. This rule relates to garnishment and has no provision similar to C.R.C.P. 102 for release of cash in the hands of a garnishee. Phoenix Assurance Co. v. Hughes, 367 F.2d 526 (10th Cir. 1966).

Attorneys' fees not permitted in garnishment. Neither this rule nor any other section or rule permits award of attorneys' fees for the garnishee in a garnishment. Commercial Claims, Ltd. v. First Nat'l Bank, 649 P.2d 736 (Colo. App. 1982).

This rule creates an exception to the American rule in garnishment actions; hence, the trial court was authorized to make an award of attorney fees. Hoang v. Monterra Homes (Powderhorn) LLC, 129 P.3d 1028 (Colo. App. 2005), rev'd on other grounds sub nom. Hoang v. Assurance Co. of Am., 149 P.3d 798 (Colo. 2007).

This rule is not applicable to spendthrift provisions of a will. Brasser v. Hutchison, 37 Colo. App. 528, 549 P.2d 801 (1976).

Funds under the control of a trustee subject to spendthrift provisions cannot be garnisheed. Brasser v. Hutchison, 37 Colo. App. 528, 549 P.2d 801 (1976).

The intent of congress that social security benefits be exempt from seizure is not undercut or in any way compromised by this rule. Ortiz v. Valdez, 971 P.2d 1076 (Colo. App. 1998).

Amendment of answer. Although this section is silent as to whether answers filed to a writ of garnishment may be amended, the guiding principle is that where the adverse party has not changed his position based on the original answer, the court, in its discretion should freely grant amendments. Brown v. Schumann, 40 Colo. App. 336, 575 P.2d 443 (1978).

Where the inability to amend would entirely foreclose the requesting party's case, and where the opposing party could show no prejudice to his case from the proposed amendment (other than the "prejudice" of having the garnishment determined on its merits), and where no prejudice to the court itself was evident from the record, the trial court abuses its discretion in ignoring the garnishee's amended answer. Brown v. Schumann, 40 Colo. App. 336, 575 P.2d 443 (1978).

Pending appellate review does not convert a judgment to a contingent liability or to a debt owing in the future. Shawn v. 1776 Corp., 787 P.2d 183 (Colo. App. 1989).

Stay of further garnishment proceedings until garnished judgments were no longer subject to stays of execution is the proper procedure and fully protects the interests of both garnishee and garnishor. Shawn v. 1776 Corp., 787 P.2d 183 (Colo. App. 1989).

A liability is not contingent merely because the garnishee disputes whether it breached its contract with the debtor. Walk-In Med. Centers, Inc. v. Breuer Capital Corp., 778 F. Supp. 1116 (D. Colo. 1991).

Unless a notice of garnishment properly runs with an accurate and sufficiently specific description against the individual to whom the garnishee may be indebted, a garnishee is totally unaffected by the notice served upon him. Anderson Boneless Beef v. Sunshine Health Care Center, Inc., 852 P.2d 1340 (Colo. App. 1993).

Applied in Stone v. Chapels for Meditation, Inc., 33 Colo. App. 346, 519 P.2d 1233 (1974).

II. PROVISIONS APPLICABLE TO ALL FORMS OF GARNISHMENTS.

A. When Writ Issues.

Annotator's note. Since section (b) of this rule was similar to § 129 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Before the turn of the century it was impossible to seize a debt owed by a nonresident garnishee to a principal defendant where the court had no jurisdiction over the situs of the debt. Garrett v. Garrett, 30 Colo. App. 167, 490 P.2d 313 (1971).

Under the present rule for garnishment, a court has jurisdiction for garnishment of a debt upon obtaining jurisdiction over the garnishee. Garrett v. Garrett, 30 Colo. App. 167, 490 P.2d 313 (1971).

Writ of garnishment can only be issued after issuance of a writ of attachment. Bernhardt v. Commodity Option Co., 187 Colo. 89, 528 P.2d 919 (1974), cert. denied, 421 U.S. 1004, 95 S. Ct. 2406, 44 L. Ed. 2d 673 (1975).

However, a proceeding by garnishment, though an independent suit, is auxiliary to

the main suit. McPhee v. Gomer, 6 Colo. App. 461, 41 P. 836 (1895).

A judgment is hypothetical when taken in advance of a judgment in the main suit, as it is dependent upon a judgment subsequently obtained. McPhee v. Gomer, 6 Colo. App. 461, 41 P. 836 (1895).

The issuance of a post-judgment writ of garnishment without a writ of execution is one alternative authorized by C.R.C.P. 69(a). Warner/Elektra/Atlantic Corp. v. B & R Record & Tape Merchandisers, Inc., 40 Colo. App. 179, 570 P.2d 1320 (1977).

When the creditor and debtor have already participated in a complete hearing on the merits of the debt, as is the case with post-judgment garnishment, there is no due process advantage to be gained by forcing the garnishor to file an additional writ. Warner/Elektra/Atlantic Corp. v. B & R Record & Tape Merchandisers, Inc., 40 Colo. App. 179, 570 P.2d 1320 (1977).

When the principal judgment has been obtained, the validity of the judgment against the garnishee depends upon the validity of the judgment against the defendant. McPhee v. Gomer, 6 Colo. App. 461, 41 P. 836 (1895).

Without jurisdiction of the defendant and a judgment against him, a judgment against the garnishee is void, and its payment will not protect the garnishee. McPhee v. Gomer, 6 Colo. App. 461, 41 P. 836 (1895).

Garnishment is proper only after a valid judgment has been entered. W. Med. Prop. Corp. v. Denver Opportunity, Inc., 482 F. Supp. 1205 (D. Colo. 1980).

If the debtor could bring an immediate action to recover the debt from the garnishee, then the debt is due and payable within the meaning of the rule. Martinez v. Dixon, 710 P.2d 498 (Colo. App. 1985); Flanders Elec. v. Davall Controls & Eng., 831 P.2d 492 (Colo. App. 1992).

In the absence of statute, if the assessment or demand has not been previously made in accordance with law, the garnishee is not liable. Universal Fire Ins. Co. v. Tabor, 16 Colo. 531, 27 P. 890 (1891).

Garnishee cannot be placed in a worse position than if defendant enforced his own claim. In the absence of fraud between defendant and a garnishee, the latter cannot be placed, through garnishment proceedings, in a worse position than if defendant's claim were enforced by defendant himself. Universal Fire Ins. Co. v. Tabor, 16 Colo. 531, 27 P. 890 (1891).

Writ of garnishment impounds all moneys held by garnishee and owing to the judgment debtor as of the date the writ is served. Graybar Elec. Co. v. Watkins Elec. Co., 626 P.2d 1157 (Colo. App. 1980), rev'd on other grounds, 662 P.2d 1064 (Colo. 1983).

The trial court obtains jurisdiction over all the monies held by garnishee which are owing to the judgment debtor on the date of the service of the writ of garnishment. Martinez v. Dixon, 710 P.2d 498 (Colo. App. 1985).

A sheriff is not required to make diligent search for other property of defendant before writ may issue. E.I. Du Pont De Nemours & Co. v. Lednum, 82 Colo. 472, 260 P. 1017 (1927).

An indebtedness only can be made the subject of garnishment, and, in order that a liability may be an indebtedness within the meaning of the law, it must arise out of contract. Lewis v. City & County of Denver, 9 Colo. App. 328, 48 P. 317 (1897).

Garnishment applies only to contracts and not to tort actions. The controlling characteristic of the remedy by garnishment is that the liability of the garnishee must originate in, and be dependent on, contract. A right of action for a tort is not, therefore, the subject of garnishment in most jurisdictions. A claim in tort, not reduced to judgment, is not a debt within the meaning of the statutes in reference to garnishment. And the rule is the same where as between the tortfeasor and the person to whom the wrong was done the latter might at his option either hold the tortfeasor to his liability in tort, or, waiving the tort, treat him as his debtor, since the creditor of the wronged person is not at liberty to exercise this option in his place and so evade the general rule as to garnishment of claims in tort by substituting therefor a liquidated claim "quasi ex contractu". Black v. Plumb, 94 Colo. 318, 29 P.2d 708 (1934).

A court should dismiss the action when it appears beyond question that the action sounds in tort. Donald Co. v. Dubinsky, 74 Colo. 128, 219 P. 209 (1923); Black v. Plumb, 94 Colo. 318, 29 P.2d 708 (1934).

A tort claim cannot be adjudicated in a garnishment procedure, for to do so compels the garnishee to enter into combat with an adversary other than its own and do battle with one who had never had any contract relation with him. Steen v. Aetna Cas. & Sur. Co., 157 Colo. 99, 401 P.2d 254 (1965).

Since there is nothing in an insurance policy, either expressly or impliedly, making a garnisher privity in contract with an insured, a stranger to the insurance policy involved, as a garnisher, can have no claim against the company, as garnishee, unless and until such transpires. Steen v. Aetna Cas. & Sur. Co., 157 Colo. 99, 401 P.2d 254 (1965).

Where one, for a valuable consideration, has assumed the obligation of another, he may be held liable as garnishee, and it is not necessary that the garnishee hold tangible real or personal property of the debtor, for the assumption of the debts of another when in proper form is a right, credit, or chose in action required to be reported in garnishment proceed-

ings. Field Family Constr. Co. v. Ryan, 145 Colo. 598, 360 P.2d 110 (1961).

A widow's allowance is subject to garnishment. Isbell-Kent-Oakes Dry Goods Co. v. Larimer County Bank & Trust Co., 75 Colo. 451, 226 P. 293 (1924).

A plaintiff in garnishment does not stand in the position of a purchaser in good faith and for value, but is in no better position than a purchaser or assignee with notice. Collins v. Thuringer, 92 Colo. 433, 21 P.2d 709 (1933).

A garnishment proceeding cannot displace prior valid and bona fide existing right and claims against the debt or property involved. Collins v. Thuringer, 92 Colo. 433, 21 P.2d 709 (1933).

For example, an attorney's lien is prior and superior to any right acquired by a plaintiff in such proceedings. Collins v. Thuringer, 92 Colo. 433, 21 P.2d 709 (1933).

Garnishment under executions is properly subordinated to garnishment under writs of attachment theretofore served on the same creditor, although the latter are, as a precautionary measure, again served on the same date as that issued under the writ of execution. Larimer County Bank & Trust Co. v. Colo. Rubber Co., 79 Colo. 4, 243 P. 622 (1926).

A creditor accepting provisions of assignment cannot reach funds of sale through garnishment. If a creditor accepts, and acts under, the provisions of an assignment for the benefit of creditors, he may not thereafter repudiate his acceptance and claim property in the hands of the trustee for the satisfaction of his debt or reach funds derived from the sale thereof by proceedings in garnishment. McMullin v. Keogh-Doyle Meat Co., 96 Colo. 298, 42 P.2d 463 (1935).

Contingent liabilities are not garnishable. Flanders Elec. v. Davall Controls & Eng., 831 P.2d 492 (Colo. App. 1992).

B. Service of Writ.

Annotator's note. Since section (c) of the prior version of this rule was similar to § 130 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Creditor must proceed in state where employment services rendered. The state in which services were rendered and in which the employer and employee reside is the situs of a chose and action for wages, and a creditor of the employee, who would reach the fund by garnishment, must proceed in that state. Atchison, T. & S. F. R. R. v. Maggard, 6 Colo. App. 85, 39 P. 985 (1895).

The fact that the employer is a railroad company operating a line through different states does not change this rule. Atchison, T. & S. F. R. R. v. Maggard, 6 Colo. App. 85, 39 P. 985 (1895).

Where an order for a widow's allowance and service of garnishment summons affecting the same are made on the same day, they are presumptively at the same time. Isbell-Kent-Oakes Dry Goods Co. v. Larimer County Bank & Trust Co., 75 Colo. 451, 226 P. 293 (1924).

Content of summons not prescribed. This section contains no provision that the court set forth any particular matters in the summons. Security State Bank v. Weingardt, 42 Colo. App. 219, 597 P.2d 1045 (1979).

Writ of garnishment served upon garnishee is insufficient if it fails to provide due process notice that a judgment could be entered against the garnishee based solely upon amount of judgment previously entered if garnishee fails to respond. Don J. Best Trust v. Cherry Creek Nat. Bank, 792 P.2d 303 (Colo. App. 1990).

A writ of garnishment pursuant to this rule and C.R.C.P. 403 provides a judgment creditor with an efficient mechanism for garnishing property to satisfy a proper judgment, provides the judgment debtor with an expedited procedure to protect his or her exempt property, and affords the judgment debtor significantly more process than is required by the United States and Colorado Constitutions. Ortiz v. Valdez, 971 P.2d 1076 (Colo. App. 1998).

C. Jurisdiction.

Garnishment cannot be extended by construction to cases which are not within both its letter and spirit, although it is true that the garnishment statutes of Colorado specifically require that they shall be liberally construed so as to promote their objects. This applies, however, only to the enforcement of the remedy after jurisdiction has attached; it does not permit courts to enlarge or extend by implication the scope of the statutes, so as to bring within their jurisdiction any cases except those to which the statutes manifestly and clearly apply. As to this, the rule of strict construction prevails, the statutes being in derogation of the common law. Troy Laundry & Mach. Co. v. City & County of Denver, 11 Colo. App. 368, 53 P. 256 (1898); Black v. Plumb, 94 Colo. 318, 29 P.2d 708 (1934).

Where a garnishee is doing business within Colorado, service of a writ of garnishment upon it at its place of business properly brings it within the jurisdiction of the court in a garnishment proceeding. Garrett v. Garrett, 30 Colo. App. 167, 490 P.2d 313 (1971).

Where it is claimed that the court does not have jurisdiction, but there was a judgment and execution in the main cause, regularly

obtained, a return of the writ of garnishment, showing due service, gives the court jurisdiction over the garnishee. E.I. Du Pont De Nemours & Co. v. Lednum, 82 Colo. 472, 260 P. 1017 (1927) (decided under § 135 of the former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941).

A garnishment can reach only such property as belongs to the debtor. Denver Joint Stock Land Bank v. Moore, 93 Colo. 151, 25 P.2d 180 (1933); People ex rel. J.W., 174 P.3d 315 (Colo. App. 2007).

This rule shows an intent that every sort of interest of the debtor might be garnished. Bank of Grand Junction v. Bank of Vernal, 81 Colo. 483, 256 P. 660 (1927).

The assertion by a garnishee of a jurisdictional defense to a judgment for which he is sought to be held is not a collateral but a direct attack upon the judgment. Tabor v. Bank of Leadville, 35 Colo. 1, 83 P. 1060 (1905).

Dormancy of judgment in foreign state does not defeat rights of creditor under this rule. Ryan v. Duffield, 899 P.2d 378 (Colo. App. 1995).

Rather than reviving a judgment lien obtained in a foreign state and subsequently recorded in Colorado, garnishments created new and separate liens against the estate of the judgment debtor. Further, the garnishments were not an effort by the judgment creditor to maintain an action in Colorado that could not be maintained in the foreign state, but instead were ancillary to the judgment previously obtained. Ryan v. Duffield, 899 P.2d 378 (Colo. App. 1995).

D. Objection of Judgment Debtor - Exemptions.

Law reviews. For note, "A Discussion of Garnishment and Its Exemptions", see 27 Dicta 453 (1950).

Absence of a creditor-debtor relationship between judgment debtor and garnishee and the existence of an agreement between such parties which specifically negated garnishee's assumption of any of judgment debtor's liability precluded judgment creditors' proceeding against garnishee. Coin Serv. Investors, Inc. v. Grooms, 743 P.2d 42 (Colo. App. 1987).

Garnishee is entitled to an evidentiary hearing concerning the validity of the garnished debt in order to afford due process to the garnishee. Maddalone v. C.D.C., Inc., 765 P.2d 1047 (Colo. App. 1988).

Failure to comply with a court order does not supercede requirement to set a hearing. The court may not sanction a party for his or her failure to comply with a court order by refusing to set a hearing on an objection or claim of exemption. The setting of a hearing is mandatory, not discretionary. Borrayo v. Lefever, 159 P.3d 657 (Colo. App. 2006).

Husband in post-dissolution garnishment proceeding received a proper hearing under subsection 6(c)(4) where trial court conducted a timely and thorough hearing at which it heard argument and received evidence in the form of exhibits from the interested parties and at which the husband's counsel neither requested the opportunity to call witnesses nor objected to the proceeding. In re Gedgaudas, 978 P.2d 677 (Colo. App. 1999).

E. Answer.

A garnishee's answer is made with reference to the facts existing at the time of the service of a writ of garnishment. Bragdon v. Bradt, 16 Colo. App. 65, 64 P. 248 (1901).

If, at that time, the garnishee owes the defendant a debt, or has personal property of the defendant in his possession or under his control, he must so answer and abide the judgment of a court. Bragdon v. Bradt, 16 Colo. App. 65, 64 P. 248 (1901).

If, at that time, he is not indebted to the defendant, or has not in his possession or under his control, any property of the defendant, he is entitled to a discharge. Bragdon v. Bradt, 16 Colo. App. 65, 64 P. 248 (1901).

Garnishee is not answerable for effects of the defendant coming into his hands, or indebtedness accruing from him to the defendant, after the garnishment. Bragdon v. Bradt, 16 Colo. App. 65, 64 P. 248 (1901).

It is only where the answer of a garnishee shows that he is indebted to the defendant, has personal property in his possession or under his control belonging to the defendant, or where his answer denying indebtedness to the defendant or possession of his property is successfully controverted that a judgment against him is lawful. Bragdon v. Bradt, 16 Colo. App. 65, 64 P. 248 (1901).

In order to charge him upon his answer, it must contain a clear admission of a debt due to, or the possession of attachable property of the defendant. Bragdon v. Bradt, 16 Colo. App. 65, 64 P. 248 (1901).

Where his answer is a substantial denial of indebtedness, or possession of attachable property belonging to the defendant, he is entitled to a judgment of discharge, unless the force of the denial is overcome by other statements in the answer or unless the answer is shown to be untrue. Bragdon v. Bradt, 16 Colo. App. 65, 64 P. 248 (1901).

A delivery by the garnishee to the sheriff can be ordered only where the answer admits possession in the garnishee of property belonging to the defendant or where, upon a trial of issue joined upon the answer, such possession is

found. Bragdon v. Bradt, 16 Colo. App. 65, 64 P. 248 (1901).

"Supplemental answer" held no answer at all where time to answer exhausted. Bragdon v. Bradt, 16 Colo. App. 65, 64 P. 248 (1901).

Note properly turned over to sheriff. Where a note in the hands of a garnishee is held pending the result of litigation on final determination of which the note inures to the benefit of the judgment creditor, it is properly turned over to the sheriff with the order that he make disposition of it in the manner required by law. Union Deposit Co. v. Driscoll, 95 Colo. 140, 33 P.2d 251 (1934).

A contingent liability is not garnishable. When a garnishee alleges a contingent liability in his answer to the writ of garnishment, the proper procedure is to allow the garnishor to traverse the garnishee's answer, followed by a trial on the issues framed. Haselden Langley Constructors, Inc. v. Graybar Elec. Co., 662 P.2d 1064 (Colo. 1983).

Payment to creditor's attorneys is payment to creditor. Where money is deposited in court by the garnishee in garnishment proceedings, payment of the fund to attorneys for the garnisheeing creditor is payment to the creditor, and an order to repay part of the fund is proper. Hahnewald v. Schlapfer, 82 Colo. 313, 260 P. 105 (1927).

Default for failure of garnishee "to answer or pay" only applies if guarnishee fails to answer or pay any nonexempt earnings. People ex rel. J.W., 174 P.3d 315 (Colo. App. 2007).

F. Traverse of Answer.

Annotator's note. Since sections (m) and (n) of the prior version of this rule were similar to §§ 144 and 145 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing those sections have been included in the annotations to this rule.

Previously, an order denying a motion to discharge a garnishee for failure of plaintiff to traverse answer of garnishee within required period was not appealable as a "final judgment, decree or order" where no final judgment was entered and garnishee specifically saved right to further challenge court's jurisdiction and nothing in record indicated that court had passed on garnishee's answer. Steel v. Revielle, 102 Colo. 271, 78 P.2d 980 (1938).

Still garnishee cannot take advantage of his own delay. A garnishee, by its own delay having made it impossible for the plaintiff to file the traverse within the time allowed by this section, is in no position to complain, since he cannot take advantage of a situation brought about by his own neglect. Stollins v. Shideler, 91 Colo. 40, 11 P.2d 562 (1932).

A traverse stating only conclusions of law and not facts is insufficient. Day v. Bank of Del Norte, 76 Colo. 223, 230 P. 785 (1924).

The answer of the garnishee and the traverse of the plaintiffs are the only pleadings provided by this rule, and make up the issues in garnishment proceedings. General Accident Fire & Life Assurance Corp. v. Mitchell, 120 Colo. 531, 211 P.2d 551 (1949).

Any new matter pleaded in the traverse is deemed to be denied or avoided. General Accident Fire & Life Assurance Corp. v. Mitchell, 120 Colo. 531, 211 P.2d 551 (1949).

Where the garnishee has no opportunity to plead to a reply without further pleading, he can avail himself of any defense he might have to the new matter set up in the affidavit. Jones v. Langhorne, 19 Colo. 206, 34 P. 997 (1893).

A partner may set up nonjoinder of copartner as a defense. Where a partner is sued individually for a firm debt he is usually required to plead the nonjoinder of his copartners in order that he may avail himself of this defense, but this general rule has no application to garnishment proceedings under this rule. Jones v. Langhorne, 19 Colo. 206, 34 P. 997 (1893).

Subsection 8(b)(5) provides authority pursuant to § 13-16-122 (1)(h) to make an award of attorney fees making § 13-17-101 et seq. inapplicable. United Bank v. State Treasurer, 797 P.2d 851 (Colo. App. 1990).

An award of attorney fees under this rule is at the trial court's discretion. United Guar. Residential Ins. Co. v. Dimmick, 916 P.2d 638 (Colo. App. 1996).

G. Intervention.

Annotator's note. Since section 9 of this rule is similar to § 146 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

This section 9 is not mandatory, and thus, one asserting rights to property which is the subject of garnishment proceedings is free to ignore those garnishment proceedings and file an independent action to enforce those rights. El Paso County Bank v. Charles R. Milisen & Co., 622 P.2d 594 (Colo. App. 1980).

In garnishment proceedings, intervention is governed by this rule which provides that a party shall proceed in accordance with C.R.C.P. 24. Capitol Indus. Bank v. Strain, 166 Colo. 55, 442 P.2d 187 (1968).

Allegations of the petition in intervention held sufficient to make out a prima facie case for intervening assignee. Denver Joint Stock Land Bank v. Moore, 93 Colo. 151, 25 P.2d 180 (1933).

With denial of right of intervention constituting reversible error. Where, in a garnish-

ment proceeding, a third party files a petition in intervention claiming the property involved, he is entitled to have his claim tried and determined, and a denial of that right constitutes reversible error. Burnett v. Jeffers, 88 Colo. 613, 299 P. 18 (1931).

Where in due time. Where the intervention is before the judgment against the garnishee and it cannot be said that the garnishment proceedings have then been determined, the intervention, therefore, is in due time. Hahnewald v. Schlapfer, 82 Colo. 313, 260 P. 105 (1927).

It is error for a trial court to quash a garnishment where the writ of garnishment is issued in accordance with this rule and the answer and return of the garnishee are made within the time prescribed by rule when the regularity of the garnishment proceeding is not attacked and a motion to quash is based wholly upon a claimed right to intervene; but the intervenor tacitly recognizes the validity of the proceedings by having filed its motion to intervene therein. Capitol Indus. Bank v. Strain, 166 Colo. 55, 442 P.2d 187 (1968).

An intervention by definition involves third parties, and such strangers to the original garnishment proceeding, by asserting ownership of the disputed property, necessarily put their ownership status, and all related questions, at issue. Great Neck Plaza, L.P. v. Le Peep Restaurants, 37 P.3d 485 (Colo. App. 2001).

Applied in Susman v. Exchange Nat'l Bank, 117 Colo. 12, 183 P.2d 571 (1947).

H. Set-off.

Law reviews. For article, "Setoff and Security Interests In Deposit Accounts", see 17 Colo. Law. 2108 (1988).

Annotator's note. Since section (p) of the prior version of this rule was similar to § 147 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

By this section a garnishee is allowed to retain or deduct out of the property or credits of the defendant in his hands all demands against the defendant of which he could have availed himself had he not been summoned as garnishee. Tabor v. Bank of Leadville, 35 Colo. 1, 83 P. 1060 (1905).

Garnishee may plead as a defense or set-off whatever he might have pleaded were the suit directly against him by his own creditor. Sauer v. Town of Nevadaville, 14 Colo. 54, 23 P. 87 (1890); Tabor v. Bank of Leadville, 35 Colo. 1, 83 P. 1060 (1905).

Garnishee is not to be placed in a worse position. Under no circumstances shall a garnishee, by the operation of the proceedings against him, be placed in any worse condition than he would be if the defendant's claim against him were enforced by the defendant himself. Tabor v. Bank of Leadville, 35 Colo. 1, 83 P. 1060 (1905); Day v. Bank of Del Norte, 76 Colo. 223, 230 P. 785 (1924).

Bank receiver was entitled to set-off compensation due him. Where an attempt is made in a garnishment proceeding to make a bank receiver liable for a judgment against the bank, such receiver is entitled to plead as a defense or set-off the compensation due him by the bank even though his appointment as such was void. Tabor v. Bank of Leadville, 35 Colo. 1, 83 P. 1060 (1905).

A garnisheed bank may apply the amount on deposit to the credit of a debtor to the payment of his note to it although not due. Day v. Bank of Del Norte, 76 Colo. 223, 230 P. 785 (1924).

Agreement after service of writ would be void. An agreement by a garnishee to apply upon or deduct from credits of the defendant in his possession, a loan made by him to the defendant after service of the writ would be void and could not be enforced by any party thereto. Day v. Bank of Del Norte, 76 Colo. 223, 230 P. 785 (1924).

Garnishee bank is entitled to claim set-off against debtor's account for moneys owed to bank even though moneys were not due at time of service of writ of garnishment. Colo. Nat. Bank - Arvada v. Greaney, 720 P.2d 611 (Colo. App. 1986).

Landlord's lien. A lease may create a valid landlord's lien, enforceable under section 8 of this rule as a set-off. Beneficial Fin. Co. v. Bach, 665 P.2d 1034 (Colo. App. 1983).

The rights and liabilities of a garnishee are to be determined as of the date of the garnishment and not upon a state of facts that existed theretofore or thereafter. Day v. Bank of Del Norte, 76 Colo. 223, 230 P. 785 (1924).

It is unreasonable to require a garnishee to claim a set-off immediately upon service of the writ of garnishment; the more reasonable approach allows a garnishee the same time period to claim set-off as allowed to file its answers to the garnishment interrogatories. Colo. Nat. Bank - Arvada v. Greaney, 720 P.2d 611 (Colo. App. 1986); Flanders Elec. v. Davall Controls & Eng., 831 P.2d 492 (Colo. App. 1992).

It is the responsibility of the trial court to determine the amounts and reasonableness of set-offs, and, absent an abuse of discretion, its decision will not be overturned. Flanders Elec. v. Davall Controls & Eng., 831 P.2d 492 (Colo. App. 1992).

Law firm had statutory charging lien on settlement proceeds. State's lien for child support did not have priority over charging lien. State was entitled to net settlement proceeds after deduction of attorney fees. A garnishment

can only reach property that belongs to the debtor. People ex rel. J.W., 174 P.3d 315 (Colo. App. 2007).

I. Claims of Third Persons.

Annotator's note. Since section (i) and (j) of the prior version of this rule were similar to §§ 138 and 141 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing these sections have been included in the annotations to this rule.

This section puts burden on claimant not only to assert an interest in the property but also to establish the extent of his interest. Security State Bank v. Weingardt, 42 Colo. App. 219, 597 P.2d 1045 (1979).

When a garnishee in his answer states that a third party claims property in his possession belonging to the debtor, it is the duty of the court to issue a citation or summons to said party requiring him to appear and set up his claim. Burnett v. Jeffers, 88 Colo. 613, 299 P. 18 (1931).

However, this rule refers to answers in good faith, so if a garnishee knows the truth he must tell it and if he tells a falsehood, at least if he tells it for a fraudulent purpose, he must pay damages. International State Bank v. Trinidad Bean & Elevator Co., 79 Colo. 286, 245 P. 489 (1926).

Payment to one other than judgment debtor held improper. Where garnishee-defendant, after answering writ of garnishment, discovers that a contract between it and judgment debtor requires that payments be made jointly to debtor and another, the garnishee-defendant then pays the latter part of the sum which it admitted in its answer was due and owing the judgment debtor, and he files an amended answer to that effect, such payment is improper without a release of garnishment or order of court. Welbourne Dev. Co. v. Affiliated Clearance Corp., 28 Colo. App. 313, 472 P.2d 684 (1970).

It is not essential that notice of an assignment be given in advance to a garnishee, although in the absence of knowledge or notice the latter would be protected against double payment. Denver Joint Stock Land Bank v. Moore, 93 Colo. 151, 25 P.2d 180 (1933).

If, during the pendency of garnishment proceedings, it is established that an assignment of the subject-matter antedating the garnishment was actually executed, the absence of previous notice to the garnishee would be immaterial, and a judgment creditor would not be entitled to notice as such. Denver Joint Stock Land Bank v. Moore, 93 Colo. 151, 25 P.2d 180 (1933).

A creditor is entitled to a fund owing defendant by his employer as against the claims of another creditor of which he had no notice where the claims of which said other creditor are not based on a contract sufficient to bind the fund. This being determined, then the only further action within the jurisdiction of the trial court is, on application, to order a judgment against the employer in favor of the defendant for the use of the plaintiff pursuant to the terms of this section. Meyer v. Delta Market, 98 Colo. 421, 57 P.2d 3 (1936).

Once a third-party claimant has conceded that the disputed property may be garnished by a creditor, the claimant is thereafter estopped from claiming the proceeds of the garnishment unless there is an agreement otherwise. Securities Investor Protection Corp. v. Goldberg, 893 F.2d 1139 (10th Cir. 1990).

Applied in Susman v. Exchange Nat'l Bank, 117 Colo. 12, 183 P.2d 571 (1947).

J. Release and Discharge.

A judgment in the principal proceeding is presumptively valid while lodged in an appellate court for review. Zurich Ins. Co. v. Bonebrake, 137 Colo. 37, 320 P.2d 975 (1958).

Such judgment when not superseded by virtue of a failure to furnish the required bond leaves a judgment creditor in the position to take usual steps to enforce collection of his judgment, precisely as if supersedeas has not been granted. Zurich Ins. Co. v. Bonebrake, 137 Colo. 37, 320 P.2d 975 (1958).

The reversal of a judgment upon which a garnishment is based leaves nothing to sustain the judgment against the garnishee. Zurich Ins. Co. v. Bonebrake, 137 Colo. 37, 320 P.2d 975 (1958).

If the original judgment is reversed, a judgment in garnishment is deprived of a basis and falls with it. Zurich Ins. Co. v. Bonebrake, 137 Colo. 37, 320 P.2d 975 (1958).

The existence of a valid judgment is a jurisdictional prerequisite to garnishment relief. Zurich Ins. Co. v. Bonebrake, 137 Colo. 37, 320 P.2d 975 (1958).

Where the judgment in the main case has been reversed, then, if it is made the basis of a garnishment, it must follow that a judgment in the garnishment proceeding cannot stand alone and must be reversed. Zurich Ins. Co. v. Bonebrake, 137 Colo. 37, 320 P.2d 975 (1958).

Since garnishee's liability is not established. Where the case which found garnishee's liability is reversed and remanded for new trial, the garnishee's liability is not established, and garnishment should be vacated. Mitchell v. Am. Family Mut. Ins. Co., 179 Colo. 372, 502 P.2d 79 (1972).

Applied in E.I. Du Pont De NeMours & Co. v. Lednum, 82 Colo. 472, 260 P. 1017 (1927).

K. Disbursement of Funds.

Court approval not required. Subsection 2(h) requires the clerk to disburse funds to the judgment creditor without further application or order. The fact that the judgment debtor had applied for a stay had no effect on the clerk's authority to release the garnished funds. Ryan v. Duffield, 899 P.2d 378 (Colo. App. 1995).

III. SPECIFIC FORMS OF GARNISHMENT.

Law reviews. For article, "The Nuts and Bolts of Collecting Support", see 19 Colo. Law. 1595 (1990).

Past-due child support payments in themselves constitute debt. Colo. State Bank v. Utt, 622 P.2d 584 (Colo. App. 1980).

Amount defendant admittedly owed for past-due child support may be garnished by bank which held judgment against former wife. Colo. State Bank v. Utt, 622 P.2d 584 (Colo. App. 1980).

Law firm had statutory charging lien on settlement proceeds. State's lien for child support did not have priority over charging lien. State was entitled to net settlement proceeds after deduction of attorney fees. A garnishment can only reach property that belongs to the debtor. People ex rel. J.W., 174 P.3d 315 (Colo. App. 2007).

C.R.C.P. 102, this rule, and § 4-8-112 may be harmonized so that stock certificates may be reached by a creditor either by actual physical seizure, by a writ of attachment, if actually seized, or by serving the person who possesses the certificate with a writ of garnishment. Moreland v. Alpert, 124 P.3d 896 (Colo. App. 2005).

Rule 104. Replevin

(a) **Personal Property.** The plaintiff in an action to recover the possession of personal property may, at the time of the commencement of the action, or at any time before trial, claim the delivery of such property to him as provided in this Rule.

(b) **Causes, Affidavit.** Where a delivery is claimed, the plaintiff, his agent or attorney, or some credible person for him, shall, by verified complaint or by complaint and affidavit under penalty of perjury show to the court as follows:

(1) That the plaintiff is the owner of the property claimed or is entitled to possession thereof and the source of such title or right; and if plaintiff's interest in such property is based upon a written instrument, a copy thereof shall be attached;

(2) That the property is being detained by the defendant against the plaintiff's claim of right to possession; the means by which the defendant came into possession thereof, and the specific facts constituting detention against the right of the plaintiff to possession;

(3) A particular description of the property, a statement of its actual value, and a statement to his best knowledge, information and belief concerning the location of the property and of the residence and business address, if any, of the defendant;

(4) That the property has not been taken for a tax assessment or fine pursuant to a statute; or seized under an execution against the property of the plaintiff; or if so seized, that it is by statute exempt from seizure.

(c) **Show Cause Order; Hearing within 14 Days.** The court shall without delay, examine the complaint and affidavit, and if it is satisfied that they meet the requirements of section (b), it shall issue an order directed to the defendant to show cause why the property should not be taken from the defendant and delivered to the plaintiff. Such order shall fix the date and time for the hearing thereof. The hearing date shall be not more than 14 days from the date of the issuance of the order and the order must have been served at least 7 days prior to the hearing date. The plaintiff may request a hearing date beyond 14 days, which request shall constitute a waiver of the right to a hearing not more than 14 days from the date of issuance of the order. Such order shall inform the defendant that he may file affidavits on his behalf with the court and may appear and present testimony in his behalf at the time of such hearing, or that he may, at or prior to such hearing, file with the court a written undertaking to stay the delivery of the property, in accordance with the provisions of section (j) of this rule, and that, if he fails to appear at the hearing on the order to show cause or to file an undertaking, plaintiff may apply to the court for an order requiring the sheriff to take immediate possession of the property described in the complaint and deliver same to the plaintiff. The summons and complaint, if not previously served, and the order

shall be served on the defendant and the order shall fix the manner in which service shall be made, which shall be by service in accordance with the provisions of Rule 4, C.R.C.P., or in such manner as the court may determine to be reasonably calculated to afford notice thereof to the defendant under the circumstances appearing from the complaint and affidavit.

(d) Order for Possession Prior to Hearing. Subject to the provisions of section 5-5-104, C.R.S. 1973, and upon examination of the complaint and affidavit and such other evidence or testimony as the court may thereupon require, an order of possession may be issued prior to hearing, if probable cause appears that any of the following exist:

(1) The defendant gained possession of the property by theft.

(2) The property consists of one or more negotiable instruments or credit cards.

(3) By reason of specific, competent evidence shown, by testimony with the personal knowledge of an affiant or witness, the property is perishable, and will perish before any noticed hearing can be had, or that the defendant may destroy, dismantle, remove parts from, or in any way substantially change the character of the property, or the defendant may conceal or remove the property from the jurisdiction of the court to sell the property to an innocent purchaser.

(4) That the defendant has by contract voluntarily and intelligently and knowingly waived his right to a hearing prior to losing possession of the property by means of a court order.

Where an order of possession has been issued prior to hearing under the provisions of this section, the defendant or other persons from whom possession of said property has been taken, may apply to the court for an order shortening time for hearing on the order to show cause, and the court may, upon such application, shorten the time for hearing, and direct that the matter shall be heard on not less than forty-eight hours' notice to the plaintiff.

(e) Bond. An order of possession shall not issue pursuant to section (d) of this rule until plaintiff has filed with the court in an amount set by the court in its discretion not to exceed double the value of the property a written undertaking executed by plaintiff and such surety as the court may require for the return of the property to the defendant, if return thereof be ordered, and for the payment to the defendant of any sum that may from any cause be recovered against the plaintiff.

(f) Temporary Order to Preserve Property. Under the circumstances described in section (b) of this Rule, or in lieu of the immediate issuance of an order of possession under any circumstances described in section (d) of this Rule, the court may, in addition to the issuance of the order to show cause, issue such temporary orders, directed to the defendant, prohibiting or requiring such acts with respect to the property as may appear to be necessary for the preservation of the rights of the parties and the status of the property.

(g) Order for Possession after Hearing; Bond; Directed to Sheriff. Upon the hearing on the order to show cause, which hearing shall be held as a matter of course by the court, the court shall consider the showing made by the parties appearing, and shall make a preliminary determination of which party, with reasonable probability, is entitled to possession, use, and disposition of the property pending final adjudication of the claims of the parties. If the court determines that the action is one in which a pre-judgment order of possession should issue, it shall direct the issuance of such order and may require a bond in such amount and with such surety as the court may determine to protect the rights of the parties. Failure of the defendant to be present or represented at the hearing on the order to show cause shall not constitute a default in the main action. The order of possession shall be directed to the sheriff within whose jurisdiction the property is located.

(h) Contents of Possession Order. The order of possession shall describe the specific property to be seized, and shall specify the location or locations where there is probable cause to believe the property or some part thereof will be found. It shall direct the sheriff to seize the same as it is found, and to retain it in his custody. There shall be attached to such order a copy of the written undertaking filed by the plaintiff, and such order shall inform the defendant that he has the right to except to the sureties or to the amount of the bond upon the undertaking or to file a written undertaking for the redelivery of such property as provided in section (j).

Upon probable cause shown by further affidavit or declaration by the plaintiff or someone in his behalf, filed with the court, an order of possession may be endorsed by the court, without further notice, to direct the sheriff to search for the property at another specified location or locations and to seize the same if found.

The sheriff shall forthwith take the property if it be in the possession of the defendant or his agent, and retain it in his custody; except that when the personal property is then occupied as a dwelling [such as but not limited to a mobile home], the sheriff shall take constructive possession of the property and shall remove its occupants and take the property into his actual custody at the expiration of 10 days after the issuance of the order of possession, or at such earlier time as the property shall have been vacated.

(i) Sheriff May Break Building; When. If the property or any part thereof is in a building or enclosure, the sheriff shall demand its delivery, announcing his identity, purpose, and the authority under which he acts. If it is not voluntarily delivered, he shall cause the building or enclosure to be broken open in such manner as he reasonably believes will cause the least damage to the building or enclosure, and take the property into his possession. He may call upon the power of the county to aid and protect him, but if he reasonably believes that entry and seizure of the property will involve a substantial risk of death or serious bodily harm to any person, he shall refrain from seizing the property, and shall forthwith make a return before the court from which the order issued, setting forth the reasons for his belief that such risk exists. The court may make such orders and decrees as may be appropriate.

The sheriff shall, without delay, serve upon the defendant a copy of the order of possession and written undertaking by delivering the same to him personally, if he can be found or to his agent from whose possession the property is taken; or, if neither can be found, by leaving them at the usual place of abode of either with some person of suitable age and discretion; or if neither has any known place of abode, by mailing them to the last known address of either.

(j) When Returned to Defendant; Bond. At any time prior to the hearing on the order to show cause, or before the delivery of the property to the plaintiff, the defendant may require the return thereof upon filing with the court a written undertaking, in an amount set by the court in its discretion not to exceed double the value of the property and executed by the defendant and such surety as the court may direct for the delivery of the property to the plaintiff, if such delivery be ordered, and for the payment to the plaintiff of such sum as may for any cause be recovered against the defendant. At the time of filing such undertaking, the defendant shall serve upon the plaintiff or his attorney, in the manner provided by Rule 5, C.R.C.P., a notice of filing of such undertaking, to which a copy of such undertaking shall be attached, and shall cause proof of service thereof to be filed with the court. If such undertaking be filed prior to hearing on the order to show cause, proceedings thereunder shall terminate, unless exception is taken to the amount of the bond or the sufficiency of the surety. If, at the time of filing of such undertaking, the property shall be in the custody of the sheriff, such property shall be redelivered to the defendant 7 days after service of notice of filing such undertaking upon the plaintiff or his attorney.

(k) Exception to Sureties. Either party may, within two business days after service of an undertaking or notice of filing and undertaking under the provisions of this Rule, give written notice to the court and the other party that he excepts to the sufficiency of the surety or the amount of the bond. If he fails to do so, he is deemed to have waived all objections to them. When a party excepts the court shall hold a hearing to determine the sufficiency of the bond or surety. If the property be in the custody of the sheriff, he shall retain custody thereof until the hearing is completed or waived. If the excepting party prevails at the hearing, the sheriff shall proceed as if no such undertaking had been filed. If the excepting party does not prevail at the hearing, or the exception is waived, he shall deliver the property to the party filing such undertaking.

(l) Duty of Sheriff in Holding Goods. When the sheriff has taken property as provided in this Rule, he shall keep it in a secure place and deliver it to the party entitled thereto, upon receiving his fees for taking and his necessary expenses for keeping the same, after expiration of the time for filing of an undertaking for redelivery and for exception to the sufficiency of the bond, unless the court shall by order stay such delivery.

(m) Claim by Third Person. If the property taken is claimed by any other person than the defendant or plaintiff, such person may intervene under the provisions of Rule 24, C.R.C.P., and in the event of a judgment in his favor, he may also recover such damages as he may have suffered by reason of any wrongful detention of the property.

(n) Return; Papers by Sheriff. The sheriff shall return the order of possession and undertakings and affidavits with his proceedings thereon, to the court in which the action is pending, within 21 days after taking the property mentioned therein.

(o) Precedence on Docket. In all proceedings brought to recover the possession of personal property, all courts, in which such actions are pending, shall, upon request of any party thereto, give such actions precedence over all other civil actions, except actions to which special precedence is otherwise given by law, in the matter of the setting of the same for hearing or trial, and in hearing or trial thereof, to the end that all such actions shall be quickly heard and determined.

(p) Judgment. In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession or the value thereof in case a delivery cannot be had, and damages for the detention. If the property has been delivered to the plaintiff, and the defendant claims a return thereof, judgment for the defendant may be for a return of the property, or the value thereof in case a return cannot be had, and damages for taking and withholding the same. The provisions of Rule 13, C.R.C.P., shall apply to replevin actions.

Source: Entire rule amended and adopted December 4, 2003, effective January 1, 2004; (c), (j), (k), and (n) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Cross references: For provisions prohibiting replevin prior to judgment in certain cases under the "Uniform Consumer Credit Code", see § 5-5-105, C.R.S.

ANNOTATION

I. General Consideration.
II. Pleading: Complaint and Affidavit.
III. Bond.
IV. Judgment.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Seizure of Person or Property: Rules 101-104", see 23 Rocky Mt. L. Rev. 603 (1951).

Annotator's note. Since this rule is similar to §§ 85 through 96 and § 247 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing those sections have been included in the annotations to this rule.

At common law replevin lay where there was an unlawful taking, and detinue where there was an unlawful detention. Denver Onyx & Marble Mfg. Co. v. Reynolds, 72 F. 464 (8th Cir. 1896).

This rule superseded the common-law action. The remedy provided by this rule supersedes the common-law action of replevin, whether in the cepit or in the detinet, and all the ancient learning relating to these distinctions became obsolete upon the adoption of the rule. Denver Onyx & Marble Mfg. Co. v. Reynolds, 72 F. 464 (8th Cir. 1896).

Purpose of prejudgment hearing. This rule clearly contemplates that the conflicting legal and equitable claims of the parties will be fully adjudicated in a trial on the merits. The prejudgment hearing serves the far narrower purpose of ensuring that a replevin defendant's constitutionally guaranteed property rights will not be jeopardized by unduly summary claim and delivery proceedings. Jack Kent Cadillac, Inc. v. District Court, 198 Colo. 403, 601 P.2d 626 (1979); Metro Nat. Bank v. District Court, 676 P.2d 19 (Colo. 1984).

Although a district court sits as a court of general jurisdiction in an action to replevy personal property, its powers are more limited where, in a prejudgment hearing on an order to show cause, the only issue to be decided is "which party, with reasonable probability, is entitled to possession, use, and disposition of the property pending final adjudication of the claims of the parties". Jack Kent Cadillac, Inc. v. District Court, 198 Colo. 403, 601 P.2d 626 (1979).

Order to show cause required for jurisdiction of possessory rights in property. A court conducting a hearing under this rule lacks jurisdiction unilaterally to affect possessory rights in any property not brought within its purview by a duly issued order to show cause. Jack Kent Cadillac, Inc. v. District Court, 198 Colo. 403, 601 P.2d 626 (1979).

The only issue to be determined in an action in replevin is ownership and right of

possession. Amarillo Auto Auction, Inc. v. Hutchinson, 135 Colo. 320, 310 P.2d 715 (1957).

To maintain action, plaintiff's right to the possession of the property must be exclusive. Hoeffer v. Agee, 9 Colo. App. 189, 47 P. 973 (1897).

The vendee of an automobile under a conditional sales contract executed and valid in another state who has feloniously been deprived of possession of said automobile may recover the same from an innocent Colorado purchaser for value. Avis Rent-A-Car Sys. v. Woelfel, 155 Colo. 207, 393 P.2d 551 (1964).

Replevin for an undivided interest in property cannot be maintained. Hoeffer v. Agee, 9 Colo. App. 189, 47 P. 973 (1897).

Defendant must have actual or constructive possession. Appellant sought to recover from appellee-defendant the physical possession of a stock certificate upon allegation that he had purchased such shares from appellee, that such certificate had been delivered to him, that appellee had later surreptitiously regained possession and had continued to withhold possession of the stock notwithstanding demand. The undisputed evidence indicated that appellee had neither actual nor constructive possession of the subject stock certificate at the time the action was commenced, a prerequisite in an action in the nature of replevin. Brennan v. Sellers, 357 F.2d 150 (10th Cir.), cert. denied, 385 U.S. 828, 87 S. Ct. 61, 17 L. Ed. 2d 64, reh'g denied, 385 U.S. 984, 87 S. Ct. 531, 17 L. Ed. 2d 445 (1966).

Plaintiff may recover damages for taking of property or judgment for its value. Under this rule the action for the recovery of personal property lies, by one entitled to the possession, against one wrongfully holding the possession, whether the possession was acquired in good or bad faith. In the action, the plaintiff may, if he maintained his suit, recover damages for the taking or detention of the property, and, if the property cannot be returned, judgment for its value. Denver Onyx & Marble Mfg. Co. v. Reynolds, 72 F. 464 (8th Cir. 1896); Roblek v. Horst, 147 Colo. 55, 362 P.2d 869 (1961).

Adjustment of equities not authorized by jurisdiction over property and parties. Jurisdiction over the parties and the subject matter does not authorize the trial court to enter whatever remedial orders it deems necessary to adjust the equities between the parties. Jack Kent Cadillac, Inc. v. District Court, 198 Colo. 403, 601 P.2d 626 (1979).

Since court had jurisdiction over the subject matter and over the person in a replevin action, and the person did not avail himself of opportunity to contest replevin action in that court but instead filed alternative actions in other courts and such other courts refused to disturb the replevin order, such person waived his right to contest the validity of the order in the replevin action in a subsequent action. Flickinger v. Ninth District Prod. Credit, 824 P.2d 19 (Colo. App. 1991).

Restrictions of Governmental Immunity Act apply to replevin action for car seized by police. Denver v. Desert Truck Sales, Inc., 837 P.2d 759 (Colo. 1992).

II. PLEADING: COMPLAINT AND AFFIDAVIT.

Commencement of action. No writ of replevin may be issued under this rule until an action in claim and delivery is commenced by the filing of a complaint which alleges the right of the plaintiff to the possession of personal property, and claims the delivery thereof. Gentry v. United States, 101 F. 51 (8th Cir. 1900).

Facts alleged in counterclaim and demand for return of all certificates held by plaintiff bank constitute a claim for replevin. Together with a "verified complaint for replevin" incorporating the answer, counterclaim, cross-claim, and third-party complaint, and sworn to by the defendant, the requirements of section (e) of this rule are met. Metro Nat. Bank v. District Court, 676 P.2d 19 (Colo. 1984).

The complaint must allege ownership. In an action to recover possession of personal property, the complaint must allege ownership, either general or special, otherwise the complaint will be bad on demurrer. Baker v. Cordwell, 6 Colo. 199 (1882); Reavis v. Stockel, 120 Colo. 82, 208 P.2d 94 (1949).

Plaintiff has the burden of affirmatively establishing his own title and right of immediate possession to the property in question. Bill Dreiling Motor Co. v. St. Paul Fire & Marine Ins., 28 Colo. App. 318, 472 P.2d 153 (1970).

Complaint may be amended to conform to proof concerning ownership of property. In an action in replevin, in the disclosed circumstances, it is held that there was no abuse of discretion on the part of the trial court in permitting the plaintiff to amend its complaint to conform to the proof concerning ownership of certain of the property involved. Thomas v. First Nat'l Bank, 97 Colo. 474, 51 P.2d 589 (1935).

Defective affidavit. If affidavit is defective, the appellant is not in a condition to avail himself of any defects. Conly v. Friedman, 6 Colo. App. 160, 40 P. 348 (1895).

Allegations of value are binding on plaintiff. In a replevin action, allegations of the value of the property in the affidavit and sworn complaint are binding on plaintiffs. Startzell v. Bowers, 88 Colo. 135, 292 P. 601 (1930).

Where the seizure was wrongful, demand prior to the commencement of suit is unnecessary. Bartels v. Arms, 3 Colo. 72 (1876); Smith v. Jensen, 13 Colo. 213, 22 P. 434 (1889);

Farncomb v. Stern, 18 Colo. 279, 32 P. 612 (1893).

Demand is only required when it is necessary to terminate the defendants' right of possession or to confer that right on the plaintiff. Lamping v. Keenan, 9 Colo. 390, 12 P. 434 (1884).

The only reason why demand is necessary in any case, is to give the defendant an opportunity to surrender without being put to costs; and while this is eminently proper, the object of the rule is fully accomplished, and the plaintiff sufficiently punished for his neglect by judgment against him for costs, without being compelled to surrender his goods. Denver Live Stock Comm'n Co. v. Parks, 41 Colo. 164, 91 P. 1110 (1907).

No proof of demand is necessary where the defendant claims ownership and right of possession. Hennessey v. Barnett, 12 Colo. App. 254, 55 P. 197 (1898); Denver Live Stock Comm'n Co. v. Parks, 41 Colo. 164, 91 P. 1110 (1907); Scott v. Bohe, 81 Colo. 454, 256 P. 315 (1927).

Nor where it is clear that it would have been unavailing. Scott v. Bohe, 81 Colo. 454, 256 P. 315 (1927).

A demand made after the beginning of the action but prior to the execution of the writ is sufficient. Denver Live Stock Comm'n Co. v. Parks, 41 Colo. 164, 91 P. 1110 (1907).

In replevin, fraud need not be specially pleaded. Sopris v. Truax, 1 Colo. 89 (1868).

Upon a general denial a defendant may show absolute title in himself or a third party but not a special property. Mason Tire Sales Co. v. Mason Tire & Rubber Co., 73 Colo. 42, 213 P. 117 (1923).

A party from whom personal property has been taken pursuant to a replevin order is entitled, upon voluntary dismissal of the action by the opposing party, to return of the property or its value unless the opposing party can establish its right to retain possession of the property. The burden of establishing the right to the property should remain on the party who initially obtained the replevin order. Where no trial is held, a plaintiff should not be permitted simply to retain the property without making a showing to establish its right to possession and without affording the defendant an opportunity to demonstrate that the property was wrongfully taken. Prefer v. PharmNetRx, LLC, 18 P.3d 844 (Colo. App. 2000).

III. BOND.

A defendant in a replevin action can recover from the surety, on the latter's bond, damages he has incurred as a result of the seizing of the property in his possession, without the requirement of showing an original judgment in his favor for the return of the property or in the alternative for damages in the event return is not possible. Denver Truck Exch., Inc. v. Globe Indem. Co., 162 Colo. 398, 426 P.2d 772 (1967).

The property must be returned in like good order and condition as when replevied. Trindle v. Register Printing & Publ'g Co., 58 Colo. 81, 143 P. 282 (1914).

A verdict for the plaintiff fixing the total value of the goods, not valuing any item separately, is conclusive upon the defendant, and his surety in the redelivery bond. Trindle v. Register Printing & Publ'g Co., 58 Colo. 81, 143 P. 282 (1914).

Bond covers only claims of possession and loss thereof. The language in section (e), "any sum that may from any cause be recovered", viewed in context, does not apply to claims unrelated to possession or the loss of the property at issue. White v. Jackson, 41 Colo. App. 433, 586 P.2d 243 (1978).

A defendant in a replevin action under this rule is entitled to recover from the surety whatever damages he has incurred as a result of the seizing of property in his possession; however, where he has lost his lien and the owner becomes entitled to possession, he suffers no damages as a result of the replevin. White v. Jackson, 41 Colo. App. 433, 586 P.2d 243 (1978).

IV. JUDGMENT.

Judgment to be for return of entire property when in the hands of the other party. Horn v. Citizens Sav. & Com. Bank, 8 Colo. App. 535, 46 P. 838 (1896); Jones v. Messenger, 40 Colo. 37, 90 P. 64 (1907); Duffy v. Wilson, 44 Colo. 340, 98 P. 826 (1908).

If possession cannot be had, judgment is for full value of property. Tucker v. Parks, 7 Colo. 62, 1 P. 427 (1883); Horn v. Citizens Sav. & Com. Bank, 8 Colo. App. 535, 46 P. 838 (1896); Jones v. Messenger, 40 Colo. 37, 90 P. 64 (1907); Duffy v. Wilson, 44 Colo. 340, 98 P. 826 (1908).

It is unimportant that the thing to be recovered cannot be identified. It is suggested that replevin will not lie for the sheep, because they cannot be identified. That is unimportant under this rule. If replevin will not lie, trover will, and under this rule, action for possession, with the alternative recovery of the property or the value thereof in such a case as this, is equivalent practically to the two together. The plaintiff states the ultimate facts and has such judgment as they justify. If the chattels cannot be delivered, their value must be paid, and the judgments in that respect are right. To hold otherwise would be to revert to the common-law forms of action now happily abolished. Clay, Robinson & Co. v. Martinez, 74 Colo. 10, 218 P. 903 (1923).

Defendant cannot complain of a judgment for the return of the property only. A judgment for the plaintiff, in an action of replevin should be in the alternative for the possession of the property, or the value thereof in case a delivery cannot be had; but, since this is for the protection of the plaintiff, the defendant cannot complain of a judgment for the return of the property only. Copeland v. Kilpatrick, 38 Colo. 208, 88 P. 472 (1906).

A judgment must be for the possession of the entire property to be operative. Jones v. Messenger, 40 Colo. 37, 90 P. 64 (1907); Duffy v. Wilson, 44 Colo. 340, 98 P. 826 (1908).

Value of property is basis for judgment. Only on evidence as to the value of property taken in replevin is there basis for judgment. Viles v. Jackson, 105 Colo. 68, 94 P.2d 1085 (1939).

Rule is satisfied by a finding of the total aggregate value of all the chattels wrongfully withheld. Stevenson v. Lord, 15 Colo. 131, 25 P. 313 (1890); Copeland v. Kilpatrick, 38 Colo. 208, 88 P. 472 (1906).

There is no need that the judgment should declare the separate value of each item of the recovery. Copeland v. Kilpatrick, 38 Colo. 208, 88 P. 472 (1906); Duffy v. Wilson, 44 Colo. 340, 98 P. 826 (1908).

A judgment in the alternative is not required where it would be useless. Where the goods in question have been consumed by defendant and therefore cannot possibly be delivered, it is proper to accept a finding of guilty, assessing the value. To require an alternative judgment would be a useless formality. Barnard v. Corlett, 62 Colo. 226, 161 P. 156 (1916); Denver Truck Exch., Inc. v. Globe Indem. Co., 162 Colo. 398, 426 P.2d 772 (1967).

Proof of facts under allegations determines relief. In a proper case the court may award a money judgment, without its being in the alternative, even though technically it was designated an action in replevin. Melnick v. Bowman, 102 Colo. 384, 79 P.2d 368 (1938).

Return and damages must be claimed in the answer. To authorize a judgment in a replevin suit, for the return of the property to the defendant or for its value, or for damage for its detention, the return and the damages must be claimed in the answer. And where the answer did not claim a return of the property or damage for its detention a judgment for its return and for damages for its detention was unwarranted and must be regarded as void. Gallup v. Wortmann, 11 Colo. App. 308, 53 P. 247 (1898).

Measure of damages. When neither fraud, malice, or wilful wrong in the taking or detention of the goods is alleged, the measure of damages is the value of the goods at the time of the taking or illegal detention. Barnard v. Corlett, 62 Colo. 226, 161 P. 156 (1916).

Damages for unlawful taking and detention. A party to a replevin action who is ultimately adjudged to have the right to possession is also entitled to damages for the unlawful taking and detention of the chattel. Roblek v. Horst, 147 Colo. 55, 362 P.2d 869 (1961).

Damages cannot be defeated by mere misnomer or bad form. While defendant's demands (other than for return of the property) are denominated "further answer", "cross complaint", and "separate and further cause of action", all are in fact for damages for wrongful taking and detention, recoverable under this section. They are not to be defeated by mere misnomer or bad form. Ellison v. Young, 71 Colo. 385, 206 P. 802 (1922).

Part of judgment awarding damages for indebtedness and attorney fees held void. In an action in replevin to secure possession of mortgaged property because of default in payment of the secured indebtedness, a judgment, insofar as it awards the property to plaintiff and for costs, may be valid, but void as to that part purporting to award damages for the indebtedness and for attorney fees. French v. Commercial Credit Co., 99 Colo. 447, 64 P.2d 127 (1936).

Judgment must be limited to ascertainment of whether there was any indebtedness. In an action in replevin by the holder of a chattel mortgage to obtain possession of the mortgaged property because the debtor was in default in payment of the secured note, the court has no jurisdiction to try the issue of indebtedness except to the point of ascertaining whether there was any indebtedness at all, and its judgment must be so limited. French v. Commercial Credit Co., 99 Colo. 447, 64 P.2d 127 (1936).

The amount of the judgment recovered by defendant is conclusive in a subsequent suit upon the replevin bond. Cantril v. Babcock, 11 Colo. 143, 17 P. 296 (1887); Denver Truck Exch., Inc. v. Globe Indem. Co., 162 Colo. 398, 426 P.2d 772 (1967).

Unauthorized use by bailee gives bailor the right of immediate possession. A use of the chattel of the bailee in a manner unauthorized by the contract of bailment gives the bailor the right of immediate possession, and he may maintain trover or replevin. Clay, Robinson & Co. v. Martinez, 74 Colo. 10, 218 P. 903 (1923).

CHAPTER 14

Real Estate

CHAPTER 14

REAL ESTATE

Rule 105. Actions Concerning Real Estate

(a) Complete Adjudication of Rights. An action may be brought for the purpose of obtaining a complete adjudication of the rights of all parties thereto, with respect to any real property and for damages, if any, for the withholding of possession. The court in its decree shall grant full and adequate relief so as to completely determine the controversy and enforce the rights of the parties. The court may at any time after the entry of the decree make such additional orders as may be required in aid of such decree.

(b) Record Interest; Actual Possession Requires Occupant Be Party. No person claiming any interest under or through a person named as a defendant need be made a party unless his interest is shown of record in the office of the recorder of the county where the real property is situated, and the decree shall be as conclusive against him as if he had been made a party; provided, however, if such action be for the recovery of actual possession of the property, the party in actual possession shall be made a party.

(c) Disclaimer Saves Costs. If any defendant in such action disclaims in his answer any interest in the property or allows judgment to be taken against him without answer, the plaintiff shall not recover costs against him, unless the court shall otherwise direct, provided that this section shall not apply to a defendant primarily liable on any indebtedness sought to be foreclosed or established as a lien.

(d) Execution of Quitclaim Deed Saves Costs. If a party, 21 days or more before bringing an action for obtaining an adjudication of the rights of another person with respect to any real property, shall request of such person the execution of a quitclaim deed to such property and shall also tender to such person $20.00 to cover the expense of the execution and delivery of a deed and if such person shall refuse or neglect to execute and deliver such deed, the filing by such person of a disclaimer shall not avoid the imposition upon such person of the costs in the action afterwards brought.

(e) Set-off for Improvements. Where a party or those under whom he claims, holding under color of title adversely to the claims of another party, shall in good faith have made permanent improvements upon real property (other than mining property) the value of such improvements shall be allowed as a set-off or as a counterclaim in favor of such party, in the event that judgment is entered against such party for possession or for damages for withholding of possession.

(f) Lis Pendens.

(1) **Filing and Notice.** A notice of lis pendens may be recorded as provided by statute.

(2) **Determination of Effect on Real Property.** Any interested person may petition the court in the action identified in the notice of lis pendens for a determination that a judgment on the issues raised by the pleadings in the pending action will not affect all, or a designated part, of the real property described in the notice of lis pendens, or a specifically described interest therein. After a hearing on such petition, the court shall make findings of fact and enter an order setting forth the description of the property as contained in the recorded notice of lis pendens and the description of the portion thereof or the interest therein, if any, the title to which will not be affected by judgment on the issues then pending in the action. Such order shall be a final judgment as to the matters set forth therein and if the order includes the determination required by Rule 54(b) as to its finality apart from remaining issues, it shall be appealable only as a separate judgment of that date.

(3) **Disclaimer.** Nothing in this Rule 105(f) shall be construed so as to preclude any party litigant from disclaiming an interest in all or any part of the real property affected by such notice of lis pendens, by filing with the court an instrument so indicating, containing a reference to the notice of lis pendens by its recording data sufficient to locate it in the

records of the clerk and recorder. The filing of such instrument with the court then having jurisdiction shall bar any further claims of said party to such real property in said action.

(4) Repealed, effective April 1, 1993.

(g) Description of Real Property. In any proceeding for the recovery of real property or an interest therein, such property shall be designated by legal description.

COMMITTEE COMMENT

The previous provisions of Rule 105(f)(1) and (4) have been superseded by the passage of House Bill 92-1038, now C.R.S. § 38-35-110 (1992). The statute sets out the circumstances under which a lis pendens may be recorded, states the legal effect of the recording as a matter of substantive law, and provides for the release of the effect of a lis pendens in certain circumstances. The statute clarifies certain issues that had arisen in interpreting the former rule. Subsections (2) and (3) have been retained, as they provide procedures for the removal of the effect of a lis pendens during the course of litigation, an area of concern which is not addressed by the statute, and which is strictly procedural in nature.

Source: (f)(1) amended, (f)(4) repealed, and committee comment added and effective April 1, 1993; committee comment approved for publication March 17, 1994, effective July 1, 1994; (d) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Cross references: For boundary proceedings and surveys, see articles 44 and 50 to 53 of title 38, C.R.S.; for parties to be named in actions concerning real property, see § 38-35-114, C.R.S.; for lis pendens as notice, see § 38-35-110, C.R.S.; for certificate staying judgment on issuance of bond and its effect on lis pendens, see C.A.R. 8(d).

ANNOTATION

I. General Consideration.
II. Scope of Relief.
III. Costs.
IV. Lis Pendens.
V. Description of Real Property.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Must Colorado Real Property Installment Sale Contracts Be Foreclosed as Mortgages?", see 9 Dicta 320 (1932). For note, "Vendor's Remedies Under Colorado Executory Land Contracts", see 22 Rocky Mt. L. Rev. 296 (1950). For article, "A Decade of Colorado Law: Conflict of Laws, Security Contracts and Equity", see 23 Rocky Mt. L. Rev. 247 (1951). For article, "Actions Concerning Real Estate Including Service of Process: Rule 105 and Rule 4", see 23 Rocky Mt. L. Rev. 614 (1951). For article, "Enforcement of Security Interests in Colorado", see 25 Rocky Mt. L. Rev. 1 (1952). For article, "Standard Pleading Samples to Be Used in Quiet Title Litigation", see 30 Dicta 39 (1953). For article, "Attorneys, Courts, Equity", see 31 Dicta 477 (1954). For article, "Property Law", see 32 Dicta 420 (1955). For article, "One Year Review of Civil Procedure", see 34 Dicta 69 (1957). For article, "One Year Review of Civil Procedure and Appeals", see 37 Dicta 21 (1960). For article, "One Year Review of Property", see 37 Dicta 89 (1960). For note, "Holdover Tenants in Colorado", see 34 Rocky Mt. L. Rev. 320 (1962). For article, "Land Description Problems", see 35 U. Colo. L. Rev. 12 (1962). For article, "Survey of Title Irregularities, Curative Statutes and Title Standards in Colorado", see 35 U. Colo. L. Rev. 21 (1962). For article, "Court Proceedings Relating to Real Estate Titles", see 35 U. Colo. L. Rev. 65 (1962). For article, "Winning the Rezoning", see 11 Colo. Law. 634 (1982). For article, "Foreclosure by Private Trustee: Now Is the Time for Colorado", see 65 Den. U. L. Rev. 41 (1988).

Purpose of this rule is to provide for a complete adjudication of the rights of all parties so that the controversy may be ended. Maitland v. Bd. of County Comm'rs, 701 P.2d 617 (Colo. App. 1984).

It is clear from the language of this rule that a C.R.C.P. 105 proceeding should completely adjudicate the rights of all parties to the action claiming interests in the property. Even if a counterclaim is not pled, or an issue is not raised in the pleadings but is apparent from the evidence, the court should reach the issue to give full relief. Keith v. Kinney, 961 P.2d 516 (Colo. App. 1997).

This rule does not change the substantive law, which is firmly established in all actions regarding possession of real property. Fastenau

v. Engel, 129 Colo. 440, 270 P.2d 1019 (1954); Martini v. Smith, 42 P.3d 629 (Colo. 2002).

This rule was not intended to permit courts to quiet title in defaulting defendants. Osborne v. Holford, 40 Colo. App. 365, 575 P.2d 866 (1978).

Substance and not form determines the nature of an action relating to real estate, since the adoption of section (a). Vogt v. Hansen, 123 Colo. 105, 225 P.2d 1040 (1950).

Whether or not an action was one for possession of land depends on the fact of possession, and not on the form of the action. Vogt v. Hansen, 123 Colo. 105, 225 P.2d 1040 (1950).

Plaintiffs must rely on the strength of their own title in suits to quiet title, and not on the weakness or supposed weakness of their adversaries. Fastenau v. Engel, 129 Colo. 440, 270 P.2d 1019 (1954); Morrissey v. Achziger, 147 Colo. 510, 364 P.2d 187 (1961); Sch. Dist. No. Six v. Russell, 156 Colo. 75, 396 P.2d 929 (1964).

A plaintiff, in an action to quiet title to lands, must rely on the strength of his own title thereto; and when it affirmatively appears that such plaintiff's rights have terminated, he is in no position to question the legality of the title claimed by others. Sch. Dist. No. Six v. Russell, 156 Colo. 75, 396 P.2d 929 (1964).

Plaintiff in an action to quiet title must show title in himself. Buell v. Redding Miller, Inc., 163 Colo. 286, 430 P.2d 471 (1967).

No necessity for either party to show possession. In an action brought for the purpose of obtaining a complete adjudication of the rights of all parties thereto with respect to real property it is not necessary for the plaintiff to allege and prove that he had possession of the real estate in question. Possession of the property in controversy in either party is wholly immaterial under this rule. Siler v. Inv. Sec. Co., 125 Colo. 438, 244 P.2d 877 (1952).

In actions brought under this rule, possession is not essential to maintain or defend such an action. An adjudication of the rights of the parties, whether of ownership or possession, may be made by the court. Lamberson v. Thomas, 146 Colo. 539, 362 P.2d 180 (1961).

Plaintiff does not have to prove possession of the property involved in order to prevail. Bd. of County Comm'rs v. Blanning, 29 Colo. App. 61, 479 P.2d 404 (1970).

When party in possession must be joined. Section (b) of this rule requires that a party in possession must be joined if the plaintiff seeks to recover actual possession of the subject property. Ginsberg v. Stanley Aviation Corp., 193 Colo. 454, 568 P.2d 35 (1977).

If the subject property is a public road that has been used as such, a disclaimer filed under the provisions of this rule by the county in control of the road cannot operate to vacate the road. Rather, the county must follow the mandates of the vacation statute. Martini v. Smith, 42 P.3d 629 (Colo. 2002).

A plaintiff not in possession must show superior title. Under this rule a plaintiff who is not in possession of real estate cannot challenge the title of a defendant in possession thereof without establishing in himself a title superior to that under which defendant occupies the land. Likewise, a defendant in an action to quiet title may effectually resist a decree against himself by showing simply that the plaintiff is without title, since if the plaintiff has no title he cannot complain that someone else, also without title, asserts an interest in the land. Fastenau v. Engel, 129 Colo. 440, 270 P.2d 1019 (1954).

In a case where defendant is in possession, plaintiff must rely on the strength of his own title, not upon the weakness of defendant's title in order to recover. Bd. of County Comm'rs v. Blanning, 29 Colo. App. 61, 479 P.2d 404 (1970).

Rights of parties considered in filing of complaint. In an action to quiet title the pertinent date fixing the rights of the parties is the date upon which the complaint is filed. No muniment of title acquired thereafter is admissible in evidence and a plaintiff cannot bolster a claim to title by acquisition of title papers subsequent to the institution of an action, unless, by supplemental pleadings, issues are framed based upon the subsequently acquired instrument. Fastenau v. Engel, 129 Colo. 440, 270 P.2d 1019 (1954).

Ejectment cannot be supported by a title acquired after action commenced nor can a defective title be aided by conveyances made pending suit. Fastenau v. Engel, 129 Colo. 440, 270 P.2d 1019 (1954).

Burden of proof. Monetary reparation cannot be based upon mere speculation, but on the other hand such need not be proven with mathematical certainty. It is sufficient if the plaintiff establishes by a preponderance of the evidence that he has in fact suffered damage or that his rights have been infringed and that his evidence in this regard provides a reasonable basis for a computation of the damage so sustained. Difficulty in proof of damages does not in and of itself destroy the right of recovery. Riggs v. McMurtry, 157 Colo. 33, 400 P.2d 916 (1965).

Plaintiff's burden of proof was to establish title to the property in question by the presentation of competent evidence. The evidence presented by plaintiff was primarily in the form of a stipulated set of facts establishing the chain of title. Under these circumstances, the trial court correctly concluded that plaintiff had established a prima facie case establishing his right to ownership of the property in question. Plaintiff was entitled to relief under this section, unless defendant could come forward with evidence to rebut plaintiff's title to the property.

Bd. of County Comm'rs v. Blanning, 29 Colo. App. 61, 479 P.2d 404 (1970).

Courts will not invoke equitable defenses to destroy legal rights where statutes of limitations are applicable. Jacobs v. Perry, 135 Colo. 550, 313 P.2d 1008 (1957).

The defense of laches is not available in a quiet title action. Jacobs v. Perry, 135 Colo. 550, 313 P.2d 1008 (1957).

Where defendant acquired a defective treasurer's deed in 1956 to the property in question, but never made use of, nor improved the property in any manner during the intervening period of time, nor expended any sums of money on it, delay, if any, has not worked to defendant's detriment in any manner, and hence dependant is not in a position to complain of delay in the bringing of this action. Bd. of County Comm'rs v. Blanning, 29 Colo. App. 61, 479 P.2d 404 (1970).

Effect of failure to raise issue of damages in quiet title action. Under this rule providing for a complete adjudication of rights of the parties litigant, together with damages, if any, it was essential that any damage claims be asserted in the quiet title action and upon failure to do so, damages could not be an issue in a condemnation action. Dillinger v. North Sterling Irrigation Dist., 135 Colo. 95, 308 P.2d 606 (1957).

When evidence should be submitted to jury. In an action for the adjudication of the right to possession of real estate and for damages for alleged wrongful trespass brought under this rule, it was held that, where there are a number of fact issues and the evidence is in conflict, the evidence should be submitted to the jury for determination. Klipp v. Grusing, 119 Colo. 111, 200 P.2d 917 (1948).

Finding supported by evidence upheld on review. The controverted issue as to the nature of gypsiferous deposits was an issue of fact and there being competent evidence to support the trial court's finding that this is a placer deposit, its determination of the matter must be upheld on review. Gypsum Aggregates Corp. v. Lionelle, 170 Colo. 282, 460 P.2d 780 (1969).

Applied in Ginsberg v. Stanley Aviation Corp., 37 Colo. App. 240, 551 P.2d 1086 (1975); Mohler v. Buena Vista Bank & Trust Co., 42 Colo. App. 4, 588 P.2d 894 (1978); Atchison, T & S.F. Ry. v. North Colo. Springs Land & Imp. Co., 659 P.2d 702 (Colo. App. 1982).

II. SCOPE OF RELIEF.

The manifest intent of section (a) of this rule is to provide "a complete adjudication of the rights of all parties". Hopkins v. Bd. of County Comm'rs, 193 Colo. 230, 564 P.2d 415 (1977).

This rule provides for a complete adjudication of all the rights of the parties in interest. Merth v. Hobart, 129 Colo. 546, 272 P.2d 273 (1954).

This rule has reference to a judgment finally determining the rights of all parties. Broadway Roofing & Supply, Inc. v. District Court, 140 Colo. 154, 342 P.2d 1022 (1959).

Where neither party has satisfactorily established title, equity and this rule direct that a complete adjudication of right be made. Hanson v. Dilley, 160 Colo. 371, 418 P.2d 38 (1966).

Equitable relief for improvements. Where the powers of the court were invoked to settle a boundary dispute and the rights of the parties with respect to improvements mistakenly built upon the land, there being no bad faith on the part of any of the parties, it was the duty of the court to grant such equitable relief as the situation required. Pull v. Barnes, 142 Colo. 272, 350 P.2d 828 (1960).

Where an adjoining owner had in good faith erected improvements on adjoining land, believing it to be his own, he should be granted the right to remove same if feasible and if not, then given an equitable lien on the property for the value thereof. Pull v. Barnes, 142 Colo. 272, 350 P.2d 828 (1960).

Courts will not enforce racial restrictive covenants. The trial court's refusal to recognize the vested interest in defendant and to enforce forfeiture of the property for failure to comply with a racial restrictive covenant did not deprive defendant of property without just compensation and without due process of law. Courts will not enforce such covenants and an action for damages will not lie for violations thereof. Capitol Fed. Sav. & Loan Ass'n v. Smith, 136 Colo. 265, 316 P.2d 252 (1957).

Removal of restrictive covenants. Sitting as a court of equity the trial court has the power to remove or cancel restrictive covenants as clouds on the title. Such power may be exercised when it is shown that the restrictive covenants no longer serve the purpose for which they were imposed and are no longer beneficial to those claiming under them. Zavislak v. Shipman, 147 Colo. 184, 362 P.2d 1053 (1961); Cole v. Colo. Springs Co., 152 Colo. 162, 381 P.2d 13 (1963).

Documents that reasonably designate land burdened by easements were not, as a matter of law, invalid because of vagueness. If, on remand, the easements are not determined to be otherwise unenforceable or invalid, their location will need to be fixed by the agreement of the parties or, if necessary, by the court. Stevens v. Mannix, 77 P.3d 931 (Colo. App. 2003).

Due-on-sale clause is not unreasonable restraint on alienation and does not require a case-by-case factual determination by trial courts whenever an effort is made to enforce a due-on-sale clause. Bakker v. Empire Sav.,

Bldg. & Loan Ass'n, 634 P.2d 1021 (Colo. App. 1981).

Enforcement of restrictions in lease. The law gives the lessor the right to impose restrictions in the lease on the right to assign or sublet the leased premises, and these restrictions may be enforced by forfeiture of the lease and reentry. Union Oil Co. v. Lindauer, 131 Colo. 138, 280 P.2d 444 (1955).

An action to terminate a lease of real property may be instituted under this rule. Union Oil Co. v. Lindauer, 131 Colo. 138, 280 P.2d 444 (1955).

Determination of adverse possession. In making a determination of the boundaries of the property to which the defendants have acquired title by actual occupancy and adverse possession, and quieting defendants' title thereto, the trial court is to determine the land necessarily appurtenant to the cabin, taking into consideration the location and nature of the property, and the uses to which the property lends itself, the uses made of the property by the defendants, and the evidence of visible occupation of the property by the defendants which would give notice of their exclusive and adverse claim to the owner and the public. Anderson v. Cold Spring Tungsten, Inc., 170 Colo. 7, 458 P.2d 756 (1969).

The possession necessary to establish title to property by adverse possession need not always be personal possession by the adverse claimant but, in some circumstances, may be established by the conduct of another whom the adverse claimant has authorized. Holland v. Sutherland, 635 P.2d 926 (Colo. App. 1981).

Court cannot quiet title in favor of defaulting party even when evidence presented by an appearing party supports the defaulting party's title interests. Reser v. Aspen Park Ass'n, 727 P.2d 378 (Colo. App. 1986).

Legal title to disputed parcel in foreclosure of deed of trust action not acquired since the documents showed parties' intent to extinguish prior deed of trust on disputed parcel. Colo. Nat'l Bank-Exch. v. Hammar, 764 P.2d 359 (Colo. App. 1988).

Court may not amplify deed by construction of contract. A decree adjudging the defendants to be the owners of the lake, together with incidental rights thereto, is tantamount to a conveyance of the lake. It is an amplification of the deed by decree, something a court may not do under the guise of construing a contract. A court cannot rewrite a contract and thereby change its terms when it is plain, clear, and unambiguous. Alexander Dawson, Inc. v. Fling, 155 Colo. 599, 396 P.2d 599 (1964).

Effect of decree following old terminology for quieting title. In an action for reformation of a mortgage and a sheriff's deed issued on its foreclosure, so as to include a parcel inadvertently omitted, the decree in form followed the old terminology for quieting title, and it was urged that the court could not quiet title in the plaintiff, since he held no title thereto. However, it was held that this contention was without merit, since the action was specifically an action for reformation, setting out properly the basis of the claim and complying sufficiently with this rule, as an action to obtain an adjudication of the rights of the parties with respect to real estate. Stubbs v. Standard Life Ass'n, 125 Colo. 278, 242 P.2d 819 (1952).

Minor improvements deemed not "taking". The placing of a few minor improvements on property does not necessarily constitute a "taking" of possessions. Holland v. Sutherland, 635 P.2d 926 (Colo. App. 1981).

Vendor's action under this rule involved the same subject matter as vendor's prior boundary line action. Therefore the subsequent action was barred by res judicata. Agee Revocable Trust v. Mang, 919 P.2d 908 (Colo. App. 1996).

Because license for recreational use of property is not an interest in the land, trial court did not err in not defining the scope of the license in quiet title action brought under this rule. Bolinger v. Neal, 259 P.3d 1259 (Colo. App. 2010).

III. COSTS.

Partial disclaimer ineffective. In an action where defendant disclaimed as to part of the premises and claimed title and right of possession as to the remainder, in case of judgment for plaintiff, defendant is not entitled to have part of the cost assessed against plaintiff. Relender v. Riggs, 20 Colo. App. 423, 79 P. 328 (1905) (decided under § 276 of the former Code of Civil Procedure).

Defendant with claim for taxes may save costs. Where a defendant disclaims title and sets up its outlays on account of taxes legally assessed, which should have been paid by the plaintiff, and asks for judgment accordingly, the cost is properly a charge against the plaintiff under this section. Empire Ranch & Cattle Co. v. Lanning, 49 Colo. 458, 113 P. 491 (1911) (decided under § 276 of the former Code of Civil Procedure).

Attorneys' fees are proper measure of damages in action for slander of title. Sussex Real Estate Corp. v. Sbrocca, 634 P.2d 999 (Colo. App. 1981).

Defendant who successfully opposed plaintiff's motion to amend quiet title decree to delete portion pertaining to title interests of defaulting defendants was not entitled to award of attorney fees. Reser v. Aspen Park Ass'n, 727 P.2d 378 (Colo. App. 1986).

IV. LIS PENDENS.

Annotator's note. Since section (f) of this rule is similar to § 38 of the former Code of

Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Purpose of recording lis pendens notice is to give notice of the pendency of an action to persons who may subsequently acquire or seek to acquire rights in the property. King v. W.R. Hall Transp. & Storage Co., 641 P.2d 916 (Colo. 1982).

Expired lis pendens did not provide constructive notice of the terms of the judgment of underlying lawsuit. This rule is designed to give party to suit sufficient time to file notice of appeal or to record transcript of judgment in county where property is situated, but is not intended not to extend constructive notice period beyond thirty days. Maddalone v. Wilson, 764 P.2d 403 (Colo. App. 1988) (decided under rule in effect prior to 1981 amendment).

Lis pendens brings the subject matter of the litigation within the control of the court, and renders the parties powerless to place it beyond the power of the final judgment. Powell v. Nat'l Bank of Commerce, 19 Colo. App. 57, 74 P. 536 (1903).

Third parties cannot thereafter interfere with the property. In an action involving the title to real property, the effect of filing a lis pendens is to prevent interference by third parties with the property during the pendency of the action. Shuck v. Quackenbush, 75 Colo. 592, 227 P. 1041 (1924).

Purchaser from one litigant takes subject to rights of other parties in the action. The general rule as to lis pendens is that a person who acquires an interest in property involved in litigation, pendente lite and from a party litigant, takes subject to the rights of the other parties to the suit as finally adjudicated. Powell v. Nat'l Bank of Commerce, 19 Colo. App. 57, 74 P. 536 (1903).

Proper subject of lis pendens. Where a complaint clearly shows that an action relates to the possession, use, or enjoyment of real property, it is, therefore, the proper subject of the filing of a lis pendens. Clopine v. Kemper, 140 Colo. 360, 344 P.2d 451 (1959).

The filing of a notice of lis pendens is proper if claimant shows that the underlying action relates to a right to possession, use, or enjoyment of real property. Salstrom v. Starke, 670 P.2d 809 (Colo. App. 1983).

Notice of lis pendens is properly filed in any case in which affirmative relief is claimed affecting the title to real property. Central Allied Profit Sharing v. Bailey, 759 P.2d 849 (Colo. App. 1988).

The notice of lis pendens and not the pleadings gives constructive notice of pending litigation affecting interests in realty. Clopine v. Kemper, 140 Colo. 360, 344 P.2d 451 (1959), overruling Central Sav. Bank v. Smith, 43 Colo. 90, 95 P. 307 (1908).

Constructive notice as of day notice is recorded. A notice of lis pendens which refers to a complaint seeking divorce and a division of property, or seeking separate maintenance and an equitable interest in property, is constructive notice as of the day notice of lis pendens is recorded. Clopine v. Kemper, 140 Colo. 360, 344 P.2d 451 (1959).

No notice to grantee under prior recorded deed. Notice of the pendency of a suit involving title to land, filed after the recording of a conveyance, is no notice to the grantee in such conveyance. Dalander v. Howell, 22 Colo. App. 386, 124 P. 744 (1912).

"Affecting the title to real property" to be expansively interpreted. An expansive interpretation of the language "affecting the title to real property", as found in section (f), serves to further the policy that successful completion of suits involving rights in real property should not be thwarted by permitting transfers of such property before such suits are resolved. Cooper v. Flagstaff Realty, 634 P.2d 1013 (Colo. App. 1981).

A proceeding by a creditor to set aside a conveyance as fraudulent pursuant to § 38-10-117 clearly falls within actions affecting the title to real property. Crown Life Ins. Co. v. April Corp., 855 P.2d 12 (Colo. App. 1993).

Litigation of promise to grant deed of trust affects title. Insofar as a case involves litigation of a promise to grant a deed of trust applying to a specific parcel of real property, it is one "affecting" title to that real property within the meaning of section (f). Cooper v. Flagstaff Realty, 634 P.2d 1013 (Colo. App. 1981).

Description of property allowing proper indexing is sufficient. The lis pendens notice contains a brief description of the property affected thereby. It is sufficient in this respect if it enables proper indexing against the proper section and block numbers. Clopine v. Kemper, 140 Colo. 360, 344 P.2d 451 (1959).

Failing to file lis pendens notice does not relieve persons who have actual notice of the pendency of the action. Buckhorn Plaster Co. v. Consol. Plaster Co., 47 Colo. 516, 108 P. 27 (1910).

Lis pendens will give notice of wife's claim against property of husband. A wife has an equitable interest in the property of her husband. In an action for separate maintenance, praying that she be awarded specific property, lis pendens duly filed is notice of her claim against that property. Tinglof v. Askerlund, 96 Colo. 27, 39 P.2d 1039 (1934); Clopine v. Kemper, 140 Colo. 360, 344 P.2d 451 (1959).

Summary judgment as to certain defendants does not release lis pendens. Under C.R.C.P. 54(b), this rule, and § 38-40-110, a lis pendens remains in full force and effect until

final judgment or until final disposition of a case, and where a summary judgment dismissing the action and releasing lis pendens as to certain defendants is granted, with no determination that there is no just reason for delay in disposing of the action as to such defendants, such summary judgment is not final for any purpose and the lis pendens is not released. Broadway Roofing & Supply, Inc. v. District Court, 140 Colo. 154, 342 P.2d 1022 (1959).

Release of property from notices of lis pendens held valid. Peoples Bank & Trust Co. v. Packard, 642 P.2d 57 (Colo. App. 1982).

Disclaimer of interest under section (f)(3) is an absolute bar to future claims to interests in property pursuant to the terms of the disclaimer, regardless of the precise legal theory or reasons that led to making the disclaimer, absent fraud or duress. Vail/Arrowhead, Inc. v. District Court, 954 P.2d 608 (Colo. 1998).

An action need not be brought under this rule as a precondition to making an effective disclaimer of interest under section (f)(3). Vail/Arrowhead, Inc. v. District Court, 954 P.2d 608 (Colo. 1998).

Adequate remedy to contest release of lis pendens on appeal. Meaker v. District Court, 134 Colo. 151, 300 P.2d 805 (1956).

Continuation of lis pendens pending appeal conditioned on posting bond held valid in Wellman v. Travelers Ins. Co., 689 P.2d 1151 (Colo. App. 1984).

Motion to quash lis pendens denied since Colorado law makes no provision for the cancellation of a notice of lis pendens by any court at any time, but instead provides by section (f) of this rule that the notice shall expire automatically. McGregor v. McGregor, 101 F. Supp. 848 (D. Colo. 1951), aff'd, 201 F.2d 528 (10th Cir. 1953).

Damages for filing in suit maliciously brought. If a suit is brought maliciously and without probable cause, and notice of lis pendens filed therein, liability would attach for such filing, for any damages occasioned thereby. Johnston v. Deidesheimer, 76 Colo. 559, 232 P. 1113 (1926); Westfield Dev. v. Rifle Inv. Assoc., 786 P.2d 1112 (Colo. 1990).

Proceeding to enforce adherence to criteria with respect to construction of improvements is one wherein affirmative relief is claimed affecting the title to real property within the meaning of this rule. Hammersley v. District Court, 199 Colo. 442, 610 P.2d 94 (1980).

Filing of notice of lis pendens provides only a qualified privilege with respect to a claim based on intentional interference with a contract and applies only when the one who interferes has, or honestly believes he has, a legally protected interest and, in good faith, asserts or threatens to assert such claim through proper means. Westfield Dev. v. Rifle Inv. Assoc., 786 P.2d 1112 (Colo. 1990).

Lis pendens expired with the dismissal of plaintiff's appeal. A subsequent settlement between the parties did not resurrect the lis pendens and thus was not binding on the interests of a third party which had filed an interest on the property during the pendency of the lis pendens. Perry Park Country Club, Inc. v. Manhattan Savings Bank, 813 P.2d 841 (Colo. App. 1991).

Neither filing a foreclosure action nor recording a lis pendens prevented the United States from releasing its own tax lien, thereby losing its priority over the owners' interests. U.S. v. Winchell, 793 F. Supp. 994 (D. Colo. 1992).

V. DESCRIPTION OF REAL PROPERTY.

A divorce action no longer has to describe the property affected. Clopine v. Kemper, 140 Colo. 360, 344 P.2d 451 (1959).

Judgment must fix boundary lines with certainty. A judgment decree involving the right to possession of real property must definitely and sufficiently describe it in order that an officer charged with the duty of executing a writ of possession may go upon the premises, and, without exercising any judicial functions whatever, ascertain with certainty the boundary lines fixed by the judgment. Calvin v. Fitzsimmons, 129 Colo. 420, 270 P.2d 748 (1954); Thompson v. Clarks, Inc., 162 Colo. 506, 427 P.2d 314 (1967).

The judgment and decree must be so definite and specific in defining the proper location of the boundary lines that all the parties affected thereby may comply with the judgment in every respect. Calvin v. Fitzsimmons, 129 Colo. 420, 270 P.2d 748 (1954); Thompson v. Clarks, Inc., 162 Colo. 506, 427 P.2d 314 (1967).

Court may adopt most definite of two repugnant descriptions. Where there are two repugnant descriptions in a deed, the trial court will look into the surrounding facts and will adopt the description which is most definite and certain and which in the light of the surrounding circumstances can be said to effectuate most clearly the intention of the parties. Wallace v. Hirsch, 142 Colo. 264, 350 P.2d 560 (1960).

Monuments control over monument calls. In a conveyance of interest in land, whether by ordinary deed or by dedication, if the description of the land be fixed by ascertainable monuments and by courses and distances, the well-settled general rule is that the monuments will control the courses and distances if they be inconsistent with the monument calls. Wallace v. Hirsch, 142 Colo. 264, 350 P.2d 560 (1960).

Where a conveyance is made with reference to an official map or plat, the map or plat

becomes a part of the grant. Radio San Juan, Inc. v. Baker, 31 Colo. App. 151, 498 P.2d 957 (1972).

Rule 105.1. Spurious Lien or Document

(a) Petition; Contents, Order to Show Cause. Any person whose real or personal property is affected by a spurious lien or spurious document, as defined by law, may file a petition in the district court in the county in which the lien or document was recorded or filed, or in the district court for the county in which affected real property is located, for an order to show cause why the lien or document should not be declared invalid. The petition, which may also be brought as a counterclaim or a cross-claim in a pending action, shall set forth a concise statement of the facts upon which the petition is based, shall be supported by the affidavit of the petitioner or the petitioner's attorney, and shall be accompanied by a copy of the lien or document as recorded or filed in the public records. The order to show cause may be granted ex parte and shall:

(1) Direct any lien claimant and any person who recorded or filed the lien or document to appear as respondent before the court at a time and place certain not less than 14 days nor more than 21 days after service of the order to show cause why the lien or document should not be declared invalid and why such other relief provided for by statute should not be granted;

(2) State that if the respondent fails to appear at the time and place specified, the lien or document, if found by the court to be spurious, will be declared invalid and released; and

(3) State that the court shall award costs, including reasonable attorney fees, to the prevailing party.

(b) Notice; Service. The petitioner shall issue a notice to respondent setting forth the time and place for the hearing on the show cause order, which hearing shall be set not less than 14 days nor more than 21 days from service of the show cause order, and shall advise respondent of the right to file and serve a response as provided in section (c), including a reference to the last day for filing a response and the addresses at which such response must be filed and served. The notice shall contain the return address of the petitioner or the petitioner's attorney. The notice and a copy of the petition and order to show cause shall be served by the petitioner on the respondent not less than 14 days prior to the date set for the hearing, by (1) mailing a true copy thereof by first class mail to each respondent at the address or addresses stated in the lien or document and (2) filing a copy with the clerk of the district court and delivering a second copy to the clerk of the district court for posting in the clerk's office, which shall be evidenced by the certificate of the petitioner or petitioner's agent or attorney. Alternatively, the petitioner may serve the petition, notice, and show cause order upon each respondent in accordance with Rule 4, or, in the event the claim is brought as a counterclaim or cross-claim in a pending action in which the parties have appeared, in accordance with Rule 5.

(c) Response; Contents; Filing and Service. Not less than 7 days prior to the date set for the hearing, the respondent shall file and serve a verified response to the petition, setting forth the facts supporting the validity of the lien or document and attaching copies of all documents which support the validity of the lien or document. Service of such response shall be made in accordance with Rule 5(b).

(d) Hearing; Decree; Hearing Dispensed With If No Response Filed. If, following a hearing on the order to show cause, the court determines that the lien or document is a spurious lien or a spurious document, the court shall make findings of fact and enter an order and decree declaring the spurious lien or document and any related notices of lis pendens invalid, releasing the recorded or filed spurious lien or spurious document, and entering a monetary judgment in the amount of the petitioner's costs, including reasonable attorney fees, against the respondent and in favor of the petitioner. If, following the hearing on the order to show cause, the court determines that the lien or document is not a spurious lien or document, the court shall issue an order so finding and enter a monetary judgment against the petitioner and in favor of the respondent in the amount of the respondent's

costs, including reasonable attorney fees. If necessary, the court may in its discretion continue the hearing on the show cause order for further proceedings and trial. If no response is filed and served by the respondent within the time permitted by section (c), the court shall examine the petition and, if satisfied that venue is proper and that the lien or document is spurious, the court shall dispense with the hearing and forthwith enter the order, which shall be a final judgment for purposes of appeal. If the petition has been personally served upon the respondent in accordance with Rule 4(e) or (g), the court shall enter judgment in favor of petitioner and against the respondent for the petitioner's costs, including reasonable attorney fees.

(e) Docket Fee. A docket fee in the amount specified by law shall be paid by the petitioner. The respondent shall pay, at the time of the filing of the response, a docket fee in the amount specified by law for a defendant or respondent in a civil action under section 13-32-101(1)(d), C.R.S.

Source: Entire rule added and adopted December 18, 1997, effective January 1, 1998; (b) and (d) corrected December 30, 1997, effective January 1, 1998; (b) amended and effective June 28, 2007; (a)(1), (b), and (c) amended and adopted December 14, 2011, effective July 1, 2012.

ANNOTATION

Because a lis pendens can be a spurious document, trial court may award attorney fees and costs for a spurious lis pendens. Shyanne Props., LLC v. Torp, 210 P.3d 490 (Colo. App. 2009).

Defendants' petition for removal of a lis pendens as a spurious document constituted a counterclaim, even though it was not denominated as such, because defendants filed the petition in a pending action and not in a separate proceeding. Therefore, defendants were not required to pay a docket fee and properly served their petition under C.R.C.P. 5 using an electronic filing system. Shyanne Props., LLC v. Torp, 210 P.3d 490 (Colo. App. 2009).

Trial court had jurisdiction to award attorney fees and costs to defendants for a spurious lis pendens. Because plaintiff did not refute that the lis pendens was spurious at the show cause hearing, trial court had jurisdiction to enter judgment in favor of defendants and against plaintiff for defendants' costs and attorney fees. Shyanne Props., LLC v. Torp, 210 P.3d 490 (Colo. App. 2009).

Trial court abused its discretion in awarding attorney fees without holding an evidentiary hearing on the reasonableness and necessity of the attorney fees requested by defendants. If a party requests a hearing concerning an award of fees, the trial court must hold a hearing. Shyanne Props., LLC v. Torp, 210 P.3d 490 (Colo. App. 2009).

CHAPTER 15

Remedial Writs and Contempt

CHAPTER 15

REMEDIAL WRITS AND CONTEMPT

Rule 106. Forms of Writs Abolished

(a) Habeas Corpus, Mandamus, Quo Warranto, Certiorari, Prohibition, Scire Facias and Other Remedial Writs in the District Court. Special forms of pleadings and writs in habeas corpus, mandamus, quo warranto, certiorari, prohibition, scire facias, and proceedings for the issuance of other remedial writs, as heretofore known, are hereby abolished in the district court. Any relief provided hereunder shall not be available in the superior or county courts. In the following cases relief may be obtained in the district court by appropriate action under the practice prescribed in the Colorado Rules of Civil Procedure:

(1) Where any person not being committed or detained for any criminal or supposed criminal matter is illegally confined or restrained of his liberty;

(2) Where the relief sought is to compel a lower judicial body, governmental body, corporation, board, officer or person to perform an act which the law specially enjoins as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such lower judicial body, governmental body, corporation, board, officer, or person. The judgment shall include any damages sustained;

(3) When any person usurps, intrudes into, or unlawfully holds or exercises any office or franchise, the district attorney of the proper district may and, when directed by the governor so to do, shall bring an action against such person in the name of the people of the state, but if the district attorney declines so to do, it may be brought upon the relation and complaint of any person. The Rule heretofore existing requiring leave of court to institute such proceedings is hereby abolished. When such an action is brought against a defendant alleged to have usurped, intruded into, or who allegedly unlawfully holds or exercises any public office, civil or military, or any franchise it shall be given precedence over other civil actions except similar actions previously commenced. The judgment may determine the rightful holder of the office or franchise;

(4) Where any governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy otherwise provided by law:

(I) Review shall be limited to a determination of whether the body or officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the record before the defendant body or officer.

(II) Review pursuant to this subsection (4) shall be commenced by the filing of a complaint. An answer or other responsive pleading shall then be filed in accordance with the Colorado Rules of Civil Procedure.

(III) If the complaint is accompanied by a motion and proposed order requiring certification of a record, the court shall order the defendant body or officer to file with the clerk on a specified date, the record or such portion or transcript thereof as is identified in the order, together with a certificate of authenticity. The date for filing the record shall be after the date upon which an answer to the complaint must be filed.

(IV) Within 21 days after the date of receipt of an order requiring certification of a record, a defendant may file with the clerk a statement designating portions of the record not set forth in the order which it desires to place before the court. The cost of preparing the record shall be advanced by the plaintiff, except that the court may, on objection by the plaintiff, order a defendant to advance payment for the costs of preparing such portion of the record designated by the defendant as the court shall determine is unessential to a complete understanding of the controversy; and upon a failure to comply with such order,

the portions for which the defendant has been ordered to advance payment shall be omitted from the record. Any party may move to correct the record at any time.

(V) The proceedings before or decision of the body or officer may be stayed, pursuant to Rule 65 of the Colorado Rules of Civil Procedure.

(VI) Where claims other than claims under this Rule are properly joined in the action, the court shall determine the manner and timing of proceeding with respect to all claims.

(VII) A defendant required to certify a record shall give written notice to all parties, simultaneously with filing, of the date of filing the record with the clerk. The plaintiff shall file, and serve on all parties, an opening brief within 42 days after the date on which the record was filed. If no record is requested by the plaintiff, the plaintiff shall file an opening brief within 42 days after the defendant has served its answer upon the plaintiff. The defendant may file and serve an answer brief within 35 days after service of the plaintiff's brief, and the plaintiff may file and serve a reply brief to the defendant's answer brief within 14 days after service of the answer brief.

(VIII) The court may accelerate or continue any action which, in the discretion of the court, requires acceleration or continuance.

(IX) In the event the court determines that the governmental body, officer or judicial body has failed to make findings of fact or conclusions of law necessary for a review of its action, the court may remand for the making of such findings of fact or conclusions of law.

(5) When judgment is recovered against one or more of several persons jointly indebted upon an obligation, and it is desired to proceed against the persons not originally served with the summons who did not appear in the action. Such persons may be cited to show cause why they should not be bound by the judgment in the same manner as though they had been originally served with the summons, and in his answer any such person may set up any defense either to the original obligation or which may have arisen subsequent to judgment, except a discharge from the original liability by the statute of limitations.

(b) Limitations as to Time. Where a statute provides for review of the acts of any governmental body or officer or judicial body by certiorari or other writ, or for a proceeding in quo warranto, relief therein provided may be had under this Rule. If no time within which review may be sought is provided by any statute, a complaint seeking review under subsection (a)(4) of this Rule shall be filed in the district court not later than 28 days after the final decision of the body or officer. A timely complaint may be amended at any time with leave of the court, for good cause shown, to add, dismiss or substitute parties, and such amendment shall relate back to the date of filing of the original complaint.

Source: (a)(4)(IV), (a)(4)(VII), and (b) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Cross references: For original jurisdiction of the supreme court, see C.A.R. 21; for original jurisdiction of supreme court on certiorari, see C.A.R. 49 and 50; for effect of judgment against a partnership, see C.R.C.P. 54(e); for petition for writ of habeas corpus in criminal cases, see § 13-45-101, C.R.S.; for writ of habeas corpus in civil cases, see § 13-45-102, C.R.S.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, "Mandamus and Other Writs", see 18 Dicta 333 (1941). For

article, "One Year Review of Civil Procedure", see 34 Dicta 69 (1957). For article, "One Year Review of Civil Procedure", see 35 Dicta 3 (1958). For article, "One Year Review of Civil Procedure and Appeals", see 37 Dicta 21 (1960). For article, "One Year Review of Civil Procedure and Appeals", see 38 Dicta 133 (1961). For article, "One Year Review of Civil Procedure and Appeals", see 39 Dicta 133 (1962). For article, "One Year Review of Civil Procedure and Appeals", see 40 Den. L. Ctr. J. 66 (1963). For article, "One Year Review of Criminal Law and Procedure", see 40 Den. L. Ctr. J. 89 (1963). For note on current developments, "Civil Procedure Application of 'Indispensable Party' Provision of Colo. R. Civ. P. 19 — the 'Procedural Phantom' Still Stalks in Colorado", see 46 U. Colo. L. Rev. 609 (1974-75). For note, "Referendum and Rezoning: Margolis v. District Court", see 53 U. Colo. L. Rev. 745 (1982). For article, "Original Proceedings in the Colorado Supreme Court", see 12 Colo. Law. 413 (1983). For article, "Asserting Vested Rights in Colorado", see 12 Colo. Law. 1199 (1983). For article, "Judicial Review, Referral and Initiation of Zoning Decisions", see 13 Colo. Law. 387 (1984). For article, "C.R.C.P. Rule 106: Amendments Governing Appeals from Local Governmental Decisions", see 15 Colo. Law. 1643 (1986). For article, "Local Government Exactions from Developers after Beaver Meadows", see 16 Colo. Law. 42 (1987). For article, "Prosecuting an Appeal from a Decision of the Colorado Public Utilities Commission", see 16 Colo. Law. 2163 (1987).

Purpose of rule. Under the former Code of Civil Procedure complaints apparently setting out facts sufficient for relief were held demurrable because the actions sought special writs. It was because of this result that this rule was adopted abolishing forms of writs and the special forms of pleadings formerly required. Berryman v. Berryman, 115 Colo. 281, 172 P.2d 446 (1946).

The rationale behind section (b) requires that the challenging party have had notice and an opportunity to be heard in a proceeding, subject to certiorari review, which is judicial or quasi-judicial in character. Julesburg Sch. Dist. No. RE-1 v. Ebke, 193 Colo. 40, 562 P.2d 419 (1977).

The substantive aspects of remedial writs are preserved, and relief in the same nature as was formerly provided in such proceedings may be granted under the Rules of Civil Procedure in accordance with precedents established under the former practice. Leonhart v. District Court, 138 Colo. 1, 329 P.2d 781 (1958); People ex rel. Mijares v. Kniss, 144 Colo. 551, 357 P.2d 352 (1960).

Rule operates only on procedure. The present Rules of Civil Procedure, and particularly this rule, operate on or with respect to matters of procedure. Enos v. District Court, 124 Colo. 335, 238 P.2d 861 (1951).

Section (a) does not preclude a court from initiating a proceeding by means other than institution of a civil action. Pena v. District Court, 681 P.2d 953 (Colo. 1984).

This rule preempts municipal provisions for review. Local ordinance provisions may not control the filing of a petition seeking review under subsection (a)(4). Gold Star Sausage Co. v. Kempf, 653 P.2d 397 (Colo. 1982); Sky Chefs v. City & County of Denver, 653 P.2d 402 (Colo. 1982).

The 30-day time limit in section (b) preempts a municipal code's 20-day time limit for seeking review. Gold Star Sausage Co. v. Kempf, 653 P.2d 397 (Colo. 1982); Sky Chefs v. City & County of Denver, 653 P.2d 402 (Colo. 1982).

Despite a municipal code's requirement of verification, a proceeding for review under this rule may be initiated without a verified petition because this rule does not so require. Gold Star Sausage Co. v. Kempf, 653 P.2d 397 (Colo. 1982).

A municipal requirement that a bond be posted before a rule 106 proceeding may be commenced is invalid. Sky Chefs v. City & County of Denver, 653 P.2d 402 (Colo. 1982).

This rule and C.A.R. 21 are to be construed together. Solliday v. District Court, 135 Colo. 489, 313 P.2d 1000 (1957).

Certiorari complaint not amendable under C.R.C.P. 15(c). Because invoking the relation-back doctrine of C.R.C.P. 15(c) to amend a certiorari complaint filed pursuant to this rule would undermine the important public policies of expediting resolution of challenges to zoning and annexation proceedings and of removing municipal planning and individual properties from a cloud of uncertainty, when the original complaint fails to state a claim for relief, said rule 15(c) has no application to the proceedings or to any further pleadings which may be filed. Richter v. City of Greenwood Vill., 40 Colo. App. 310, 577 P.2d 776 (1978).

"District court" refers to state and not federal courts. City of Colo. Springs v. Blanche, 761 P.2d 212 (Colo. 1988).

This rule applies only to relief sought in the district courts against inferior courts, administrative boards, and officials. Gen. Aluminum Corp. v. Arapahoe County Dist. Court, 165 Colo. 445, 439 P.2d 340 (1968).

It does not apply to original proceedings. Lucas v. District Court, 140 Colo. 510, 345 P.2d 1064 (1959).

This rule does not apply to original proceedings in the supreme court. Nolan v. District Court, 195 Colo. 6, 575 P.2d 9 (1978).

Rule to show cause limited to exceptional cases. A superior tribunal should exercise great caution and circumspection before issuing a rule to show cause to an inferior tribunal, and

then only when such court is satisfied that the ordinary remedies provided by law are not applicable or are inadequate. Only in exceptional cases or classes of cases should applications of this character be allowed. Leonhart v. District Court, 138 Colo. 1, 329 P.2d 781 (1958).

Party must exhaust available administrative remedies before seeking judicial review pursuant to this rule or district court lacks jurisdiction to hear the case. This doctrine cannot be circumvented by seeking declaratory relief. City & County of Denver v. United Air Lines, Inc., 8 P.3d 1206 (Colo. 2000).

"Quasi-judicial action" defined. A quasi-judicial action, reviewable under subsection (a)(4), is generally characterized by the following factors: (1) A local or state law requiring that notice be given before the action is taken; (2) a local or state law requiring that a hearing be conducted before the action is taken; and (3) a local or state law directing that the action results from the application of prescribed criteria to the individual facts of the case. Baldauf v. Roberts, 37 P.3d 483 (Colo. App. 2001).

Administrative segregation actions by department of corrections are quasi-judicial actions reviewable under subsection (a)(4) of this rule. Baldauf v. Roberts, 37 P.3d 483 (Colo. App. 2001).

Action by the department of corrections that affects a protected liberty interest of an inmate falls within the realm of reviewable quasi-judicial activity, and review is appropriate. Fisher v. Colo. Dept. of Corr., 56 P.3d 1210 (Colo. App. 2002).

Department of corrections' (DOC) classification of inmate as sex offender is a quasi-judicial action subject to review under this rule. Vondra v. Colo. Dept. of Corr., 226 P.3d 1165 (Colo. App. 2009).

Subsection (a)(4) review is sufficient for purposes of assuring that university's and regents' actions were functionally equivalent to the judicial process and therefore merited quasi-judicial immunity. Churchill v. Univ. of Colo. at Boulder, __ P.3d __ (Colo. App. 2010).

Reviewing court must apply abuse of discretion or made without justification or jurisdiction standard when reviewing DOC classification of inmate as sex offender. If the evidence is conflicting, the hearing panel's findings are binding on appeal. Vondra v. Colo. Dept. of Corr., 226 P.3d 1165 (Colo. App. 2009).

Review pursuant to C.R.C.P. 57 is more appropriate than review pursuant to this rule in the context of a quasi-judicial proceeding where a declaratory judgment is requested and this rule does not provide an adequate remedy. Constitutional questions and challenges to the overall validity of a statute or ordinance are more properly reviewed under C.R.C.P. 57. Native Am. Rights Fund, Inc. v. City of Boulder, 97 P.3d 283 (Colo. App. 2004).

District attorney may appear on his or her own behalf or on behalf of a county court and a county court judge who are named defendants in an action brought under section (a)(4) of this rule. It would make little sense to prohibit the district attorney from appearing or representing the county court or its judge when the people of the state are, in practice, the real parties in interest as to the county court's ruling, nor is there any basis to disqualify the district attorney. Huang v. County Court of Douglas County, 98 P.3d 924 (Colo. App. 2004).

Constitutional violation is not a prerequisite to review. Subsection (a)(4) did not require that inmate allege a protected liberty interest or a violation of due process to challenge an administrative segregation action by the department of corrections. Baldauf v. Roberts, 37 P.3d 483 (Colo. App. 2001).

Review under subsection (a)(4) must be taken within 30 days of the date of the action for which review is sought and failure to comply with the 30-day limitations period divests the district court of subject matter jurisdiction to hear the action. Crawford v. State Dept. of Corr., 895 P.2d 1156 (Colo. App. 1995); Baker v. City of Dacono, 928 P.2d 826 (Colo. App. 1996).

Since defendant did not appeal his sex offender classification in a timely manner, the parole board had the authority to impose sex offender conditions and treatment as part of defendant's parole. Similarly, the trial court lacked jurisdiction to consider defendant's claims regarding his parole conditions since the claims were based upon his classification as a sex offender. People v. Jones, 222 P.3d 377 (Colo. App. 2009).

Trial court properly determined that it lacked jurisdiction to hear claims for review of planning commission's June 8, 2005 final decision to issue a building permit. Section (a)(4) of this rule provides for district court review of final, quasi-judicial decisions of a governmental entity; however, such claims must be filed within 30 days after the challenged decision was rendered. If the claims are not timely filed, the district court lacks jurisdiction to hear them under section (b) of this rule. Here, because plaintiffs did not file their complaint until August 23, 2005, they exceeded the 30-day deadline. JJR 1, LLC v. Mt. Crested Butte, 160 P.3d 365 (Colo. App. 2007).

Plaintiffs' claim for declaratory relief asserting that planning commission did not provide sufficient notice to them of a permit review meeting was also properly dismissed under rule. Because section (a)(4) of this rule is the exclusive remedy for reviewing quasi-judicial decisions, all claims that effectively

seek such review (whether framed as claims under section (a)(4) of this rule or not) are subject to the 30-day deadline under section (b). Thus, claims for declaratory relief under C.R.C.P. 57 that seek review of quasi-judicial decisions must be filed within 30 days. JJR 1, LLC v. Mt. Crested Butte, 160 P.3d 365 (Colo. App. 2007).

Although plaintiffs' claim against town for monetary damages under 42 U.S.C. § 1983 seeks review of quasi-judicial decisions, it also requests a "uniquely federal remedy" and, therefore, is not subject to the filing deadline of section (b). Because facial challenges seek review of quasi-legislative actions rather than quasi-judicial actions, they are also not subject to the filing deadline of section (b). JJR 1, LLC v. Mt. Crested Butte, 160 P.3d 365 (Colo. App. 2007).

Since action pursuant to subsection (a)(4) can only be commenced pursuant to C.R.C.P. 4, C.R.C.P. 6(e) cannot apply to extend the time. Cadnetix Corp. v. City of Boulder, 807 P.2d 1253 (Colo. App. 1991).

The time restriction in section (b) deals only with certiorari or other writs taken from quasi-judicial proceedings. Julesburg Sch. Dist. No. RE-1 v. Ebke, 193 Colo. 40, 562 P.2d 419 (1977).

Section (b) of this rule has to be read together with the balance of the rule. Vigil v. Indus. Comm'n, 160 Colo. 23, 413 P.2d 904 (1966).

When so examined in connection with subsection (a)(2) and section (4), it is clear that section (b) must be so interpreted as not to defeat the limitations in subsection (a)(2) and section (4). Vigil v. Indus. Comm'n, 160 Colo. 23, 413 P.2d 904 (1966).

Strict adherence to section (b) required. Strict adherence to the deadline imposed by section (b) of this rule is required. Civil Serv. Comm'n v. District Court, 186 Colo. 308, 527 P.2d 531 (1974); Danielson v. Zoning Bd. of Adjustment, 807 P.2d 541 (Colo. 1991).

A claim for relief pursuant to subsection (a)(4) does not prevent the complaint from being amended as to other claims. Krupp v. Breckenridge Sanitation Dist., 1 P.3d 178 (Colo. App. 1999).

Failure to join indispensable parties within 30 days not fatal. As a result of the 1981 amendment to section (b), the failure to join indispensable parties within the 30-day time limit established by section (b) need no longer result in dismissal. Tri-State Generation & Transmission Co. v. City of Thornton, 647 P.2d 670 (Colo. 1982).

Failure to file a claim for judicial review within thirty days is not jurisdictionally fatal when such claim is combined with a claim for declaratory judgment. Section (b) does not prevent the district court from considering a declaratory judgment claim that challenges the constitutionality of a city's zoning ordinance even though judicial review is barred for failure to file a timely claim. Danielson v. Zoning Bd. of Adjustment, 807 P.2d 541 (Colo. 1991).

But the district court may not exercise jurisdiction where claimant failed to challenge in the district court proceedings the facial constitutionality of a city's zoning ordinance. The district court may not raise the constitutional issue on its own motion. Danielson v. Zoning Bd. of Adjustment, 807 P.2d 541 (Colo. 1991).

Section (b) of this rule is controlling on actions to review rezoning divisions of county commissioners. Hidden Lake Dev. Co. v. District Court, 183 Colo. 168, 515 P.2d 632 (1973).

Where the concerned parties in a rezoning determination have notice of a public hearing in which they may participate, it is not unfair to require that they litigate their challenge, be it constitutional or statutory, within the time limits established in section (b). Snyder v. City of Lakewood, 189 Colo. 421, 542 P.2d 371 (1975).

Under section (b), a county's final decision in a subdivision approval process took place when the board of county commissioners voted publicly to approve the subdivisions, even though the approval was subject to conditions. 3 Bar J Homeowners Assoc., Inc. v. McMurry, 967 P.2d 633 (Colo. App. 1998).

When a written resolution is revised, it is the date of adoption of the revised version that constitutes the point of administrative finality for purposes of section (b). Here, the "point of administrative finality" was May 15, 1997, the date the revised resolution was signed. Thus, the 30-day period under section (b) did not begin to run until that date, and plaintiffs' complaint was thus timely filed on Monday, June 16, 1997. Wilson v. Bd. of County Comm'rs of Weld County, 992 P.2d 668 (Colo. App. 1999).

Section (b) may prevent town board from reconsidering own action. Where the town board permitted its grant of the variance to stand long after the 30-day review period under section (b) had expired, plaintiffs were entitled to, and did, rely on the variance, and, absent a change of circumstances, the board was without authority to reconsider. Andreatta v. Kuhlman, 43 Colo. App. 200, 600 P.2d 119 (1979).

Unilateral action taken by a school board in refusing to grant teachers longevity increments in salary for one school for year fell outside the scope of section (b) of this rule. Julesburg Sch. Dist. No. RE-1 v. Ebke, 193 Colo. 40, 562 P.2d 419 (1977).

Petition stating grounds for relief not limited to remedy under this rule. A plaintiff who has misconceived his remedy and is seeking relief to which he is not entitled under the law should not have his petition dismissed. The remedy provided by this rule is not exclusive,

and, if under the allegations of the petitions he is entitled to any relief, the court upon a hearing may grant him the relief to which he is entitled regardless of the prayer in the petition. The question, therefore, is not whether a plaintiff in a case at bar is asking for the proper remedy, but whether under his pleadings he is entitled to any remedy. Regennitter v. Fowler, 132 Colo. 489, 290 P.2d 223 (1955).

Where a review of the record made by the board of adjustment would be wholly inadequate to provide a remedy for plaintiff, the remedy provided by this rule is not exclusive. If a plaintiff elects so to do, an action should proceed upon the issues made by the pleadings as in other cases independent of this rule. Regennitter v. Fowler, 132 Colo. 489, 290 P.2d 223 (1955); Morris v. Bd. of County Comm'rs, 150 Colo. 33, 370 P.2d 438 (1962).

No deprivation of due process. Standard of review provided by this rule did not deny due process to owner of building challenging safety code application. Van Sickle v. Boyes, 797 P.2d 1267 (Colo. 1990).

The determinative date for review under this rule was when the final decision was rendered and not the date upon which the decision was received. Crawford v. State Dept. of Corr., 895 P.2d 1156 (Colo. App. 1995).

Thirty-day limitations period under section (b) is jurisdictional and begins to run at the point of administrative finality, which occurs when the action complained of is complete, leaving nothing further for the agency to decide. Cadnetix Corp. v. Boulder, 807 P.2d 1253 (Colo. App. 1991); Baker v. Dacono, 928 P.2d 826 (Colo. App. 1996); 3 Bar J Homeowners Ass'n., Inc. v. McMurry, 967 P.2d 633 (Colo. App. 1998); Carney v. Civil Serv. Comm'n, 30 P.3d 861 (Colo. App. 2001).

For purposes of judicial review of actions of the civil service commission pursuant to subsection (a)(4), the final decision of the commission was rendered on the date of certification and publication of the eligibility register, not on the date the commission announced that the promotional examination would contain a personnel record evaluation (PRE) component. The injury of which plaintiffs complain was not complete until the examination results were published and certified, which was the point of administrative finality. Carney v. Civil Serv. Comm'n, 30 P.3d 861 (Colo. App. 2001).

Action filed by nonexistent corporation is a nullity. A nonprofit corporation's lawsuit is void ab initio when it was filed after expiration of the 30-day period but before the secretary of state accepted and filed amended articles of incorporation. Therefore, no good cause can be shown to allow substitution of parties. Black Canyon Citizens Coalition, Inc. v. Bd. of County Comm'rs of Montrose County, 80 P.3d 932 (Colo. App. 2003).

Court's review under subsection (a)(4) is on a de novo basis, based on the record made before the lower tribunal. Feldewerth v. Joint Sch. Dist. 28-J, 3 P.3d 467 (Colo. App. 1999); Carney v. Civil Serv. Comm'n, 30 P.3d 861 (Colo. App. 2001).

Court's scope of review regarding sentence imposed by county court judge is strictly limited to whether the judge exceeded his jurisdiction or abused his discretion. Held that where the county judge immediately imposed sentence based on representations that defendant met the criteria for immediate sentencing under § 42-4-1301 and discovered later that defendant did not meet those criteria, county judge did not exceed his jurisdiction or abuse his discretion in resentencing the defendant. Walker v. Arries, 908 P.2d 1180 (Colo. App. 1995).

Notwithstanding C.R.C.P. 54(d), § 13-16-111 allows a prevailing plaintiff in an action under subsection (a)(4) of this rule to recover costs against the state, its officers, or agencies. Branch v. Colo. Dept. of Corr., 89 P.3d 496 (Colo. App. 2003).

Applied in Mesch v. Bd. of County Comm'rs, 133 Colo. 223, 293 P.2d 300 (1956); Larson v. City & County of Denver, 33 Colo. App. 153, 516 P.2d 448 (1973); Precision Heating & Plumbing, Inc. v. Bd. of Review, 184 Colo. 346, 520 P.2d 109 (1974); Civil Serv. Comm'n v. District Court, 185 Colo. 179, 522 P.2d 1231 (1974); People in Interest of D.H., 37 Colo. App. 544, 552 P.2d 29 (1976), aff'd, 192 Colo. 542, 561 P.2d 5 (1977); Hernandez v. District Court, 194 Colo. 25, 568 P.2d 1168 (1977); Harris v. Owen, 39 Colo. App. 494, 570 P.2d 26 (1977); Adams County Ass'n for Retarded Citizens, Inc. v. City of Westminster, 196 Colo. 79, 580 P.2d 1246 (1978); Tihonovich v. Williams, 196 Colo. 144, 582 P.2d 1051 (1978); Bedford v. Bd. of County Comm'rs, 41 Colo. App. 125, 584 P.2d 90 (1978); Bachicha v. Municipal Court, 41 Colo. App. 198, 581 P.2d 746 (1978); Crittenden v. Hasser, 41 Colo. App. 235, 585 P.2d 928 (1978); Schlager v. Greenwood, 41 Colo. App. 449, 586 P.2d 248 (1978); Frankmore v. Bd. of Educ., 41 Colo. App. 416, 589 P.2d 1375 (1978); Associated Dry Goods Corp. v. City of Arvada, 197 Colo. 491, 593 P.2d 1375 (1979); Thomas v. County Court, 198 Colo. 87, 596 P.2d 768 (1979); Hide-A-Way Massage Parlor, Inc. v. Bd. of County Comm'rs, 198 Colo. 175, 597 P.2d 564 (1979); Spiker v. City of Lakewood, 198 Colo. 528, 603 P.2d 130 (1979); Johnson v. City Council, 42 Colo. App. 188, 595 P.2d 701 (1979); Info. Please, Inc. v. Bd. of County Comm'rs, 42 Colo. App. 392, 600 P.2d 86 (1979); Tri-State Generation & Transmission Ass'n v. Bd. of County Comm'rs, 42 Colo. App. 479, 600 P.2d 103 (1979); DuHamel v. People ex rel. City of Arvada, 42 Colo. App. 491, 601 P.2d 639 (1979); Fitz Mo-

tors, Inc. v. City of Northglenn, 43 Colo. App. 137, 602 P.2d 890 (1979); Romero v. Rossmiller, 43 Colo. App. 215, 603 P.2d 964 (1979); Einarsen v. City of Wheat Ridge, 43 Colo. App. 232, 604 P.2d 691 (1979); Rainwater v. County Court, 43 Colo. App. 477, 604 P.2d 1195 (1979); People ex rel. Losavio v. Gentry, 199 Colo. 153, 606 P.2d 57 (1980); Bd. of County Comm'rs v. District Court, 199 Colo. 338, 607 P.2d 999 (1980); Barnes v. District Court, 199 Colo. 310, 607 P.2d 1008 (1980); West-Brandt Found., Inc. v. Carper, 199 Colo. 334, 608 P.2d 339 (1980); CF&I Steel Corp. v. Colo. Air Pollution Control Comm'n, 199 Colo. 270, 610 P.2d 85 (1980); Douglass v. Kelton, 199 Colo. 446, 610 P.2d 1067 (1980); Trinen v. Diamond, 44 Colo. App. 325, 616 P.2d 986 (1980); Ambassador Bldg. Corp. v. Bd. of Review, 623 P.2d 79 (Colo. App. 1980); State Pers. Bd. v. District Court, 637 P.2d 333 (Colo. 1981); Bernstein v. Livingston, 633 P.2d 519 (Colo. App. 1981); People v. Clerkin, 638 P.2d 808 (Colo. App. 1981); Franco v. District Court, 641 P.2d 922 (Colo. 1982); Harris v. District Court, 655 P.2d 398 (Colo. 1982); DiManna v. Kalbin, 646 P.2d 403 (Colo. App. 1982); Hallmark Bldrs. & Realty v. City of Gunnison, 650 P.2d 556 (Colo. App. 1982); Homa v. Civil Serv. Comm'n, 650 P.2d 1322 (Colo. App. 1982); Crandall v. Municipal Court ex rel. City of Sterling, 650 P.2d 1324 (Colo. App. 1982); Honeywell Info. Sys. v. Bd. of Assmt. Appeals, 654 P.2d 337 (Colo. App. 1982); Beacom v. Bd. of County Comm'rs, 657 P.2d 440 (Colo. 1983); Hoffer v. Town of Carbondale, 662 P.2d 495 (Colo. App. 1983); Hudspeth v. Bd. of County Comm'rs, 667 P.2d 775 (Colo. App. 1983); Anchorage Joint Venture v. Anchorage Condo. Ass'n, 670 P.2d 1249 (Colo. App. 1983); Lombardi v. Bd. of Adjustment, 675 P.2d 21 (Colo. App. 1983); Sandoval v. Farish, 675 P.2d 300 (Colo. 1984); Lamb v. County Court, 697 P.2d 802 (Colo. App. 1984); Barnes v. City of Westminster, 723 P.2d 164 (Colo. App. 1986); Wilkinson v. Bd. of County Comm'rs, 872 P.2d 1269 (Colo. App. 1993); Droste v. Bd. of County Comm'rs, 85 P.3d 585 (Colo. App. 2003); Buenabenta v. Neet, 160 P.3d 290 (Colo. App. 2007); Dolores Huerta Prep. High v. Colo. State Bd. of Educ., 215 P.3d 1229 (Colo. App. 2009).

II. HABEAS CORPUS.

This rule abolishes the special forms previously considered necessary and peculiar to the writ of habeas corpus, and relief may now be obtained either by an action or by a motion under the new practice set up in the Rules of Civil Procedure. Rogers v. Best, 115 Colo. 245, 171 P.2d 769 (1946).

Habeas corpus is a civil action, and the proceedings are governed by the rules of civil procedure. Schauer v. Smeltzer, 175 Colo. 364, 488 P.2d 899 (1971).

The application of this rule is limited to affording relief where any person not being committed or detained for any criminal or supposed criminal matter is illegally confined or restrained of his liberty. Wright v. Tinsley, 148 Colo. 258, 365 P.2d 691 (1961).

Person denied parole can seek judicial review only as provided by subsection (a)(2) of this rule. In re Question Concerning State Judicial Review, 199 Colo. 463, 610 P.2d 1340 (1980).

Acts of parole board are not reviewable. Administrative acts of the parole board, being definitely a matter of grace, and not a matter of right, are not such a function as is reviewable by the courts by habeas corpus, certiorari, or mandamus. Berry v. State Bd. of Parole, 148 Colo. 547, 367 P.2d 338 (1961), cert. denied, 370 U.S. 927, 82 S. Ct. 1569, 8 L. Ed. 2d 507 (1962).

Decision of state board of parole to grant or deny parole is clearly discretionary since parole is a privilege, and no prisoner is entitled to it as a matter of right. In re Question Concerning State Judicial Review, 199 Colo. 463, 610 P.2d 1340 (1980).

Actions reviewable only when board failed to exercise its statutory duties. It is only when the Colorado state board of parole has failed to exercise its statutory duties that the courts of Colorado have the power to review the board's actions. In re Question Concerning State Judicial Review, 199 Colo. 463, 610 P.2d 1340 (1980).

Certification of sanity unavailable through habeas corpus. For a patient confined in the state penitentiary after being found not guilty of murder by reason of insanity and transferred from the state hospital as a dangerous patient, the remedy available to obtain a judicial determination of a claimed restoration to sanity and present mental condition is formerly prescribed by statute and provided that the superintendent of the state hospital must first certify to the committing court that the defendant is sane. Habeas corpus was an inappropriate form of relief to obtain this certification. Pigg v. Patterson, 370 F.2d 101 (10th Cir. 1966).

III. MANDAMUS.

Annotator's note. Since subsection (a)(2) of this rule is similar to § 342 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

A. In General.

The substantive aspects of mandamus proceedings are preserved even though this rule

"abolishes the special form of pleading", writ and name of the remedy theretofore known as mandamus, and relief of the same nature as was formerly provided in mandamus actions may be granted in accordance with precedents established under the old practice. North Poudre Irrigation Co. v. Hinderlider, 112 Colo. 467, 150 P.2d 304 (1944); Hall v. City & County of Denver, 117 Colo. 508, 190 P.2d 122 (1948); Ahern v. Baker, 148 Colo. 408, 366 P.2d 366 (1961).

Mandamus lies to compel performance of official act. Under subsection (a)(2) of this rule, when a board or person charged with performing an official duty fails or refuses to act, mandamus will lie to compel performance. Sheeley v. Bd. of County Comm'rs, 137 Colo. 350, 325 P.2d 275 (1958).

Subsection (a)(2) of this rule permits the granting of relief to compel an "inferior tribunal, corporation, board, officer or person" to perform some required duty or act. Vigil v. Indus. Comm'n, 160 Colo. 23, 413 P.2d 904 (1966).

It is not an ordinary action or proceeding available as matter of right, and the courts are invested with a sound discretion as to its issuance. Hall v. City & County of Denver, 117 Colo. 508, 190 P.2d 122 (1948).

Relief is narrowly interpreted. Relief in the nature of mandamus to compel a public official to perform an act is narrowly interpreted. Brown v. Barnes, 28 Colo. App. 593, 476 P.2d 295 (1970).

Three-part test for mandamus. There is a three-part test which must be satisfied by a plaintiff before mandamus will be issued by the court: (1) The plaintiff must have a clear right to the relief sought; (2) the defendant must have a clear duty to perform the act requested; and (3) there must be no other available remedy. Gramiger v. Crowley, 660 P.2d 1279 (Colo. 1983).

Test applied in White v. Rickets, 684 P.2d 239 (Colo. 1984); Mahon v. Harst, 738 P.2d 1190 (Colo. App. 1987); Asphalt Specialties, Co. v. City of Commerce City, 218 P.3d 741 (Colo. App. 2009).

It is maintainable only when there is no other adequate legal remedy. Hall v. City & County of Denver, 117 Colo. 508, 190 P.2d 122 (1948); Julesburg Sch. Dist. No. Re-1 v. Ebke, 193 Colo. 40, 562 P.2d 419 (1977).

In cases where adequate relief may be had by an action for damages, an action under subsection (a)(2) will not lie as a general rule. Bell v. Thomas, 49 Colo. 76, 111 P. 76 (1910); Hall v. City & County of Denver, 117 Colo. 508, 190 P.2d 122 (1948).

Mandamus will not lie where there is another specific and adequate mode of relief available to the parties. Potter v. Anderson, 155 Colo. 25, 392 P.2d 650 (1964).

Since mandamus is available only when no other adequate remedy is available, in a case where a developer's plan met the requirements of the city zoning ordinance, and the city was acting in a quasi-judicial capacity in approving or denying the developer's plan, the proper remedy available to the developer was certiorari under subsection (a)(4) and not mandamus under subsection (a)(2), and the developer was not entitled to damages. Sherman v. Colo. Springs Planning Comm'n, 763 P.2d 292 (Colo. 1988).

Mandamus is not appropriate unless all alternative forms of relief have been exhausted. When administrative remedies are provided by statute or ordinance, the procedure outlined in the statute must be followed if the contested matter is within the jurisdiction of the administrative authority. Egle v. City & County of Denver, 93 P.3d 609 (Colo. App. 2004).

If a plaintiff fails to exhaust administrative remedies or to establish that an exception to the exhaustion requirement excuses the failure to do so, the district court may lack subject matter jurisdiction over the action. Exhaustion is unnecessary when: (1) It is clear beyond a reasonable doubt that further administrative review by the agency would be futile because the agency will not provide the relief requested; or (2) the agency lacks the authority or capacity to determine the matters in controversy. Here, trial court correctly held plaintiffs had complete, adequate, and speedy administrative remedies to challenge zoning department's decision to approve issuance of certificate of occupancy and building department's issuance of that certificate, and the trial court did not err in dismissing complaint. Egle v. City & County of Denver, 93 P.3d 609 (Colo. App. 2004).

Where an action is based on a breach of contract, mandamus is not the exclusive remedy. Julesburg Sch. Dist. No. RE-1 v. Ebke, 193 Colo. 40, 562 P.2d 419 (1977).

In the case of ministerial officers, there is an exception to the general rule, and they may be compelled to exercise their functions according to law, even though the party has another remedy against them. An action will lie, although the party may have also a remedy upon the official bond of the ministerial officer. Bell v. Thomas, 49 Colo. 76, 111 P. 76 (1910).

Mandamus will not lie to enforce duties generally, or to control and regulate a general course of official conduct for a long series of continuous acts to be performed under varying conditions. Ahern v. Baker, 148 Colo. 408, 366 P.2d 366 (1961).

Unless a party has a clear legal right to compel the action sought, he cannot maintain an action. Civil Serv. Comm'n v. People ex rel. Beates, 88 Colo. 319, 295 P. 920 (1931); Hertz Drive-Ur-Self Sys. v. Doak, 94 Colo. 200, 29 P.2d 625 (1934).

No one is entitled to mandamus whose right is not clear and unquestionable. Sturner v. James A. McCandless Inv. Co., 87 Colo. 23, 284 P. 778 (1930); Barghler v. Farmers' Irrigation Co., 87 Colo. 605, 290 P. 288 (1930).

When the right claimed is doubtful, action will not lie. People ex rel. Foley v. Stapleton, 98 Colo. 354, 56 P.2d 931 (1936).

An action lies only where the petitioner has a clear legal right to have the respondent perform a clear legal duty. Heimbecher v. City & County of Denver, 97 Colo. 465, 50 P.2d 785 (1935).

The general rule is that a writ of mandamus will not be issued with respect to the making or enforcement of police regulations except to enforce a clear legal right or to compel the performance of a clear legal duty. Ahern v. Baker, 148 Colo. 408, 366 P.2d 366 (1961).

Mandamus will not issue in doubtful cases. Potter v. Anderson, 155 Colo. 25, 392 P.2d 650 (1964).

Action lies to compel clear legal duty. Where a petition shows that there is neither a clear legal right in the petitioner nor a clear legal duty corresponding thereto, relief is properly denied. Roper v. Indus. Comm'n, 93 Colo. 250, 25 P.2d 725 (1933).

An action lies only when on the one side there is a clear legal right to demand the doing of a certain thing, and on the other side a clear legal duty to do it. Schneider v. People ex rel. Grant, 95 Colo. 300, 35 P.2d 498 (1934).

An action lies to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station. Bd. of Trustees v. Endner, 18 Colo. App. 65, 70 P. 152 (1902); Statton v. People ex rel. Burr, 18 Colo. App. 85, 70 P. 157 (1902); Colo. Pub. Welfare Bd. v. Viles, 105 Colo. 62, 94 P.2d 713 (1939).

Mandamus is only justified when a state agency has failed to perform a statutory duty or to adhere to its statutory responsibility. Peoples Natural Gas Div. v. Pub. Utils. Comm'n, 626 P.2d 159 (Colo. 1981).

The one bringing the action must show a clear legal right to demand the performance of a certain act as well as a clear legal duty on the part of the officer to do the thing demanded. Ahern v. Baker, 148 Colo. 408, 366 P.2d 366 (1961).

An action compelling an officer to act will lie only when that officer fails to perform an official duty. Where there is no duty to act, an action in the nature of mandamus cannot be sustained. People ex rel. Garrison v. Lamm, 622 P.2d 87 (Colo. App. 1980).

Mandamus will not issue to coerce an official to perform acts which it is not his official duty to perform. Potter v. Anderson, 155 Colo. 25, 392 P.2d 650 (1964).

Mandamus is an extraordinary remedy. It may be used to compel the performance by a public officer of a plain legal duty devolving upon him by virtue of his office or which the law enjoins as a duty resulting from the office. Potter v. Anderson, 155 Colo. 25, 392 P.2d 650 (1964).

Relief in the nature of mandamus will be granted only in cases where the act is administrative in nature and a clear legal duty exists under a statute to perform this act. Brown v. Barnes, 28 Colo. App. 593, 476 P.2d 295 (1970).

Mandamus is appropriate if the decision-maker has grossly abused its discretion and if the damage suffered by the petitioner cannot be cured by means of an appeal, while matters relating to the discovery of evidence are usually reviewable only on an appeal. Peoples Natural Gas Div. v. Pub. Utils. Comm'n, 626 P.2d 159 (Colo. 1981).

Action for the performance of a purely ministerial duty involving no discretionary right or the exercise of judgment is proper. Lindsey v. Carlton, 44 Colo. 42, 96 P. 997 (1908); Hall v. City & County of Denver, 117 Colo. 508, 190 P.2d 122 (1948).

Mandamus does not lie to compel the performance of a trust sought which is discretionary or involves the exercise of judgment. Lindsey v. Carlton, 44 Colo. 42, 96 P. 997 (1908).

Mandamus has its function in those cases where the duty of the public officer or board is purely ministerial and not discretionary. Ahern v. Baker, 148 Colo. 408, 366 P.2d 366 (1961).

If the act sought to be compelled is one involving the exercise of discretion on the part of the official, or requiring a choice between alternative courses of action, then relief in the nature of mandamus will be denied. Brown v. Barnes, 28 Colo. App. 593, 476 P.2d 295 (1970).

Mandamus only to compel officer to perform ministerial function. Relief in the nature of mandamus will be granted only in cases where a clear legal duty exists for an administrative officer to perform a ministerial act. Menchetti v. Wilson, 43 Colo. App. 19, 597 P.2d 1054 (1979); Sherman v. City of Colo. Springs Planning Comm'n, 680 P.2d 1302 (Colo. App. 1983); Reynolds v. City Council of Longmont, 680 P.2d 1350 (Colo. App. 1984).

Mandamus is improper if the court must give directions about the manner in which administrative discretion is to be exercised. Peoples Natural Gas Div. v. Pub. Utils. Comm'n, 626 P.2d 159 (Colo. 1981).

Mandamus will not lie to compel a quasi-judicial tribunal to exercise its discretion in a particular way. Peoples Natural Gas Div. v. Pub. Utils. Comm'n, 626 P.2d 159 (Colo. 1981).

Approval of requests for money from county general fund is discretionary function of boards of county commissioners, not a ministerial act. Tisdel v. Bd. of County Comm'rs, 621 P.2d 1357 (Colo. 1980).

Adoption of budgetary items is legislative, not judicial, in character. Tisdel v. Bd. of County Comm'rs, 621 P.2d 1357 (Colo. 1980).

Mandamus will be allowed where a statute prescribes no remedy for the refusal to perform a duty made imperative thereby, or in case of doubt whether there be another effectual remedy. Bell v. Thomas, 49 Colo. 76, 111 P. 76 (1910).

Where there is a conflict between a statute and a rule, the former must govern; rules of court can neither abridge, enlarge, nor modify substantive rights of a litigant. Sherman v. Colo. Springs Planning Comm'n, 729 P.2d 1014 (Colo. App. 1986), aff'd, 763 P.2d 292 (Colo. 1988).

Where rule provides that the "judgment shall include any damages sustained" but a statute makes available the doctrine of sovereign immunity as a defense to such damage award, the statute governs, and damages are not recoverable. Sherman v. Colo. Springs Planning Comm'n, 729 P.2d 1014 (Colo. App. 1986), aff'd, 763 P.2d 292 (Colo. 1988).

Action cannot usurp the functions of an appeal. Lindsey v. Carlton, 44 Colo. 42, 96 P. 997 (1908).

Action will not lie from the district court to compel the county court to enter a judgment in a divorce proceeding different from the judgment which had been rendered, this being an attempt to review, annul, and modify such judgment, and to usurp the functions of an appeal to such judgment, and also an attempt to control the discretion and judgment of the county court. Linsdey v. Carlton, 44 Colo. 42, 96 P. 997 (1908).

Action will not lie against a court unless it be clearly shown that such court has refused to perform some manifest duty. Lindsey v. Carlton, 44 Colo. 42, 96 P. 997 (1908).

Action will not lie when the interests of third parties who are not before the court are involved. Sturner v. James A. McCandless Inv. Co., 87 Colo. 23, 284 P. 778 (1930); Barghler v. Farmers' Irrigation Co., 87 Colo. 605, 290 P. 288 (1930); Hertz Drive-Ur-Self Sys. v. Doak, 94 Colo. 200, 29 P.2d 625 (1934).

Action will not lie to compel the commission on judicial discipline or its executive director to investigate a complaint alleging judicial misconduct or to compel the governor to investigate a complaint of alleged judicial misconduct. The district court lacks subject matter jurisdiction to compel such investigations. Higgins v. Owens, 13 P.3d 837 (Colo. App. 2000).

Failure to join indispensable parties jurisdictional error. Failure to join indispensable parties within 30 days after the final action of a tribunal is a jurisdictional defect requiring dismissal of the entire action. Smith v. County of El Paso, 42 Colo. App. 316, 593 P.2d 979 (1979).

Failure to join all indispensable parties in action under this rule within the 30-day time limit prescribed by the rule is a jurisdictional defect which requires dismissal of the action. Dahman v. City of Lakewood, 44 Colo. App. 261, 610 P.2d 1357 (1980).

Failure to join nonindispensable parties not error. Permissive joinder and permissive intervention can only be effected within 30 days after the final action taken by the tribunal; however, failure to join parties who are not indispensable is not a jurisdictional error, and therefore does not require dismissal of the suit. Smith v. County of El Paso, 42 Colo. App. 316, 593 P.2d 979 (1979).

City council is indispensable party to suit brought seeking review of denial of rezoning petition and failure to join it is a jurisdictional defect requiring dismissal. Dahman v. City of Lakewood, 44 Colo. App. 261, 610 P.2d 1357 (1980).

Naming municipality is not substitute for naming city council in an action seeking review of denial of rezoning petition. Dahman v. City of Lakewood, 44 Colo. App. 261, 610 P.2d 1357 (1980).

Relief inappropriate where board does act. Where a board does act, denying a license, as opposed to failing to act, mandamus is not appropriate. Sheeley v. Bd. of County Comm'rs, 137 Colo. 350, 325 P.2d 275 (1958).

A proceeding cannot be maintained in anticipation of an omission to perform a duty or because the relator fears there will be an omission, but there must be shown an actual failure or refusal to perform the duty before an action can be maintained to compel its performance. Orman v. People, 18 Colo. App. 302, 71 P. 430 (1903).

Proceeding not appropriate to compel a ministerial officer not to act. Judgment in an action may be that a ministerial officer — where there is a clear legal duty — shall perform, or where the duty does not appear, that he need not perform, but never that he shall not perform. If the latter judicial direction is given it must be by a judgment entered in an equitable action for injunction. Brownlow v. Wunch, 102 Colo. 447, 80 P.2d 444 (1938).

Petition insufficient. The use of such words as "compel", and the prayer that the trial court "order" the secretary of state "to perform" in a specified manner in the enforcement of the liquor code "as a duty resulting from his office" in a complaint to bring action under this rule is not sufficient to invoke the issuance of a writ of mandamus. Ahern v. Baker, 148 Colo. 408, 366 P.2d 366 (1961).

Trial court was justified in drawing a distinction between the writ of mandamus and proceedings under subsection (a)(4) of this

rule. Hall v. City & County of Denver, 117 Colo. 508, 190 P.2d 122 (1948).

POME standard for consideration of motion to dismiss claim for abuse of process based on first amendment right to petition. Trial court should consider whether the petitioning activities on the part of the party being sued for abuse of process were not immunized from liability by the first amendment because: (1) Those activities are devoid of factual support or, if supportable in fact, have no cognizable basis in law; (2) the primary purpose of the petitioning activities is to harass the other party or to effectuate some other improper objective; and (3) those petitioning activities have the capacity to have an adverse effect on a legal interest of the other party. Protect Our Mountain Environment (POME) v. District Court, 677 P.2d 1361 (Colo. 1984) (decided prior to 1981 amendment).

Standard extended to case under section (a)(2) in Concerned Members v. District Court, 713 P.2d 923 (Colo. 1986); Ware v. McCutchen, 784 P.2d 846 (Colo. App. 1989).

Relief in the nature of mandamus may be appropriate when it is alleged that a sheriff or chief of police has refused to accept applications for concealed weapons permits from private investigators who are not current or retired law enforcement officers and the sheriff or police chief has thereby breached a statutory duty to conduct a background check on each applicant. Miller v. Collier, 878 P.2d 141 (Colo. App. 1994).

A request for extraordinary relief in the form of mandamus under this rule is improper to challenge arbitrary action by the department of revenue in revoking a person's driver's license, even though petition was filed on the basis that the department refused to conduct a revocation hearing. The state Administrative Procedures Act provides the proper mechanism for seeking relief based on arbitrary action by an executive agency. Dept. of Rev. v. District Court, 802 P.2d 473 (Colo. 1990).

Money damages are not available in a C.R.C.P. 106 proceeding. Accordingly, plaintiffs could not seek such damages in an action brought under rule and did not have a remedy at law. Sundheim v. Bd. of County Comm'rs, 904 P.2d 1337 (Colo. App. 1995), aff'd, 926 P.2d 545 (Colo. 1996); Fortner v. Cousar, 992 P.2d 697 (Colo. App. 1999).

Applied in Local 1 v. Metro Wastewater Reclamation, 876 P.2d 82 (Colo. App. 1994).

B. Illustrative Cases.

Action lies to compel the performance of a single act. People ex rel. City & County of Denver v. District Court, 81 Colo. 163, 255 P. 447 (1927).

Action may also be invoked to require the execution of a series of acts. People ex rel. City & County of Denver v. District Court, 81 Colo. 163, 255 P. 447 (1927).

To compel the issuance of a building permit which has been denied on the ground that the construction of the proposed building would infringe the zoning ordinances of the city would be improper. Hedgcock v. People ex rel. Arden Realty & Inv. Co., 98 Colo. 522, 57 P.2d 891 (1936).

An action in the nature of mandamus is a proper remedy to require a building inspector to issue a building permit. Mahnke v. Coughenour, 170 Colo. 61, 458 P.2d 747 (1969).

To compel ousted officer to deliver papers to appointee. Where an ousted secretary of an irrigation district refused to turn over the books and papers to the regular appointee, an action to compel delivery is proper. Kepley v. People ex rel. Everson, 76 Colo. 233, 230 P. 804 (1924).

To compel justice of peace to issue writ of commitment. Where a justice of the peace tried and convicted a defendant and sentenced him to imprisonment in the county jail, his duty to issue a writ of commitment was mandatory, and upon his refusal to issue such writ when demanded, action would lie to compel him to issue the writ. It was immaterial that time had elapsed since the sentence and before the writ was demanded which exceeded the length of the term of sentence. Mann v. People, 16 Colo. App. 475, 66 P. 452 (1901).

To compel revocation of unlawful order of suspension. An action under subsection (a)(2) lies to enforce the revocation of an order of suspension unlawfully entered against a police officer who was holding his position under civil service. Bratton v. Dice, 93 Colo. 593, 27 P.2d 1028 (1933).

Mandamus would be proper if an effort were being made to compel the civil service commission to reinstate an aggrieved employee. Turner v. City & County of Denver, 146 Colo. 336, 361 P.2d 631 (1961).

To compel audit for services. An acting public official is entitled to an audit of his claim for services rendered in his official capacity, and an action will lie to compel such audit. McNichols v. People ex rel. Hershey, 92 Colo. 469, 22 P.2d 131 (1933).

Courts will direct an officer to proceed and exercise the discretion vested in him by law. Refusal of a city auditor to approve a demand, because of claimed want of authority, amounts to a refusal to act, and an action will lie to compel action where he is vested with authority. People ex rel. Hershey v. McNichols, 91 Colo. 141, 13 P.2d 266 (1932).

To compel determination of tax. When a tax assessor refuses to perform a purely ministerial function which the law imposes, performance may be enforced by mandamus. Bohen

v. Bd. of County Comm'rs, 109 Colo. 283, 124 P.2d 606 (1942).

The statute is mandatory as to the requirement that a gift tax shall be determined upon proper application. The inheritance tax commissioner has no discretion in that ministerial duty and mandamus was the proper course to compel him as a public official to act. Tasher v. Trentaz, 165 Colo. 97, 437 P.2d 529 (1968).

To compel filling of vacancies. Where city charter provides for the appointment of at least two justices of the peace, any vacancy in such offices to be filled by the mayor, mandamus would lie to compel the mayor to fill any vacancy, at least to the number of two, as a mandatory public duty required by the charter. McNichols v. City & County of Denver, 109 Colo. 269, 124 P.2d 601 (1942).

To compel approval of home care application. The plaintiff completed those things required of her under the statute and under the rules, but the affirmative action by the state board of education requiring that it give its approval and make its recommendation was not done. Absent the rule which the board had no authority to promulgate, the plaintiff's application could be processed. The trial court should have directed that the board complete plaintiff's application for home care. Flemming v. Colo. State Bd. of Educ., 157 Colo. 45, 400 P.2d 932 (1965).

To grant prisoner a free transcript. Defendant is caught in a vicious circle — unable to put into a petition the matters and things which are required, and being denied a transcript because he has not asserted any of those grounds. The district court is ordered to grant the prisoner's petition for a free transcript of the proceedings at the time of the court acceptance of his plea of guilty as well as of the trial in which the determination of the degree of the offense was made. Sherbondy v. District Court, 170 Colo. 114, 459 P.2d 133 (1969).

Right of school board to demand performance of school district. Section 27-11-103 clearly requires that the "school district shall provide to the community incorporated board" a sum of money determined by a stated formula; therefore, the clear right of a school board to demand performance, and the clear legal duty on a school district to act, makes this a proper case for disposition by mandamus. Denver Ass'n for Retarded Children v. Sch. Dist. No. 1, 188 Colo. 310, 535 P.2d 200 (1975).

Mandamus was the appropriate remedy, rather than a motion under subsection (a)(4) of this rule, to address a school district board of education's action in not renewing a probationary teacher's employment contract. Although the school board has broad discretion in determining whether to renew employment contracts for probationary teachers, that discretion is limited by § 22-32-110 (4)(c), which prohibits the board from using as grounds for nonrenewal any actions taken by the probationary teacher in good faith and in compliance with the school district's discipline policy. Since there is no remedy provided if the school board violates this prohibition, the probationary teacher's action in seeking mandamus was appropriate. McIntosh v. Bd. of Educ. of Sch. Dist. No. 1, 999 P.2d 224 (Colo. App. 2000).

Action will not lie to test rule of procedure in workmen's compensation case. This remedy may not be invoked in a workmen's compensation case for the purpose of testing the meaning or validity of a mere rule of procedure when the commission which framed it has seen fit to disregard it. Roper v. Indus. Comm'n, 93 Colo. 250, 25 P.2d 725 (1933).

Nor to compel appointment by civil service commission. A person who stands second on a civil service eligible list for appointment to a clerical position cannot compel his appointment in the absence of a showing that the person standing first had been tendered and refused the appointment or had failed to make demand therefor upon request of relator. Civil Serv. Comm'n v. People ex rel. Beates, 88 Colo. 319, 295 P. 920 (1931).

Nor to control discretion of mayor as to appointments. Under city charter, authorizing mayor to appoint justices of the peace, the discretion of the mayor as to whom he appoints, except as it may be limited by the charter, cannot be controlled by mandamus. McNichols v. City & County of Denver, 109 Colo. 269, 124 P.2d 601 (1942).

Nor to compel appropriations. Action does not lie to compel a city council to make an appropriation for civil service commission expense. Schneider v. People ex rel. Grant, 95 Colo. 300, 35 P.2d 498 (1934).

Nor to compel school board to allow claims. It is the duty of a school board to disallow invalid claims, according to its judgment, and courts cannot control that judgment by proceedings under subsection (a)(2). Sorensen v. Echternacht, 74 Colo. 91, 218 P.1046 (1923).

Nor to test title to office. When a person is in actual possession of an office under an election or commission, and exercising its duties under color of right, his title to the office cannot be tried or tested under subsection (a)(2). Henderson v. Glynn, 2 Colo. App. 303, 30 P. 265 (1892); City Council v. People ex rel. Ferguson, 19 Colo. App. 399, 75 P. 603 (1903).

Nor to compel admission of claimant to occupied office. When an office is already filled by an actual incumbent, exercising the functions of the office de facto, and under color of right, an action will not lie to compel the admission of another claimant. City Council v. People

ex rel. Ferguson, 19 Colo. App. 399, 75 P. 603 (1903).

Nor to compel discretionary hearing. The effect of a mandamus to determine the scope of insurance coverage would be to require the commissioner to find that the filing is defective, and that the public interest requires hearings on this matter. These are matters within the discretionary function of the commissioner and therefore cannot be compelled under subsection (a)(2) of this rule. Brown v. Barnes, 28 Colo. App. 593, 476 P.2d 295 (1970).

Nor to compel hearing where none is provided by statute. The statutes providing for the procedures that must be followed prior to the issuance of a liquor license do not require a hearing, no hearing; after issuance is in any manner provided for in the statutes and, therefore, mandamus may not issue. Potter v. Anderson, 155 Colo. 25, 392 P.2d 650 (1964).

Nor to compel enforcement of police or criminal laws by police officers generally, such as the keeping of places of business open for the sale of liquors on Sundays or holidays. Ahern v. Baker, 148 Colo. 408, 366 P.2d 366 (1961).

A public officer will not be compelled by mandamus to enforce liquor laws, since it would entail the ordering of a discretionary authority. Ahern v. Baker, 148 Colo. 408, 366 P.2d 366 (1961).

Nor to compel municipal board empowered with discretionary procedures. Where an advisory board is given discretion in preparing recommendations of salaries for certain municipal employees to a city council, subsection (a)(2) cannot be invoked to compel the board to revise its procedures for preparing those recommendations. Reeve v. Career Serv. Bd., 636 P.2d 1307 (Colo. App. 1981).

Action does not lie to compel the department of corrections to place an inmate in community corrections if the inmate is under a detainer. Rivera-Bottzeck v. Ortiz, 134 P.3d 517 (Colo. App. 2006).

Relief unavailable where certiorari remedy was not utilized. Where there is other adequate relief available to the parties by review of the action of the local licensing authority by certiorari under subsection (a)(4), providing therein for stay of execution of the issuing of the license pending review, but that remedy was not sought, and the license issued, mandamus will not lie. Potter v. Anderson, 155 Colo. 25, 392 P.2d 650 (1964).

Mandamus is an inappropriate form of relief to obtain certification of sanity for a patient confined in the state penitentiary after being found not guilty of murder by reason of insanity and transferred from the state hospital as a dangerous patient. The remedy available to obtain a judicial determination of a claimed restoration to the superintendent's good faith and discretion in sanity and present mental condition is prescribed by a statute. Pigg v. Patterson, 370 F.2d 101 (10th Cir. 1966).

Allegations sufficient to state a claim of relief. Assertion by petitioner that parole board had acted pursuant to § 16-13-203 when it ordered petitioner transferred to a different facility and that the department of corrections was required to comply with that order alleged both a right and a duty owed to him by the department of corrections. Therefore, petition contained sufficient allegations to state a claim for relief in mandamus under this rule. White v. Rickets, 684 P.2d 239 (Colo. 1984).

Mandamus relief under subsection (a)(2) is available to challenge the parole board's actions if it has failed to exercise its statutory duties. Although plaintiff did not expressly seek mandamus relief pursuant to subsection (a)(2), the gravamen of his complaint was that the parole board's failure to consider any events or circumstances prior to plaintiff's incarceration was in direct violation of statutory guidelines for parole. Under these circumstances, the trial court had jurisdiction to address the merits of the complaint. Fraser v. Colo. Bd. of Parole, 931 P.2d 560 (Colo. App. 1996).

IV. QUO WARRANTO.

A. In General.

Law reviews. For article, "The Misuse of Judicial Flexibility in Quo Warranto Cases", see 10 Rocky Mt. L. Rev. 239 (1938).

Annotator's note. Since subsection (a)(3) of this rule is similar to § 321 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Common-law writ. The writ of quo warranto was originally a prerogative writ of the crown against one who usurped any office, franchise, or liberty of the crown and was also used in the case of nonuse or long neglect of a franchise or misuse or abuse thereof. At common law it served the function of testing title to public and corporate offices. Burns v. District Court, 144 Colo. 259, 356 P.2d 245 (1960).

Rule substituted for common law and code. Former provisions of the Code of Civil Procedure were a substitute for the original common-law quo warranto remedy and retained the purpose and scope of that which it supplanted. These code provisions were superseded by this rule. People ex rel. Mijares v. Kniss, 144 Colo. 551, 357 P.2d 352 (1960).

Purpose of relief. Traditionally, quo warranto was directed against one charged with usurping an office, to inquire by what authority he claims to hold such office, in order to adjudge his right thereto. Its purpose was to pro-

tect the interest of the public and not to protect or promote private rights. People ex rel. Mijares v. Kniss, 144 Colo. 551, 357 P.2d 352 (1960).

The various procedural changes do not affect the basic purposes for which the writ of quo warranto was originally designed. People ex rel. Mijares v. Kniss, 144 Colo. 551, 357 P.2d 352 (1960).

The traditional concept of quo warranto relief is prevailing under this rule. People ex rel. Mijares v. Kniss, 144 Colo. 551, 357 P.2d 352 (1960).

Subsection (a)(3) does not enlarge or abridge substantive rights. This section is not a statute and does not, and cannot, have the force and effect of a statute, and cannot enlarge or abridge substantive rights. Enos v. District Court, 124 Colo. 335, 238 P.2d 861 (1951).

If subsection (a)(3) enlarges the scope of quo warranto by making relief thereunder obtainable by persons who had no access to such accommodation before, the supreme court would bestow jurisdiction upon trial courts which they did not have in the past. This would constitute a legislative act beyond its authority. The supreme court will not so encroach upon the legislative domain. People ex rel. Mijares v. Kniss, 144 Colo. 551, 357 P.2d 352 (1960).

Substantial elements of relief remain the same. While the procedural pattern has been simplified, the substance of what constitutes the basis of quo warranto relief remains the same. In order to prevail, proof of the substantive elements authorizing such relief should be of the same kind, quality, and quantity as would have warranted a favorable judgment under the older forms. People ex rel. Mijares v. Kniss, 144 Colo. 551, 357 P.2d 352 (1960).

The substance of the relief determines the character of the action; the name given an extraordinary writ such as quo warranto is unimportant. Burns v. District Court, 144 Colo. 259, 356 P.2d 245 (1960).

"Any person" in the first sentence is characterized by the following words "such person" and the context thereof. People ex rel. Mijares v. Kniss, 144 Colo. 551, 357 P.2d 352 (1960).

A proceeding under subsection (a)(3) is the exclusive method by which to try title to public office. People ex rel. Barton v. Londoner, 13 Colo. 303, 22 P. 764, 6 L.R.A. 444 (1889); Bd. of Comm'rs v. Gould, 6 Colo. App. 44, 39 P. 895 (1895); Wason v. Major, 10 Colo. App. 181, 50 P. 741 (1897); State R. R. Comm'n v. People ex rel. Denver & R. G. R. R., 44 Colo. 345, 98 P. 7 (1908); Roberts v. People ex rel. Duncan, 81 Colo. 338, 255 P. 461 (1927); Bd. of Comm'rs v. Wharton, 82 Colo. 466, 261 P. 4 (1927).

It is a general rule that when the statute provides a remedy to test the right to exercise a franchise or office, it is exclusive of all other remedies. Atchison, T. & S. F. R. R. v. People, 5 Colo. 60 (1879).

Thus, title to office cannot be tested by subsection (a)(2). Where a party is in actual possession of an office under an election or commission, and exercising its duties under color of right, his title to the office cannot be tried or tested by a proceeding under subsection (a)(2). City Council v. People ex rel. Ferguson, 19 Colo. App. 399, 75 P. 603 (1904).

Title to office cannot be tested in a suit brought to recover a salary. Bd. of Comm'rs v. Wharton, 82 Colo. 466, 261 P. 4 (1927).

Title to an office cannot be tried in a collateral proceeding. Bd. of Comm'rs v. Gould, 6 Colo. App. 44, 39 P. 895 (1895).

Distinction between proceeding under this section and election contest. A proceeding by the people for the purpose of trying the incumbent's title to office, regardless of the claimant's right, is not an "election contest" within the meaning of this phrase as employed in § 12 of art. VII, Colo. Const. Statutes passed by the general assembly in obedience to the constitutional mandate relating to contested elections do not deprive the courts of jurisdiction to inquire into usurpations and unlawful holdings of office or petitioners of a remedy in quo warranto. People ex rel. Barton v. Londoner, 13 Colo. 303, 22 P. 764 (1889).

A proceeding to oust a party from an office cannot be converted into a statutory election contest. People ex rel. Stidger v. Horan, 34 Colo. 304, 86 P. 252 (1905).

The right to the official salary is not to be determined in a proceeding under subsection (a)(3), but is to be determined in other proceedings. Capp v. People ex rel. Walker, 64 Colo. 58, 170 P. 399 (1918).

General assembly may limit time to challenge recreation district. The general assembly may validly limit the period within which the constitutionally guaranteed remedy of quo warranto is available to challenge the validity of a recreation district, unless the time is so unreasonably short as to destroy the substance of the remedy. Burns v. District Court, 144 Colo. 259, 356 P.2d 245 (1960).

Cause of action limited to parties named and served. Where relators did not bring the quo warranto action as a class action, nor did they name and serve as parties the other numerous school districts in the state, their cause of action must be limited to action against the captioned respondents who were named and served. People ex rel. Cory v. Colo. High Sch. Activities Ass'n, 141 Colo. 382, 349 P.2d 381 (1960).

Corporation, not stockholder, is indispensable party. The requirements of this rule do not set forth the parties who are indispensable to a quo warranto proceeding, but provide a framework under which the state, or a shareholder if

the state refuses to act, may review the propriety of a challenged election. While the legality of an issuance of stock could not be adjudicated adversely to the absent holder, yet his right to vote could be passed upon notwithstanding his absence insofar as was necessary to determine the result of the particular election that was under review. The corporation, however, is an indispensable party. State ex rel. Gentles v. Barnholt, 145 Colo. 259, 358 P.2d 466 (1961).

B. Franchises and Offices.

Law reviews. For comment on People ex rel. Mijares v. Kniss (cited below), see 38 Dicta 361 (1961).

Office defined. An office is an employment on behalf of the government in any station or public trust, not transient, occasional, or incidental. People ex rel. Denver & R. G. R. R. v. Garfield County Court, 59 Colo. 52, 147 P. 329 (1915).

Franchise defined. A franchise is defined as a particular privilege conferred upon individuals by grant from the government. Franchises are usually conferred upon corporations for the purpose of enabling them to do certain things. Franchises are vested in the corporate entity. Londoner v. People ex rel. Barton, 15 Colo. 246, 25 P. 183 (1890); Grant v. Elder, 64 Colo. 104, 170 P. 198 (1918).

Where it is alleged that the purpose of the challenged group is to render services to the public and that its operations are so permeated with the public interest as to be such that everyone may not engage therein as a matter of right, and that the exercise of such authority requires, or may require, a specific grant of privilege from the general assembly, a franchise is involved. People ex rel. Cory v. Colo. High Sch. Activities Ass'n, 141 Colo. 382, 349 P.2d 381 (1960).

A franchise is involved in a situation where public high school districts voluntarily join together to perform jointly a public function through a public or quasi-public body that is operating independently of statutory authority. People ex rel. Cory v. Colo. High Sch. Activities Ass'n, 141 Colo. 382, 349 P.2d 381 (1960).

An "office or franchise" can be deemed to exist where there has been no legislative act or constitutional provision authorizing the creation of one. People ex rel. Mijares v. Kniss, 144 Colo. 551, 357 P.2d 352 (1960).

Unless an existing statute is inconsistent with an amendment to the state constitution, then the statute continues in force subsequent to the adoption and effective date of the amendment. People ex rel. Union Trust Co. v. Superior Court, 175 Colo. 391, 488 P.2d 66 (1971).

The statute which established the superior court was never inconsistent with the constitutional provisions that judicial power shall be vested in a supreme court, district courts, and others. Therefore, the statute was not automatically repealed by enactment of new constitutional provision. People ex rel. Union Trust Co. v. Superior Court, 175 Colo. 391, 488 P.2d 66 (1971) (decided prior to abolition of superior courts).

The right of a county judge to hold office is dependent upon the validity of the proceedings by which he was appointed, but such right cannot be determined in an injunctive proceeding, because the exclusive means of determining whether a person unlawfully holds any office is by a writ in the nature of quo warranto. McCamant v. City & County of Denver, 31 Colo. App. 287, 501 P.2d 142 (1972).

This rule relates to public offices. People ex rel. Mijares v. Kniss, 144 Colo. 551, 357 P.2d 352 (1960).

It does not authorize a contest over private office in a quo warranto action. People ex rel. Mijares v. Kniss, 144 Colo. 551, 357 P.2d 352 (1960).

It was not in contemplation of this remedy that the district attorney, either on his own motion or at the behest of the governor or the request of the individual, should intervene in the governance of an unincorporated society. People ex rel. Mijares v. Kniss, 144 Colo. 551, 357 P.2d 352 (1960).

The provisions of this rule may not be utilized by members of a labor union to dislodge other members from offices which they hold in the organization, the application of the rule and the remedy being limited to public officers. People ex rel. Mijares v. Kniss, 144 Colo. 551, 357 P.2d 352 (1960).

Subsection (a)(3) was not intended to give private person right to redress his own wrongs. Subsection (a)(3) was not intended to give a private person the right to question the corporate existence of another, in order to protect his own rights or redress his own wrongs, unless it may be in that class of cases where the title to an office is involved, or some similar question is presented. If the law officer should refuse, the private relator could proceed and institute an action to remedy a public wrong. In the latter case, however, it must appear that the object aimed at is a public one, and is the protection of the interests and the maintenance of the welfare of the people. People ex rel. Union Pac. Ry. v. Colo. E. Ry., 8 Colo. App. 301, 46 P. 219 (1896); State R. R. Comm'n v. People ex rel. Denver & R. G. R. R., 44 Colo. 345, 98 P. 7 (1908); People ex rel. Weisbrod v. Lockhard, 26 Colo. App. 439, 143 P. 273 (1914), aff'd, 65 Colo. 558, 178 P. 565 (1919).

When the action is brought to protect private rights, it should not be maintained. This remedy is for the protection of the interests of the public as contradistinguished from private rights, and when the object of a proceeding is

the protection of the latter, the action should not be maintained. State R. R. Comm'n v. People ex rel. Denver & R. G. R. R., 44 Colo. 345, 98 P. 7 (1930).

An action lies to try right of those lawfully elected directors of private corporations. The phrase "any franchise" in subsection (a)(3) includes the powers and rights conferred upon a private corporation, and an action lies to try the right of those lawfully elected directors of a private corporation and wrongfully prevented from acting. Grant v. Elder, 64 Colo. 104, 170 P. 198 (1918).

An action in quo warranto is authorized with respect to corporations, which are creatures of statute. State ex rel. Gentles v. Barnholt, 145 Colo. 259, 358 P.2d 466 (1961).

An action lies to test the title of the office of a director of an irrigation district. Lockhard v. People ex rel. Hasselbush, 80 Colo. 31, 250 P. 152 (1926).

Action to determine the validity of a high school activities association. In a proper case quo warranto is a suitable method to test the validity of the Colorado high school activities association activities. People ex rel. Cory v. Colo. High Sch. Activities Ass'n, 141 Colo. 382, 349 P.2d 381 (1960).

A club organized in violation of law may be dissolved under subsection (a)(3). A club organized ostensibly as a social club, but in fact with the sole purpose to dispense intoxicating liquors, in violation of law and local ordinances, may be dissolved by a proceeding under subsection (a)(3). Canon City Labor Club v. People ex rel. Jamieson, 21 Colo. App. 37, 121 P. 120 (1912).

Action may not be used to test the regularity of the appointment of commissioners to hold an incorporation election for a town, as such commissioners are not public officers. Commissioners appointed under the statute to hold an election upon the question whether a town shall become incorporated are not public officers. People ex rel. Denver & R. G. R. R. v. Garfield County Court, 59 Colo. 52, 147 P. 329 (1915).

However, when the town is declared formed the validity of the proceeding may be tested under subsection (a)(3). People ex rel. Denver & R. G. R. R. v. Garfield County Court, 59 Colo. 52, 147 P. 329 (1915).

The writ of quo warranto is a proper proceeding to attack the legal existence of a quasi-municipal corporation. Burns v. District Court, 144 Colo. 259, 356 P.2d 245 (1960).

This section provides a proper remedy in cases involving incorporations of towns and cities. Wiltgen v. Berg, 164 Colo. 139, 435 P.2d 378 (1967).

C. Who May Bring Action.

As a general rule, prosecutions for public wrongs must be instituted by the state through properly authorized agents, while the individual can only sue for injuries peculiarly affecting him. People ex rel. Byers v. Grand River Bridge Co., 13 Colo. 11, 21 P. 898 (1889).

If the defendant corporation has violated the law, either by doing some forbidden act or by neglecting to do some act enjoined upon it, it is not every person who may call it to account for such violation. People ex rel. Byers v. Grand River Bridge Co., 13 Colo. 11, 21 P. 898 (1889).

Exception where agent neglects or refuses to bring action. The provision permitting an action to be brought by a purely private party, upon the neglect or refusal of the district attorney to bring such action, must be construed with reference to this general rule. People ex rel. Byers v. Grand River Bridge Co., 13 Colo. 11, 21 P. 898 (1889).

Where by statute authority is given to a particular officer, its exercise by any other officer is forbidden by implication. Atchison, T. & S. F. R. R. v. People, 5 Colo. 60 (1879).

Under § 32-6-107 providing for the election and organization of metropolitan recreation districts, quo warranto is available only to the people on relation of the attorney general. Burns v. District Court, 144 Colo. 259, 356 P.2d 245 (1960).

District attorney is proper officer to determine whether public interest is involved. Under subsection (a)(3), the district attorney is the proper officer to determine in the first instance whether the public interest is involved, and whether or not a franchise, as contemplated by that provision, is properly an issue. People v. Painless Parker Dentist, 85 Colo. 304, 275 P. 928, cert. denied, 280 U.S. 566, 50 S. Ct. 25, 74 L. Ed. 620 (1929).

Refusal of district attorney to bring action is sufficient to authorize action by private parties. It was alleged and proven that the district attorney upon request made by relators and their attorneys and upon complaint being submitted to him, refused to prosecute the proceedings, and under the circumstances in this case such refusal was sufficient to authorize the court to permit the prosecution upon the relation of such private parties without the aid or sanction of the district attorney. Canon City Labor Club v. People ex rel. Jamieson, 21 Colo. App. 37, 121 P. 120 (1912).

Where there is no allegation in the complaint that the district attorney has declined to institute an action under this rule, nothing in the complaint discloses that the claimant has any special interest separate and apart from that held by the general public, and the complaint fails to allege the violation of any of claimant's rights which the law recognizes and for which a remedy is provided, such an action may not be maintained by a private citizen. McCamant v.

City & County of Denver, 31 Colo. App. 287, 501 P.2d 142 (1972).

In order to support an action by the people for redress of a wrong, that wrong must appear to have been done to the people. People ex rel. Union Pac. Ry. v. Colo. E. Ry., 8 Colo. App. 301, 46 P. 219 (1896).

The provisions which give permission to a private party to bring the action and also to have the right of one other than the incumbent adjudicated, do not turn the proceeding from one to protect the public interests into one to safeguard the purely private rights of the relator. State R. R. Comm'n v. People ex rel. Denver & R. G. R. R., 44 Colo. 345, 98 P. 7 (1908).

Person is not disqualified because of having been opposing candidate for office in question. One possessing the qualifications of "freeholder, resident and elector" is not disqualified from acting as plaintiff in the proceedings by reason of having been the opposing candidate for the office in question. People ex rel. Barton v. Londoner, 13 Colo. 303, 22 P. 764 (1889).

A certain degree of interest on the part of plaintiffs in the proceedings is generally deemed requisite; and the officious intermeddling by parties having absolutely no interest, either as taxpayers or voters, is disfavored. People ex rel. Barton v. Londoner, 13 Colo. 303, 22 P. 764 (1889); Canon City Labor Club v. People ex rel. Jamieson, 21 Colo. App. 37, 121 P. 120 (1912).

A plaintiff must have some interest in the matter before he would be entitled to institute such proceedings. People ex rel. Byers v. Grand River Bridge Co., 13 Colo. 11, 21 P. 898 (1899); People ex rel. Weisbrod v. Lockhard, 26 Colo. App. 439, 143 P. 273 (1914), aff'd, 65 Colo. 558, 178 P. 565 (1919).

Any person making a sufficient showing of a special interest in the business of the corporation and its property is a proper party. State ex rel. Gentles v. Barnholt, 145 Colo. 259, 358 P.2d 466 (1961).

Resident electors and taxpayers of a city are competent plaintiffs in such case. Canon City Labor Club v. People ex rel. Jamieson, 21 Colo. App. 37, 121 P. 120 (1912).

A taxpayer may act as relator in quo warranto proceedings against one claiming to exercise a public office. People ex rel. Cory v. Colo. High Sch. Activities Ass'n, 141 Colo. 382, 349 P.2d 381 (1960).

A private citizen and taxpayer is undoubtedly interested in the duties required of public officials authorized to levy taxes or to expend the proceeds of taxation, and has a standing to maintain quo warranto proceedings in a matter of public interest in which he has a special interest by reason of being a contributor to the public funds. People ex rel. Cory v. Colo. High Sch. Activities Ass'n, 141 Colo. 382, 349 P.2d 381 (1960).

Stockholders, officers, and corporations are suitable plaintiffs. In the absence of express provisions, proceedings to determine the title to office and to oust persons who are illegally in possession may be instituted by the corporation, by officers who have the legal title to the office, or by stockholders. State ex rel. Gentles v. Barnholt, 145 Colo. 259, 358 P.2d 466 (1961).

Where the proceedings involve the entire control of the corporation, the grievance alleged is not just that accruing to an individual, but one common to the entire corporate body, and suit may be brought by one or more stockholders affected. State ex rel. Gentles v. Barnholt, 145 Colo. 259, 358 P.2d 466 (1961).

Claim for damages is not sufficient interest to authorize suit to dissolve corporation. The fact that the plaintiff owns land which the defendant corporation has appropriated without compensation does not give him such an interest as enables him to maintain the action to dissolve the corporation. His interest is not one in which the public is concerned, being merely a right to sue for damages. People ex rel. Byers v. Grand River Bridge Co., 13 Colo. 11, 21 P. 898 (1889).

Private persons may maintain proceedings to dissolve corporation organized for illegal purpose. If private persons may institute and maintain proceedings to oust the mayor of a great city, to prohibit the regents of the state university from exercising certain powers claimed by them, there is no good reason why such private persons may not, by like permission of the court, institute and maintain proceedings to dissolve a corporation alleged to have been organized mala fide for the sole purpose of carrying on some business in defiance of the laws of the state and the ordinances of the city, and to the detriment of the public welfare. Canon City Labor Club v. People ex rel. Jamieson, 21 Colo. App. 37, 121 P. 120 (1912).

Action to try the validity of contested corporate elections. Where the validity of a corporate election is in dispute, and it involves nothing but the title to the board of directors, in the absence of a statute created specially for the specific purpose of trying the validity of contested corporate elections, a proceeding under subsection (a)(3) is an appropriate remedy, and private individuals elected, but wrongfully prevented from acting upon the board by the intruders, may apply to the district attorney, and, if he fails to act, may bring an action themselves in the name of the people to oust the usurpers from exercising the franchises and to install the relators. Grant v. Elder, 64 Colo. 104, 170 P. 198 (1918).

A private person is not entitled to maintain an action to oust a corporation of its fran-

chise. Under license from the city the defendant corporation had, at great expense, constructed a line of telephone occupying with its structures the public streets. Since the city had accepted and was still accepting valuable services from defendant and had taken no step to revoke the license, a private citizen was not entitled to maintain an action to oust defendant of the franchise, especially as the municipality had the power of revocation, and the like power was vested in the inhabitants through the initiative. Mountain States Tel. & Tel. Co. v. People ex rel. Wilson, 68 Colo. 487, 190 P. 513 (1920).

V. CERTIORARI OR PROHIBITION.

A. In General.

Law reviews. For article, "One Year Review of Civil Procedure", see 34 Dicta 69 (1957). For article, "One Year Review of Civil Procedure and Appeals", see 36 Dicta 5 (1959). For note, "Writ of Prohibition as Applied in Colorado", see 33 Rocky Mt. L. Rev. 553 (1961). For note, "One Year Review of Colorado Law — 1964", see 42 Den. L. Ctr. J. 140 (1965). For article, "Land Use Decisionmaking: Legislative or Quasi-judicial Action", see 18 Colo. Law. 241 (1989).

Annotator's note. Since subsection (a)(4) of this rule is similar to §§ 331 through 341 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing those sections have been included in the annotations to this rule.

This rule provides for writs in the nature of certiorari or prohibition. Eveready Freight Serv., Inc. v. Pub. Utils. Comm'n, 131 Colo. 172, 280 P.2d 442 (1955); Colo. State Bd. of Med. Exam'rs v. District Court, 138 Colo. 227, 331 P.2d 502 (1958).

The adoption of this rule altered procedural aspects only of the remedy previously known as certiorari. Colo. State Bd. of Exam'rs of Architects v. Marshall, 136 Colo. 200, 315 P.2d 198 (1957).

The substantive aspects remain the same. Colo. State Bd. of Exam'rs of Architects v. Marshall, 136 Colo. 200, 315 P.2d 198 (1957).

Proceedings authorized by subsection (a)(4) of this rule are extraordinary in nature, and may not be employed as a substitute for prescribed appellate procedures. Kirbens v. Martinez, 742 P.2d 330 (Colo. 1987).

Subsection (a)(4) does not confer any legally protected interest for purposes of establishing standing. Rather, the rule establishes procedures for seeking review when standing otherwise independently exists. Reeves v. City of Fort Collins, 170 P.3d 850 (Colo. App. 2008).

An order of the district court refusing to issue a citation to show cause directed to the county court is proper under subsubsection (a)(4) and does not imply any determination by the court of the merits of the case. Since there is nothing in the record to establish any final judgment in favor of either party, appellate review is unavailable. Milburn v. El Paso County Ct., 859 P.2d 909 (Colo. App. 1993).

Purpose of action is to review the action of an inferior tribunal, board, or officer who, in exercising judicial functions, has exceeded the jurisdictional or grossly abused the discretion which the law reposes in such tribunal or officer, and no review is allowed, nor, in the judgment of the court, any plain, speedy, and adequate remedy. Union Pac. Ry. v. Bowler, 4 Colo. App. 25, 34 P. 940 (1893); Union P. R. R. v. Wolfe, 26 Colo. App. 567, 144 P. 330 (1914); Nisbet v. Frincke, 66 Colo. 1, 179 P. 867 (1919).

The function of a proceeding under this rule is to review the action of an inferior tribunal which has allegedly exceeded its jurisdiction or abused its discretion. Kornfeld v. Perl Mack Liquors, Inc., 193 Colo. 442, 567 P.2d 383 (1977).

The purpose of an action brought under subsection (a)(4) is to determine if an inferior tribunal, exercising judicial or quasi-judicial functions, has exceeded its jurisdiction or abused its discretion. Garland v. Bd. of County Comm'rs, 660 P.2d 20 (Colo. App. 1982).

Standard for challenging inferior tribunal. A superior court should exercise great caution and circumspection before issuing a rule to show cause to an inferior tribunal, and then only when such court is satisfied that the ordinary remedies provided by law are not applicable or are inadequate. Only in exceptional cases or classes of cases should applications of this character be allowed. Kirbens v. Martinez, 742 P.2d 330 (Colo. 1987).

The purpose of prohibition is to prevent usurpation or unwarranted assumption of jurisdiction on the part of an inferior tribunal. Colo. State Bd. of Med. Exam'rs v. District Court, 138 Colo. 227, 331 P.2d 502 (1958).

A writ of prohibition is a proper method of challenging the jurisdiction of a trial court. County Court v. Ruth, 194 Colo. 352, 575 P.2d 1 (1977); Empiregas, Inc. of Pueblo v. Pueblo County Court, 713 P.2d 937 (Colo. App. 1985).

Relief under subsection (a)(4) is appropriate to contest a lower court's order of criminal contempt. Jordan v. County Court, 722 P.2d 450 (Colo. App. 1986).

Prohibition defined. Prohibition is commonly defined as a writ to prevent the exercise by a tribunal possessing judicial powers of jurisdiction over matters not within its cognizance, or exceeding its jurisdiction in matters of which it has cognizance. Bustamante v. District Court, 138 Colo. 97, 329 P.2d 1013 (1958).

Relief in the nature of prohibition is discretionary. There is a wide discretion vested in a district court to which a petition is addressed seeking relief in the nature of prohibition. Justice Court v. Coleman, 137 Colo. 12, 320 P.2d 336 (1958).

Grant of prohibition should not be reversed except for abuse of discretion. In a proceeding in a district court seeking relief in the nature of prohibition against enforcement of a judgment of a justice of the peace, where the complaint alleges facts sufficient to authorize the court, in the exercise of a sound discretion, to grant the relief sought, the judgment of the district court will not be disturbed in the absence of a showing of an abuse of such discretion. Justice Court v. Coleman, 137 Colo. 12, 320 P.2d 336 (1958).

A writ of certiorari will not issue as a matter of right, but only upon good cause shown, as for an abuse of discretion. People ex rel. Kimball v. Crystal River Corp., 131 Colo. 163, 280 P.2d 429 (1955).

Although an order to show cause is usually granted on an ex parte application for a writ of certiorari to the trial court or judge, it is not allowed as a matter of right or as a matter of course, but is a matter within the discretion of that court. The very right to issue a rule to show cause legally presupposes a judicial discretionary authority. Berry v. State Bd. of Parole, 148 Colo. 547, 367 P.2d 338 (1961), cert. denied, 370 U.S. 927, 82 S. Ct. 1569, 8 L. Ed. 2d 507 (1962).

Certiorari is the continuing of a prior action, a form of appellate review. North Glenn Sub. Co. v. District Court, 187 Colo. 409, 532 P.2d 332 (1975).

Relief available for exceeding jurisdiction or abuse of discretion. This rule limits the issuance of certiorari and prohibition to cases where an inferior tribunal exercising judicial or quasi-judicial functions has exceeded its jurisdiction or abused its discretion, and where there is no plain, speedy, and adequate remedy. Eveready Freight Serv., Inc. v. Pub. Utils. Comm'n, 131 Colo. 172, 280 P.2d 442 (1955); Colo. State Bd. of Med. Exam'rs v. District Court, 138 Colo. 227, 331 P.2d 502 (1958); Turner v. City & County of Denver, 146 Colo. 336, 361 P.2d 631 (1961); People ex rel. Orcutt v. District Court, 167 Colo. 162, 445 P.2d 887 (1968); State Farm v. City of Lakewood, 788 P.2d 808 (Colo. 1990).

The license authority rulings are subject to certiorari review by the courts, and, if its action in refusing a license is found to be arbitrary or capricious, a court has the authority, and the duty, to order the license to issue. Bd. of County Comm'rs v. Salardino, 136 Colo. 421, 318 P.2d 596 (1957); Morris-Schindler, LLC v. City & County of Denver, 251 P.3d 1076 (Colo. App. 2010).

Prohibition lies to prevent an inferior tribunal, whether it has judicial or quasi-judicial powers, from usurping a jurisdiction with which it is not legally vested. Leonhart v. District Court, 138 Colo. 1, 329 P.2d 781 (1958).

Prohibition may issue to prevent a court from proceeding against the express prohibition of a statute or where an adequate and exclusive remedy to obtain certain relief is provided by statute and the inferior court proceeds by another remedy. Bustamante v. District Court, 138 Colo. 97, 329 P.2d 1013 (1958).

A writ of prohibition is proper, not only in cases where the lower tribunal has no legal authority to act at all, but also in cases wherein such inferior tribunal, although having general jurisdiction over a particular class of cases, has exceeded such jurisdiction in the particular case. Bustamante v. District Court, 138 Colo. 97, 329 P.2d 1013 (1958).

Whenever the question is whether a public board or commission has exceeded its jurisdiction or abused its discretion, certiorari is the proper remedy to secure a review of its action. Holly Dev., Inc. v. Bd. of County Comm'rs, 140 Colo. 95, 342 P.2d 1032 (1959).

The various licensing authorities have discretionary power in granting or denying licenses and their actions will not be disturbed on review unless arbitrary or capricious. Quedens v. J. S. Dillon Co., 146 Colo. 161, 360 P.2d 984 (1961).

When a trial court exceeds its jurisdiction in a statutory proceeding, a writ of prohibition is the appropriate remedy. Evans v. District Court, 182 Colo. 93, 511 P.2d 471 (1973).

Misinterpretation or misapplication of governing law by an agency is an alternative ground for finding an abuse of discretion under subsection (a)(4). District properly determined that correctional hearing officer abused discretion by failing to document that inmate had knowingly and voluntarily waived right to remain silent during administrative hearing as required by agency regulation. Gallegos v. Garcia, 155 P.3d 405 (Colo. App. 2006).

Proper remedy under this rule for abuse of discretion by prison hearing officer is to remand the case for a new hearing, rather than to expunge the inmate's disciplinary conviction. Gallegos v. Garcia, 155 P.3d 405 (Colo. App. 2006).

No abuse of discretion. There is no evidence that the department of corrections officer violated any of the department's regulations related to the inmate grievance, and the inmate failed to show how he was prejudiced by any of the actions by the department of corrections officer. Alward v. Golder, 148 P.3d 424 (Colo. App. 2006).

No authority to consider constitutional issues. Procedures afforded by this rule are available to review the decision of a local licensing

authority in suspending a license, but does not provide authority for consideration of constitutional issues. Two G's, Inc. v. Kalbin, 666 P.2d 129 (Colo. 1983).

Constitutional challenges are not within scope of review under subsection (a)(4). Price Haskel v. Denver Dept. of Excise & Licenses, 694 P.2d 364 (Colo. App. 1984).

Stay of proceedings only against inferior tribunals. The provisions of subsection (a)(4) do not provide for a stay order against any party which is not "an inferior tribunal". PII of Colo., Inc. v. District Court, 197 Colo. 239, 591 P.2d 1316 (1979).

Relief granted only against tribunal. Since a proceeding under this rule is properly brought against the inferior tribunal and the rule to show cause issues only against the tribunal, the relief may be granted, if at all, against the tribunal only. Kornfeld v. Perl Mack Liquors, Inc., 193 Colo. 442, 567 P.2d 383 (1977).

Discretionary powers of district court. The issuance of a citation to show cause under this rule lies within the district court's broad discretionary powers. The district court may dismiss a complaint filed pursuant to this rule if the complaint is defective on its face or if no relief can be granted. Info. Please, Inc. v. District Court, 194 Colo. 42, 568 P.2d 1162 (1977).

Where district court failed to issue the required citation to show cause to the county court, the court of appeals exceeded its jurisdiction by reaching the issue and ordering that a writ of prohibition issue. County Court v. Ruth, 194 Colo. 352, 575 P.2d 1 (1977).

For purpose of standing for district court review, no relief can be afforded if person suffers injury in fact, but not from violation of a legally protected right. Brown v. Bd. of County Comm'rs, 720 P.2d 579 (Colo. App. 1985).

If there is illegal search and seizure, a defendant has plain, speedy, and adequate remedy by motion to suppress and for return of property, and prohibition will not lie in district court to bar further related proceedings in county court. Seccombe v. District Court, 180 Colo. 420, 506 P.2d 153 (1973).

This rule provides a plain, speedy, and adequate remedy of review of a decision of the conservation board as to the sufficiency of a petition, by virtue of which rule the district court is authorized to determine whether or not the board had jurisdiction or abused its discretion. Friesen v. People ex rel. Fletcher, 118 Colo. 1, 192 P.2d 430 (1948).

Where it is contended that the county court was without or exceeded its jurisdiction, or abused its discretion, subsection (a)(4) provides a plain, speedy, and adequate remedy. People ex rel. Wilson v. Blake, 128 Colo. 111, 260 P.2d 592 (1953).

Although the Denver city charter does not spell out a procedure for judicial review of the orders of the civil service commission of Denver, a remedy nevertheless exists through the extraordinary writs, provision for which is found in § 9 of art. VI, Colo. Const. Turner v. City & County of Denver, 146 Colo. 336, 361 P.2d 631 (1961).

This rule's relief is not an exclusive remedy, declaratory judgment being available to obtain review of matters not reviewable by certiorari. Corper v. City & County of Denver, 36 Colo. App. 118, 536 P.2d 874 (1975), aff'd, 191 Colo. 252, 552 P.2d 13 (1976).

The validity of zoning ordinances has been challenged by certiorari review under subsection (a)(4), and declaratory relief under C.R.C.P. 57, and on occasion, these forms of relief have been pursued simultaneously. Snyder v. City of Lakewood, 189 Colo. 421, 542 P.2d 371 (1975).

Declaratory judgment may be proper remedy. As a general rule, judicial review by way of subsection (a)(4) is the exclusive remedy for one challenging a rezoning determination on a parcel of property. Where persons have not had prior notice of a rezoning hearing and have not participated in it, certiorari review is not always an effective remedy and a hearing de novo under a declaratory judgment is a proper and effective remedy. Norby v. City of Boulder, 195 Colo. 231, 577 P.2d 277 (1978).

The district court may consider a declaratory judgment claim that challenges the constitutionality of a city's zoning ordinance even though judicial review claim is barred for failure to file a timely claim in accordance with section (b). Danielson v. Zoning Bd. of Adjustment, 807 P.2d 541 (Colo. 1991).

But the district court may not exercise jurisdiction where claimant failed to challenge in the district court proceedings the facial constitutionality of a city's zoning ordinance and the district court may not raise the constitutional issue on its own motion. Danielson v. Zoning Bd. of Adjustment, 807 P.2d 541 (Colo. 1991).

Where no hearing was held by the board before it made its decision, subsection (a)(4) of this rule is clearly not plaintiffs' exclusive remedy. Ebke v. Julesburg Sch. Dist. No. RE-1, 37 Colo. App. 349, 550 P.2d 355 (1976), aff'd on other grounds, 193 Colo. 40, 562 P.2d 419 (1977).

Requirements of C.R.C.P. 65 not applicable. While C.R.C.P. 65 provides that no restraining order or preliminary injunction shall issue except upon giving security by the applicant, that no order or injunction shall issue without notice, except under certain situations, and that an early hearing shall be provided, no such conditions appear in subsection (a)(4) of this rule. PII of Colo., Inc. v. District Court, 197 Colo. 239, 591 P.2d 1316 (1979).

This rule does not require the submission of an affidavit or verification of the com-

plaint in order to perfect an action for review. U-Tote-M of Colo., Inc. v. City of Greenwood Vill., 39 Colo. App. 28, 563 P.2d 373 (1977).

A complaint neither verified nor accompanied by an affidavit suffices to initiate a proceeding for review, and a citation to show cause need not thereafter issue as such orders presuppose a judicial discretional authority. U-Tote-M of Colo., Inc. v. City of Greenwood Vill., 39 Colo. App. 28, 563 P.2d 373 (1977).

The request for an order to certify the record was not necessary to the perfection of plaintiff's action. U-Tote-M of Colo., Inc. v. City of Greenwood Vill., 39 Colo. App. 28, 563 P.2d 373 (1977).

Orders to certify the record are not issued under subsection (a)(4) of this rule merely as a matter of course. U-Tote-M of Colo., Inc. v. City of Greenwood Vill., 39 Colo. App. 28, 563 P.2d 373 (1977).

Neither subsection (a)(4) of this rule nor any other pertinent rule of procedure requires a plaintiff to request certification of the record. U-Tote-M of Colo., Inc. v. City of Greenwood Vill., 39 Colo. App. 28, 563 P.2d 373 (1977).

Plaintiff's failure to request an order certifying the record within 30 days of the city council's decision denying his beverage license application did not require dismissal of the complaint, since plaintiff was only required to "apply for review" within the prescribed 30-day period. U-Tote-M of Colo., Inc. v. City of Greenwood Vill., 39 Colo. App. 28, 563 P.2d 373 (1977).

Distinction between judicial and administrative acts. The test for distinguishing judicial and quasi-judicial acts from administrative acts is to determine whether the function under consideration involves the exercise of discretion and requires notice and hearing. If these elements are present the "finding" is generally a quasi-judicial act; if any of them are absent, it is generally an administrative act. Hoffman v. City of Fort Collins, 30 Colo. App. 123, 489 P.2d 355 (1971); Van Pelt v. State Bd. for Cmty. Colls. & Occupational Educ., 195 Colo. 316, 577 P.2d 765 (1978).

Act of dismissing probationary firefighters is administrative where the only limitation on dismissal is approval by the civil service commission, the civil service commission's approval is not based on preexisting legal standards or policy considerations, and there is no right to appeal dismissal. Chellsen v. Pena, 857 P.2d 472 (Colo. App. 1992).

Quasi-judicial action decides rights and liabilities based upon past or present facts. City & County of Denver v. Eggert, 647 P.2d 216 (Colo. 1982).

The action of an agency will be deemed quasi-judicial for subsection (a)(4) purposes if: (1) A state or local law requires that the body give adequate notice to the community before acting; (2) a state or local law requires that the body conduct a public hearing pursuant to notice at which time concerned citizens must be given an opportunity to be heard and present evidence; and (3) a state or local law requires the body to make a determination by applying the facts of a specific case to certain criteria established by law. City & County of Denver v. Eggert, 647 P.2d 216 (Colo. 1982).

Quasi-judicial action generally involves a determination of rights, duties, or obligations of specific individuals by applying legal standards or policy considerations to facts developed at a hearing conducted for purpose of resolving interests in question. State Farm v. City of Lakewood, 788 P.2d 808 (Colo. 1990); Carpenter v. Civil Serv. Comm'n, 813 P.2d 773 (Colo. App. 1990).

Quasi-legislative action reflects public policy relating to matters of permanent or general character, is not normally restricted to identifiable persons or groups, and is usually prospective in nature. In addition, such action requires the balancing of questions of judgment and discretion, is of general application, and concerns an area usually governed by legislation. State Farm v. City of Lakewood, 788 P.2d 808 (Colo. 1990).

Absence of notice and public hearing requirement is not determinative of the nature of the action. The nature of the decision and the process by which it is reached is the predominant consideration in determining whether an action is quasi-judicial. Carpenter v. Civil Serv. Comm'n, 813 P.2d 773 (Colo. App. 1990).

Although the board of county commissioners of Boulder county provided notice and public hearings, the board's actions in adopting a rezoning resolution were quasi-legislative in nature based on the prospective nature and broad impact of the resolution. Therefore, landowner is not entitled to relief under subsection (a)(4). Jafay v. Bd. of County Comm'rs of Boulder County, 848 P.2d 892 (Colo. 1993).

Where city council was acting in a legislative capacity when it approved an ordinance requiring relocation underground of overhead electricity and communications facilities by owners and operators at their own cost, telecommunications provider was not entitled to certiorari review under subsection (a)(4). US West Commc'ns v. City of Longmont, 924 P.2d 1071 (Colo. App. 1995), aff'd on other grounds, 948 P.2d 509 (Colo. 1997).

The fixing of the time and manner of payment of restitution for all prisoners by the director of the department of corrections pursuant to statute is not a judicial or quasi-judicial action on the part of the department or the correctional facility, therefore, the district court lacked jurisdiction to hear prisoner's complaint and did not err in dismissing the complaint on that basis.

Jones v. Colo. Dept. of Corr., 53 P.3d 1187 (Colo. App. 2002).

Test applied in Stuart v. Bd. of County Comm'rs, 699 P.2d 978 (Colo. App. 1985).

Commission's denial of applicant's appeal of disqualification from employment was quasi-judicial action even though regulations did not require a formal hearing on the appeal. Carpenter v. Civil Serv. Comm'n, 813 P.2d 773 (Colo. App. 1990).

Act must be judicial to be reviewable. Where the state board of land commissioners wrongfully canceled a lease of state school lands on the ground that the rent was delinquent, when in fact it was not, and executed a lease thereof to another party, the act was not judicial in its nature and is not subject to review under subsection (a)(4). State Bd. of Land Comm'rs v. Carpenter, 16 Colo. App. 436, 66 P. 165 (1901).

When the civil service commission of Denver is acting in a quasi-judicial capacity, certiorari is the proper remedy for review of its decision. Turner v. City & County of Denver, 146 Colo. 336, 361 P.2d 631 (1961).

Incorporation proceedings are judicial in nature and the district court could entertain an action enforcing priority of jurisdiction with respect to dual actions involving the same subject matter and substantially the same parties. Wiltgen v. Berg, 164 Colo. 139, 435 P.2d 378 (1967).

Under this rule, certiorari is available only upon exercise of a "judicial or quasi-judicial" function. Hoffman v. City of Fort Collins, 30 Colo. App. 123, 489 P.2d 355 (1971).

Where the charter of a city establishes a civil service commission and provides for hearing and review of dismissals by the manager of safety, these charter provisions clearly place the commission in a quasi-judicial position and bring its decisions within the purview of this rule. Hoffman v. City of Fort Collins, 30 Colo. App. 123, 489 P.2d 355 (1971).

Although the supreme court has repeatedly stated that zoning and rezoning are legislative matters, an ordinance prescribing standards and procedures for obtaining a rezoning establishes a quasi-judicial, rather than a legislative, procedure by: (1) Providing for notice and hearing; and (2) setting forth the criteria to be taken into account by the planning commission in arriving at its decision, and therefore, an alleged abuse of discretion by the commission is reviewable under this rule. Kizer v. Beck, 30 Colo. App. 569, 496 P.2d 1062 (1972).

It cannot be legislative or executive. The court does not review an order, action, or proceeding, unless it be judicial in its nature, and not legislative or merely ministerial. State Bd. of Land Comm'rs v. Carpenter, 16 Colo. App. 436, 66 P. 165 (1901); Colo.-Ute Elec. Ass'n v. Air Pollution Control Comm'n, 41 Colo. App. 393, 591 P.2d 1323 (1978), rev'd on other grounds sub nom. CF&I Steel Corp. v. Colo. Air Pollution Control Comm'n, 199 Colo. 463, 610 P.2d 85 (1980).

Subsections (a)(2) and (a)(4) of this rule are inapplicable to challenges of legislative actions. Cherokee Water & Sanitation v. El Paso, 770 P.2d 1339 (Colo. App. 1988).

The fact-finding function of the board of county commissioners' proceeding under the county housing authority act was the exercise of a legislative directive and not a quasi-judicial proceeding reviewable under this rule. The board finds the facts but passes no judgment thereon; it is given no judicial power. Smith v. Waymire, 29 Colo. App. 544, 487 P.2d 599 (1971).

If the act of removal is executive, not judicial or quasi-judicial, it is not reviewable by certiorari. Hoffman v. City of Fort Collins, 30 Colo. App. 123, 489 P.2d 355 (1971).

Where the subject of a declaratory judgment action is the review of an executive or administrative decision, subsection (a)(4) is neither the appropriate nor the exclusive remedy by which a declaration of rights could be obtained. Bonacci v. City of Aurora, 642 P.2d 4 (Colo. 1982).

If the law makes no provisions for hearing, but gives power to remove and only requires that reasons therefor be stated in writing and filed, and if the officer desires, he may be given an opportunity to explain, the removal act is "executive" so far as the right to review by certiorari is concerned. Hoffman v. City of Fort Collins, 30 Colo. App. 123, 489 P.2d 355 (1971).

From the explicit wording of this rule, certiorari will not apply for review of the propriety of legislative action. Kizer v. Beck, 30 Colo. App. 569, 496 P.2d 1062 (1972).

A challenge to legislation and the governmental legislative conduct is not available in proceedings to review quasi-judicial governmental acts pursuant to subsection (a)(4). Liquor & Beer Licensing Ad. Bd. v. Cinco, 771 P.2d 482 (Colo. 1989).

City's decision to exterminate prairie dogs in a city park was administrative, not quasi-judicial, and was not subject to judicial review under subsection (a)(4). Prairie Dog Advocates v. City of Lakewood, 20 P.3d 1203 (Colo. App. 2000).

The career service board's decision to demote an employee because she did not have the level of education required by the city's personnel policy was administrative rather than quasi-judicial in nature. The employee, therefore, was not entitled to judicial review of the board's action under subsection (a)(4). Bourgeron v. City & County of Denver, 159 P.3d 701 (Colo. App. 2006).

Quasi-legislative action is prospective in nature, is of general application, and requires the balancing of questions of judgment and discretion. City & County of Denver v. Eggert, 647 P.2d 216 (Colo. 1982).

A master plan that established land use policies, was prospective in nature and general in character, and had not been applied against plaintiff's property is legislative in nature. Condiotti v. Bd. of County Comm'rs, 983 P.2d 184 (Colo. App. 1999).

Judicial review of quasi-legislative action is more limited than that of quasi-judicial action; thus, a court may not substitute its opinion for that of a school board. Bruce v. Sch. Dist. No. 60, 687 P.2d 509 (Colo. App. 1984).

It may be maintained if remedy is not plain and adequate. People ex rel. L'Abbe v. District Court, 26 Colo. 386, 58 P. 604 (1899); Union P. R. R. v. Wolfe, 26 Colo. App. 567, 144 P. 330 (1914); State Civil Serv. Comm'n v. Cummings, 83 Colo. 379, 265 P. 687 (1928).

Whenever there is no direct remedy provided for review, the writ of certiorari lies, even though some other remedy can be conceived as possible in the future. Holly Dev., Inc. v. Bd. of County Comm'rs, 140 Colo. 95, 342 P.2d 1032 (1959).

Whether the amendment could operate retrospectively was at least doubtful even to a prudent lawyer making a realistic evaluation of possible remedies. Considering the presence of this dilemma it cannot be said that a plain, speedy, and adequate legal remedy existed. Toland v. Strohl, 147 Colo. 577, 364 P.2d 588 (1961).

If the remedy is inadequate, it is no remedy, and gives to a court of record in a proceeding under this rule the same right, and imposes upon it the same duty, to grant relief as if no right of review existed. Union P. R. R. v. Wolfe, 26 Colo. App. 567, 144 P. 330 (1914).

Expense of trial may not be used as grounds for prohibition. Seccombe v. District Court, 180 Colo. 421, 506 P.2d 153 (1973).

The fact that proceedings may be expensive and may result in ultimate reversal of the trial court for error, affords insufficient basis for resort to proceedings in the nature of prohibition. Leonhart v. District Court, 138 Colo. 1, 329 P.2d 781 (1958).

Delay and expense do not ordinarily render appeal inadequate. The delay and expense of an appeal or other available remedy ordinarily furnish no sufficient reasons for holding that the remedy by appeal is not adequate or speedy, although there are many instances in which the expense and delay of an appeal have, in part at least, impelled the superior court to grant prohibition. Prinster v. District Court, 137 Colo. 393, 325 P.2d 938 (1958).

The court may quash or refuse to quash the proceeding complained of. No rights growing out of such proceeding can be enforced. State Civil Serv. Comm'n v. Cummings, 83 Colo. 379, 265 P. 687 (1928).

It has no power to correct a mistake of fact or erroneous conclusion from the facts, made by the inferior tribunal. State Bd. of Med. Exam'rs v. Spears, 79 Colo. 588, 247 P. 563 (1926).

Court will not restrain mere error. A writ of prohibition never issues to restrain a lower tribunal from committing mere error in deciding a question properly before it. Prinster v. District Court, 137 Colo. 393, 325 P.2d 938 (1958).

Although "good cause" was not specifically alleged as the basis for amending the complaint, the district court did not abuse its discretion when it granted motion to avoid piece-meal litigation. Neighbors For A Better Approach v. Nepa, 770 P.2d 1390 (Colo. App. 1989).

Restraint from final adjudication within court's jurisdiction not appropriate. Prohibition may never be used to restrain a trial court having jurisdiction of the parties and of the subject matter from proceeding to a final conclusion. Prinster v. District Court, 137 Colo. 393, 325 P.2d 938 (1958).

Prohibition of statutory functions of executive department. A district court does not have jurisdiction to prohibit a branch of the executive department from carrying out its statutory functions. Colo. State Bd. of Med. Exam'rs v. District Court, 138 Colo. 227, 331 P.2d 502 (1958); Chonoski v. State Dept. of Rev., 699 P.2d 416 (Colo. App. 1985).

A claim that the statute under which an executive department is proceeding is unconstitutional will not clothe the judiciary with power to interfere with or control such department in advance of its taking final action. Colo. State Bd. of Med. Exam'rs v. District Court, 138 Colo. 227, 331 P.2d 502 (1958); People ex rel. Orcutt v. District Court, 167 Colo. 162, 445 P.2d 887 (1968); Colo. Dept. of Rev. v. District Court, 172 Colo. 144, 470 P.2d 864 (1970).

Power to stay orders is modifiable by statute. While the courts have power to issue stay orders in certiorari proceedings, statutes may modify or abrogate that power. In the annexation statutes it is clear that the general assembly intended to preclude the issuance of a stay order pending appeal of the annexation proceedings. In this respect they were not legislating on procedure but declaring by substantive law a legal status. City of Westminster v. District Court, 167 Colo. 263, 447 P.2d 537 (1968).

Where the general assembly, in the interest of public safety, has provided a reasonable limitation upon the right to secure postponement of the effective date of suspension of a driver's license by the director of revenue, requiring a showing of irreparable injury, the courts have no power to nullify by procedural rule the limitations so imposed, the function of the courts

being limited to a review of the acts of the director. Theobald v. District Court, 148 Colo. 466, 366 P.2d 563 (1961).

Review of denial of license does not stay new application. Where a party applied for a liquor license which was denied, a proceeding to review such denial under this rule does not operate to stay the hand of the licensing officer in receiving and acting upon the application of another party for a license to operate at the same location. Cronin v. Ward, 144 Colo. 192, 355 P.2d 655 (1960).

When (1) a statute, rule, or regulation requires that an individual or entity obtain a license to perform a certain activity, (2) the requirement of the license is valid, and (3) there are judicial remedies to challenge an alleged wrongful refusal of that license, the person or entity may not disregard the licensing requirements, but instead must suspend engaging in the activity for which the license is required pending judicial resolution of the alleged wrongful denial. Here, plaintiffs knew that the city council had affirmed the city's denial of their renewal application and, aware that a preliminary injunction had not been granted, chose to continue to operate their business without the proper license. Because the ordinance was valid, plaintiffs cannot assert wrongful denial as a defense to operating their business without a valid license. Fortner v. Cousar, 992 P.2d 697 (Colo. App. 1999).

Determination by trial court that plaintiff's license had been wrongfully denied was not the equivalent of granting plaintiffs a license. Therefore, trial court properly determined that plaintiffs were not licensed for the period between the city council's denial of their license and trial court's reversal in their favor on procedural grounds. Fortner v. Cousar, 992 P.2d 697 (Colo. App. 1999).

Section provides for civil action. Subsection (a)(4) clearly contemplates the application of C.R.C.P. 2 providing for one form of civil action since it requires a complaint which must be filed and summons issued and served as in other actions. Colo. State Bd. of Exam'rs of Architects v. Marshall, 136 Colo. 200, 315 P.2d 198 (1957).

Other rules of civil procedure, when pertinent, apply to proceedings under this rule. Colo. State Bd. of Exam'rs of Architects v. Marshall, 136 Colo. 200, 315 P.2d 198 (1957).

The time limit for a subsection (a)(4) action is that specified by applicable statute or, if there is none, then not later than 30 days from the final decision complained of. Norby v. City of Boulder, 195 Colo. 231, 577 P.2d 277 (1978); Sullivan v. Bd. of County Comm'rs, 692 P.2d 1106 (Colo. 1984).

Pleading requirements of subsection (a)(4) must yield to conflicting statutory procedures codified in § 40-6-115 of the Public Utilities Law. Silver Eagle Servs. v. P.U.C., 768 P.2d 208 (Colo. 1989).

Compliance with time limitation of section (b) required. Any challenge to an agency action under subsection (a)(4) must be perfected within the 30-day limitation of section (b) of this rule. Civil Serv. Comm'n v. District Court, 186 Colo. 308, 527 P.2d 531 (1974); Bd. of County Comm'rs v. Carter, 193 Colo. 225, 564 P.2d 421 (1977); Smith v. County of El Paso, 42 Colo. App. 316, 593 P.2d 979 (1979); Thorne v. Bd. of County Comm'rs, 638 P.2d 69 (Colo. 1981).

The failure to bring a subsection (a)(4) proceeding within 30 days of the enactment of the city rezoning ordinance is a jurisdictional defect under section (b). Snyder v. City of Lakewood, 189 Colo. 421, 542 P.2d 371 (1975); Bd. of County Comm'rs v. Carter, 193 Colo. 225, 564 P.2d 421 (1977).

Failure to bring the requisite certiorari action within 30 days as provided by section (b) of this rule is a jurisdictional defect. Lorenz v. City of Littleton, 38 Colo. App. 16, 550 P.2d 884 (1976); Gold Star Sausage Co. v. Kempf, 653 P.2d 397 (Colo. 1982); Sullivan v. Bd. of County Comm'rs, 692 P.2d 1106 (Colo. 1984).

Where the time for perfecting the review of a rezoning decision, pursuant to subsection (a)(4) had expired at the time indispensable parties were added as parties defendant, the failure of the plaintiffs to perfect their petition for certiorari review within 30 days constituted a fatal defect which required that the complaint be dismissed, since the requirements of section (b) must be construed as a statute of limitation. Westlund v. Carter, 193 Colo. 129, 565 P.2d 920 (1977).

Failure to pursue timely remedies bars declaratory judgment action. Plaintiff's failure to pursue remedies provided in § 24-4-106, judicial review under the administrative procedure act, and subsection (a)(4) of this rule in a timely manner bars a declaratory judgment action. Greyhound Racing Ass'n v. Colo. Racing Comm'n, 41 Colo. App. 319, 589 P.2d 70 (1978).

Failure to file a claim for judicial review within 30 days is not jurisdictionally fatal when such claim is combined with a declaratory claim. Section (b) does not prevent the district court from considering a declaratory judgment claim that challenges the constitutionality of a city's zoning ordinance even though judicial review is barred for failure to file a timely claim. Danielson v. Zoning Bd. of Adjustment, 807 P.2d 541 (Colo. 1991).

But the district court may not exercise jurisdiction where claimant failed to challenge in the district court proceedings the facial constitutionality of a city's zoning ordinance. The district court may not raise the constitutional issue

on its own motion. Danielson v. Zoning Bd. of Adjustment, 807 P.2d 541 (Colo. 1991).

Plaintiff need not cause district court to issue citation in 30 days. Perfection of an appeal under this rule does not require that the plaintiff cause the district court to issue a citation within the same 30-day period. Info. Please, Inc. v. District Court, 194 Colo. 42, 568 P.2d 1162 (1977).

Necessity for calling attention to lack of jurisdiction. Order in the nature of a writ of prohibition will not be issued to an inferior court unless the attention of the court whose proceedings it is sought to arrest first has been called to the lack of jurisdiction alleged, unless extraordinary circumstances are present. Justice Court of Precinct No. 1 v. People ex rel. Harvey, 109 Colo. 287, 124 P.2d 934 (1942).

Prohibition will not issue where the attention of the inferior tribunal has not been called to its alleged lack of jurisdiction, since one summoned can appear specially in the court or quasi-judicial agency to move that process be quashed as to him. The court in such cases is vested with power to determine whether it has jurisdiction. City of Thornton v. Pub. Utils. Comm'n, 154 Colo. 431, 391 P.2d 374 (1964).

Prohibition will not issue where the attention of the inferior tribunal has not been called to its alleged lack of jurisdiction. Town of Vail v. District Court, 163 Colo. 305, 430 P.2d 477 (1967).

Joinder of all of petitioner's claims in one action required. When an action is timely filed under subsection (a)(4), public policy requires the joinder of all of the petitioner's claims in one action. Powers v. Bd. of County Comm'rs, 651 P.2d 463 (Colo. App. 1982).

This includes constitutional claims. Bd. of County Comm'rs v. Sundheim, 926 P.2d 545 (Colo. 1996).

Lack of jurisdiction for failure to join parties. This rule provides a 30-day limitation for filing an action for certiorari. Because an appeal must be perfected—as well as commenced—within the time period established, and part of the perfection of an appeal requires the joinder of indispensable parties, an amendment to a complaint seeking to add a party as indispensible to the action, filed after the time limitation for filing, was too late. City & County of Denver v. District Court, 189 Colo. 342, 540 P.2d 1088 (1975).

Standard for determining whether party must be joined. The correct standard for determining whether a party must be joined in a subsection (a)(4) action is that the appropriate municipal body to be joined is the inferior tribunal which made the decision being contested, and not some other municipal body. Gold Star Sausage Co. v. Kempf, 653 P.2d 397 (Colo. 1982).

Failure to join all indispensable parties in a C.R.C.P. 106 action within the time limit prescribed by the rule is a jurisdictional defect which requires dismissal of the action. Norby v. City of Boulder, 195 Colo. 231, 577 P.2d 277 (1978).

An action brought under subsection (a)(4) must be "perfected" as well as filed within the 30-day limit. Tri-State Generation & Transmission Co. v. City of Thornton, 647 P.2d 670 (Colo. 1982).

Indispensable parties must be correctly joined. Perfection of a challenge to an agency action includes the correct joinder of indispensable parties as required by C.R.C.P. 19. Bd. of County Comm'rs v. Carter, 193 Colo. 225, 564 P.2d 421 (1977).

Failure to join party in petition for review is not jurisdictionally fatal. Since a subsection (a)(4) petition may be amended to add parties, where the defendant does not protest or show prejudice, the failure to join a party as a named party defendant in the petition for review is not jurisdictionally fatal. Soon Yee Scott v. City of Englewood, 672 P.2d 225 (Colo. App. 1983).

The person whose rezoning application is challenged is an indispensable party to that proceeding. Bd. of County Comm'rs v. Carter, 193 Colo. 225, 564 P.2d 421 (1977).

Motion for new trial necessary before review. Proceedings under this rule are subject to C.R.C.P. 59 requiring a motion for new trial or an order dispensing therewith and such requirements apply whether the reviewing court acts as a trial court or as an appellate tribunal in reviewing the actions of a quasi-judicial tribunal. Colo. State Bd. of Exam'rs of Architects v. Marshall, 136 Colo. 200, 315 P.2d 198 (1957).

Under this rule it is necessary in actions in the nature of certiorari to move for a new trial. Walter v. Walter, 136 Colo. 405, 318 P.2d 221 (1957).

Lack of adequate appeal must be alleged. Carlton v. Carlton, 44 Colo. 27, 96 P. 995 (1908).

Taxpayers have standing to question scope of board powers. As taxpayers it is clear the relators have standing to question the legality of expenditures of public funds and to enjoin such expenditures if they are proved to be unconstitutional or without legal authority; they also have the right to question other acts of the school district that are alleged to be beyond the scope of its powers. People ex rel. Cory v. Colo. High Sch. Activities Ass'n, 141 Colo. 382, 349 P.2d 381 (1960).

This section makes no distinction between an aggrieved individual and a municipal corporation which seeks review in the interest of the public as a whole. Turner v. City & County of Denver, 146 Colo. 336, 361 P.2d 631 (1961).

Subsection (a)(4) provides a taxpayer a right of review in a state court from a proceeding in

an inferior tribunal. Local 1497, Nat'l Fed'n of Fed. Employees v. City & County of Denver, 301 F. Supp. 1108 (D. Colo. 1969), appeal dismissed, 396 U.S. 273, 90 S. Ct. 561, 24 L. Ed. 2d 464 (1970).

Trial court's dismissal of petition for prohibition or mandamus was affirmed where plaintiffs, who brought the action in their official capacities as members of the board of county commissioners to protest state-ordered reappraisals of properties in the county, have neither standing nor legal authority to maintain this action; taxpayers who are adversely affected may have judicial review. Bd. of County Comm'rs v. Love, 172 Colo. 121, 470 P.2d 861 (1970).

A competitor is not a person substantially aggrieved by the district court action, which would give him a right to seek review under subsection (a)(4) of this rule. Woda v. City of Colo. Springs, 40 Colo. App. 173, 570 P.2d 1318 (1977).

The certification of the record is an official act of the inferior tribunal and is not necessarily contingent upon certification of the transcript of the proceedings by a certified shorthand reporter. Civil Serv. Comm'n v. Doyle, 174 Colo. 149, 483 P.2d 380 (1971).

In certain circumstances, a court, even in a certiorari proceeding, should order a remand to an administrative agency on clear-cut issues involving documentary evidence. Johnston v. City Council, 177 Colo. 223, 493 P.2d 651 (1972).

Action of municipal legislative body quasi-judicial. In order to support a finding that the action of a municipal legislative body is quasi-judicial and thus subject to review by certiorari, all of the following factors must exist: (1) A state or local law requiring that the body give adequate notice to the community before acting; (2) a state or local law requiring that the body conduct a public hearing, pursuant to notice, at which time concerned citizens must be given an opportunity to be heard and present evidence; and (3) a state or local law requiring the body to make a determination by applying the facts of a specific case to certain criteria established by law. Snyder v. City of Lakewood, 189 Colo. 421, 542 P.2d 371 (1975).

Rezoning quasi-judicial. Enactment of a rezoning ordinance by the legislative body of a city, governed by both state zoning statutes as well as the municipal code, pursuant to statutory criteria, after notice and a public hearing, constitutes a quasi-judicial function subject to certiorari review. Snyder v. City of Lakewood, 189 Colo. 421, 542 P.2d 371 (1975).

Although early decisions viewed the enactment of rezoning ordinances as a legislative function, more recent decisions have held such activity to be a quasi-judicial function and reviewable under subsection (a)(4). Snyder v. City of Lakewood, 189 Colo. 421, 542 P.2d 371 (1975).

Rezoning procedures are reviewed under subsection (a)(4) of this rule as quasi-judicial activities. Corper v. City & County of Denver, 36 Colo. App. 118, 536 P.2d 874 (1975), aff'd, 189 Colo. 421, 552 P.2d 13 (1976).

The amendment of a general zoning ordinance is a quasi-judicial act reviewable under this rule. Corper v. City & County of Denver, 191 Colo. 252, 552 P.2d 13 (1976).

Exclusive when entire zoning ordinance not challenged. Subsection (a)(4) is now an exclusive remedy to challenge a rezoning determination where the entire general zoning ordinance is not challenged and where a review of the record would be an adequate remedy. Snyder v. City of Lakewood, 189 Colo. 421, 542 P.2d 371 (1975); Corper v. City & County of Denver, 191 Colo. 252, 552 P.2d 13 (1976); Higby v. Bd. of County Comm'rs, 689 P.2d 635 (Colo. App. 1984).

Certiorari relief is the exclusive remedy for allegedly invalid rezoning. Gold Run, Ltd. v. Bd. of County Comm'rs, 38 Colo. App. 44, 554 P.2d 317 (1976).

Section (a) of this rule is the exclusive process to challenge a rezoning determination as to specific property. Bd. of County Comm'rs v. Carter, 193 Colo. 225, 564 P.2d 421 (1977).

Subsection (a)(4) of this rule provides the exclusive remedy for challenging a rezoning determination of specific land. Westlund v. Carter, 193 Colo. 129, 565 P.2d 920 (1977).

This rule provides the exclusive remedy for challenging a rezoning determination and the time limitations for certiorari review. Info. Please, Inc. v. District Court, 194 Colo. 42, 568 P.2d 1162 (1977).

Exclusive where specific amendatory zoning ordinance challenged. Where plaintiff was challenging a specific amendatory ordinance as applied to the property of the defendants and not the general zoning ordinance of the city, his exclusive remedy was to bring an action for certiorari review under subsection (a)(4), and, thus, his initial complaint seeking a declaratory judgment and injunctive relief was properly dismissed. Lorenz v. City of Littleton, 38 Colo. App. 16, 550 P.2d 884 (1976).

Where denial of variance challenged. Where denial of a variance from a county building code requirement was challenged, then a subsection (a)(4) proceeding was the exclusive remedy. Van Huysen v. Bd. of Adjustment, 38 Colo. App. 9, 550 P.2d 874 (1976).

Property owners can maintain claim under 42 U.S.C. § 1983 against planning board for violations of federal constitutional rights even though this rule purports to be the exclusive remedy for challenging zoning decisions since the owners are seeking monetary damages under that claim and not declaratory or injunc-

tive relief. Sclavenitis v. Cherry Hills Bd. of Adjustment, 751 P.2d 661 (Colo. App. 1988).

A § 1983 damage claim exists separately from an action for reviewing a quasi-judicial decision made by a government entity and, accordingly, the § 1983 claim is not required to be filed within the 30-day rule set forth in this rule. Bd. of County Comm'rs v. Sundheim, 926 P.2d 545 (Colo. 1996).

Plaintiff's claim for permanent injunction moot and judgment dismissing action proper when plaintiff failed to seek temporary or preliminary injunctive relief in connection with challenge to zoning ordinance which authorized construction of facility, coupled with actual completion of facility during pending litigation. Zoning Bd. of Adjustment v. DeVilbiss, 729 P.2d 353 (Colo. 1986).

City and zoning administrators are proper parties to bring decision of board of adjustment before district court and ultimately appeal to court of appeals. City & County of Denver v. Bd. of Adjustment, 31 Colo. App. 324, 505 P.2d 44 (1972).

Judicial review of denial of rezoning of land is properly limited to review of record of proceedings before county planning commission and county commissioners. Famularo v. Bd. of County Comm'rs, 180 Colo. 333, 505 P.2d 958 (1973).

Where the zoning body has established requirements governing a particular use and the developer has met those requirements, the zoning body exceeded its jurisdiction when, using its discretion, it rejected the developer's plan. Sherman v. City of Colo. Springs Planning Comm'n, 680 P.2d 1302 (Colo. App. 1983); Sherman v. Colo. Springs Planning Comm'n, 763 P.2d 292 (Colo. 1988).

And where developer's plan met the requirements of the city zoning ordinance, and the city's action in approving or denying the developer's plan was quasi-judicial in nature, the proper remedy available to the developer was certiorari under subsection (a)(4) and not mandamus under subsection (a)(2), and the developer was not entitled to damages. Sherman v. Colo. Springs Planning Comm'n, 763 P.2d 292 (Colo. 1988).

The weighing of evidence and the determination of fact are functions of the rezoning board and are not matters for consideration upon appellate review. Coleman v. Gormley, 748 P.2d 361 (Colo. App. 1987).

Approval by city council of initial petition for formation of special district within boundaries of city was legislative in nature and action not reviewable pursuant to this rule. State Farm v. City of Lakewood, 788 P.2d 808 (Colo. 1990).

Zoning board's approval of rezoning application was final only when board executed and approved development plan and filing deadline commenced on that date. Luck v. Bd. of County Comm'rs, 789 P.2d 475 (Colo. App. 1990).

A zoning ordinance amendment is not subject to review pursuant to this rule where the amendment is of general application, may be enacted by initiative, and is subject to referendum. Russell v. City of Central, 892 P. 2d 432 (Colo. App. 1995).

Board exceeded its jurisdiction and acted arbitrarily and capriciously where it approved a special review land use that was dependent on the validity of an ordinance. Russell v. City of Central, 892 P.2d 432 (Colo. App. 1995).

Whatever form a final decision may take in any given context, a party whose property interests are adversely affected by it may not, in the absence of timely notice of the decision, be deprived of review for failing to seek it in a timely manner. Citizens for Resp. Growth v. RCI Dev. Ptr., 252 P.3d 1104 (Colo. 2011).

The loss of a right to judicial review for failure to timely file in the absence of adequate notice would clearly violate due process of law. By including the disposition of two related applications in the written resolution it was required to formally adopt to approve land developer's 1041 application, the board of county commissioners made clear its intent to supersede, or finalize, the earlier oral adoption of all three applications. Where the ripeness of neither the planned unit development application nor the preliminary subdivision plat application was disputed, the complaint seeking judicial review of both was timely filed. Citizens for Resp. Growth v. RCI Dev. Ptr., 252 P.3d 1104 (Colo. 2011).

Subsection (a)(4) held improperly applied in wrongful discharge, outrageous conduct, and civil rights action against town. Wilson v. Town of Avon, 749 P.2d 990 (Colo. App. 1987).

District court does not have jurisdiction under this rule to review an interlocutory order of a state administrative agency, absent a showing of irreparable harm from such order. T & S Leasing v. District Court, 728 P.2d 729 (Colo. 1986).

Since municipal court rules became effective on April 1, 1970, the argument that there is no established procedure in the municipal courts is therefore moot. Municipal Court v. Brown, 175 Colo. 433, 488 P.2d 61 (1971).

Motion for new trial not required. A motion for new trial to secure appellate review of a district court's judgment in a proceeding under this rule is not required where the hearing in the district court did not involve controverted issues of fact. Cline v. City of Boulder, 35 Colo. App. 349, 532 P.2d 770 (1975).

The administrative and judicial review provisions of the Workmen's Compensation Act of Colorado are complete, definitive, and

organic, without the need of supplementation from other legislative acts or the procedural relief afforded by C.R.C.P. 16. Gardner v. Friend, 849 P.2d 817 (Colo. App. 1992).

Denial of a non-conforming use application and denial of a variation application were final decisions for purposes of this rule and judicial review was the exclusive remedy for review of such decisions. A petition for review was, therefore, subject to the 30-day filing deadline. Buck v. Park, 839 P.2d 498 (Colo. App. 1992).

But, where the decision of the commission was merely a recommendation to the city council and the city council had responsibility for the final decision, the decision of the commission was not final agency action and was not appealable. Buck v. Park, 839 P.2d 498 (Colo. App. 1992).

Absent a showing of prejudice, the premature filing of an appeal does not preclude the court from addressing the case on its merits. Save Park County v. Bd. of County Comm'rs, 969 P.2d 711 (Colo. App. 1998), aff'd on other grounds, 990 P.2d 35 (Colo. 1999).

Certiorari review is not appropriate to review the decision of a sheriff or a chief of police denying an application for a concealed weapons permit. Miller v. Collier, 878 P.2d 141 (Colo. App. 1994).

The scope of this rule includes prison disciplinary proceedings. Mariani v. Colo. Dept. of Corr., 956 P.2d 625 (Colo. App. 1997).

Applied in Shearer v. Bd. of Trustees of Firemen's Pension Fund, 121 Colo. 592, 218 P.2d 753 (1950); Rothwell v. Coffin, 122 Colo. 140, 220 P.2d 1063 (1950); Bacon v. Steigman, 123 Colo. 62, 225 P.2d 1046 (1950); Berger v. People, 123 Colo. 403, 231 P.2d 799, cert. denied, 342 U.S. 837, 72 S. Ct. 62, 96 L. Ed. 633 (1951); Mardi, Inc. v. City & County of Denver, 151 Colo. 28, 375 P.2d 682 (1962); Fort Collins-Loveland Water Dist. v. City of Fort Collins, 174 Colo. 79, 482 P.2d 986 (1971); North Kiowa-Bijou Mgt. Dist. v. Ground Water Comm'n, 180 Colo. 313, 505 P.2d 377 (1973); City of Lakewood v. District Court, 181 Colo. 69, 506 P.2d 1228 (1973); Ross v. Fire and Police Pension Ass'n, 713 P.2d 1304 (Colo. 1986); Gallagher v. County Court, 759 P.2d 859 (Colo. App. 1988).

B. Extent of Review.

Scope of review strictly limited. The scope of review granted to the district court in a proceeding under subsection (a)(4) of this rule is strictly limited. City of Colo. Springs v. District Court, 184 Colo. 177, 519 P.2d 325 (1974).

It is beyond the scope of this rule to challenge administrative regulations on the grounds that such rules are vague and overbroad. Mariani v. Colo. Dept. of Corr., 956 P.2d 625 (Colo. App. 1997).

In an appeal from a judgment entered in a proceeding under this rule, the court of appeals is in the same position as the district court concerning the review of the county court proceeding. Empiregas, Inc. of Pueblo v. County Court, 713 P.2d 937 (Colo. App. 1985).

In reviewing a local board of adjustment's decision pursuant to subsection (a)(4) of this rule, the court of appeals calls into question the decision of the board itself, not the district court's determination on review. The review is based solely on the record that was before the board, and the decision must be affirmed unless there is no competent evidence in the record to support it such that it was arbitrary or capricious. The court considers whether the board abused its discretion or exceeded its jurisdiction, as well as whether it applied an erroneous legal standard. City & County of Denver v. Bd. of Adjustment, 55 P.3d 252 (Colo. App. 2002); Lieb v. Trimble, 183 P.3d 702 (Colo. App. 2008).

This rule limits the issuance of orders in the nature of prohibition to cases where an inferior tribunal has exceeded its jurisdiction or abused its discretion in exercising judicial or quasi-judicial functions, and where there is no plain, speedy, or adequate remedy. Banking Bd. v. District Court, 177 Colo. 77, 492 P.2d 837 (1972).

In other words the scope of review is limited to the inquiry as to whether jurisdiction has been exceeded, discretion abused, or authority regularly pursued. City Council v. Hanley, 19 Colo. App. 390, 75 P. 600 (1904); Graeb v. State Bd. of Med. Exam'rs, 55 Colo. 523, 139 P. 1099 (1913); Chenoweth v. State Bd. of Med. Exam'rs, 57 Colo. 74, 141 P. 132 (1914); Thompson v. State Bd. of Med. Exam'rs, 59 Colo. 549, 151 P. 436 (1915); State Bd. of Med. Exam'rs v. Noble, 65 Colo. 410, 177 P. 141 (1918); State Bd. of Med. Exam'rs v. Boulls, 69 Colo. 361, 195 P. 325 (1920); State Bd. of Med. Exam'rs v. Brown, 70 Colo. 116, 198 P. 274 (1921); White v. Andrew, 70 Colo. 50, 197 P. 564 (1921); Dilliard v. State Bd. of Med. Exam'rs, 69 Colo. 575, 196 P. 866 (1921); Doran v. State Bd. of Med. Exam'rs, 78 Colo. 153, 240 P. 335 (1925); State Bd. of Med. Exam'rs v. Spears, 79 Colo. 588, 247 P. 563 (1926); Bd. of Comm'rs v. Dunlap, 83 Colo. 360, 265 P. 94 (1928); Pub. Utils. Comm'n v. City of Loveland, 87 Colo. 556, 289 P. 1090 (1930); State Bd. of Dental Exam'rs v. Savelle, 90 Colo. 177, 8 P.2d 693 (1932); Pub. Utils. Comm'n v. Erie, 92 Colo. 151, 18 P.2d 906 (1933); City & County of Denver v. People ex rel. Pub. Utils. Comm'n, 129 Colo. 41, 266 P.2d 1105 (1954).

The court can review the action of the state board of medical examiners only upon the ques-

tion of jurisdiction or great abuse of discretion. White v. Andrew, 70 Colo. 50, 197 P. 564 (1921).

The remedy is restricted in its inquiry to jurisdictional questions and to a manifest abuse of discretion. State Civil Serv. Comm'n v. Cummings, 83 Colo. 379, 265 P. 687 (1928).

Under subsection (a)(4) the court is limited to a determination of questions of jurisdiction and abuse of discretion. Hawkins v. Hunt, 113 Colo. 468, 160 P.2d 357 (1945); Shupe v. Boulder County, 230 P.3d 1269 (Colo. App. 2010).

A review of the action of the state board of health in revoking a license for the operation of a chiropractic sanitarium was held to be limited to the inquiry as to whether jurisdiction has been exceeded, discretion abused, or authority regularly pursued. Spears Free Clinic & Hosp. for Poor Children v. State Bd. of Health, 122 Colo. 147, 220 P.2d 872 (1950).

The sole matter before a trial court under the record is governed by this rule and limits the inquiry to a determination of whether the licensing authority has exceeded its jurisdiction or abused its discretion. Bacher v. Bd. of County Comm'rs, 136 Colo. 67, 314 P.2d 607 (1957).

Under this rule the function of the district court is to determine whether the respondent authorities have exceeded their jurisdiction or abused their discretion. La Junta Easy Shops, Inc. v. Hendren, 164 Colo. 55, 432 P.2d 754 (1967).

The breadth of the district court's review does not extend further than to determine whether the inferior tribunal has exceeded its jurisdiction or abused its discretion. City of Colo. Springs v. District Court, 184 Colo. 177, 519 P.2d 325 (1974).

An appellate court's review under subsection (a)(4) is limited to a determination of whether the governmental body or officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the record before the defendant body or officer. Since the question is whether there is adequate support for the decision reached by the administrative tribunal, the appellate court is in the same position as the district court in reviewing an administrative decision under subsection (a)(4). Ad Two, Inc. v. City & County of Denver, 9 P.3d 373 (Colo. 2000); Covered Bridge, Inc. v. Town of Vail, 197 P.3d 281 (Colo. App. 2008).

Review of a prison disciplinary decision is limited to whether the prison officials exceeded their jurisdiction or abused their discretion. Under this standard, the decision of the prison officials must be upheld if there is "some evidence" to support it. Washington v. Atherton, 6 P.3d 346 (Colo. App. 2000).

Consideration of evidence relevant to jurisdiction proper. In determining whether the board had exceeded its jurisdiction or abused its discretion, the trial court properly gave consideration to evidence of material facts which could not escape notice, and did not substitute the decision of the board. Bd. of Adjustment v. Abe Perlmutter Constr. Co., 131 Colo. 230, 280 P.2d 1107 (1955).

The merits of the case are not involved. On proceedings to review an order of an administrative body the only questions presented are: Did the board exceed its jurisdiction, or abuse its discretion? The merits of the controversy are not involved. State Bd. of Med. Exam'rs v. Noble, 65 Colo. 410, 177 P. 141 (1918).

It brings up no issue of law or fact not involved in the question of jurisdiction. Under no circumstances can the review be extended to the merits. Upon every question except the mere question of power, the action of the inferior tribunal is final and conclusive. State Bd. of Med. Exam'rs v. Brown, 70 Colo. 116, 198 P. 274 (1921).

Whether a decision on the merits is right or wrong is not within the issue. State Bd. of Med. Exam'rs v. Brown, 70 Colo. 116, 198 P. 274 (1921); State Bd. of Med. Exam'rs v. Spears, 79 Colo. 588, 247 P. 563, 54 A.L.R. 1498 (1926).

It does not settle disputed facts. The object of the proceeding is not to settle or determine disputed facts, but to investigate and correct errors of law of a jurisdictional nature, and abuses of discretion. Doran v. State Bd. of Med. Exam'rs, 78 Colo. 153, 240 P. 335 (1925).

A district court could not, in proceedings to determine whether a justice of the peace exceeded his jurisdiction, determine disputed questions of fact. Toland v. Strohl, 147 Colo. 577, 364 P.2d 588 (1961).

Mere irregularities are not reviewable. Phillips County Court v. People ex rel. Chicago, B. & Q. R. R., 55 Colo. 258, 133 P. 752 (1913).

Mere disagreement with a ruling is not sufficient showing of abuse of discretion to require issuance of a writ of prohibition. Bristol v. County Court, 143 Colo. 306, 352 P.2d 785 (1960).

Judgment of lower court will not be rejudged on merits. While power is vested in the courts to review the proceedings of all inferior jurisdictions to correct jurisdictional errors, they will not rejudge their judgments on the merits. The correctional power extends no further than to keep them within the limits of their jurisdiction, and to compel them to exercise it with regularity. Bd. of Aldermen v. Darrow, 13 Colo. 460, 22 P. 784 (1889); State Bd. of Land Comm'rs v. Carpenter, 16 Colo. App. 436, 66 P. 165 (1901).

The district court has no jurisdiction to review the action of a city council in a matter of contest of election of its members, and to determine whether the action of the council in such contested election was justified by the evidence.

City Council v. Hanley, 19 Colo. App. 390, 75 P. 600 (1904).

Subsection (a)(4) not substitute for available statutory review. A party cannot substitute proceedings seeking declaratory and injunctive relief under subsection (a)(4) for an available avenue of plain, speedy and adequate review prescribed by the general assembly. Claskey v. Klapper, 636 P.2d 682 (Colo. 1981).

Review pursuant to C.R.C.P. 57 is appropriate where subsection (a)(4) relief is unavailable because the challenged action is legislative or because review of the record is an insufficient remedy. Grant v. District Court, 635 P.2d 201 (Colo. 1981).

The court acted within its discretion in dismissing a claim for declaratory relief under C.R.C.P. 57, because the review provided under this rule had already considered all the issues in that claim. Denver Center for Performing Arts v. Briggs, 696 P.2d 299 (Colo. 1985).

Subsection (a)(4) cannot be substituted for an appeal. When a county court overruled defendant's motion to vacate the judgment, it had jurisdiction over the subject matter and over the person of the defendant and exercised that jurisdiction regularly. It may be that it ought to have vacated the judgment and that it committed error in not doing so, but this is a matter to be determined by appeal and not by a proceeding under subsection (a)(4). Pierce v. Hamilton, 55 Colo. 448, 135 P. 796 (1913).

The words "abuse of discretion" in subsection (a)(4) do not mean such an abuse of discretion as may be committed by a court in overruling a motion to vacate a judgment when the action of the court may be reviewed on appeal, for otherwise an action would lie to review the action of a county court in refusing to set aside a default and vacate a judgment taken thereon in almost any case. Pierce v. Hamilton, 55 Colo. 448, 135 P. 796 (1913).

"Abuse of discretion" does not entail only acts in excess of jurisdiction, and this section is not therefore limited solely to a determination of whether the inferior tribunal exceeded its jurisdiction. Ragsdale v. County Court, 39 Colo. App. 341, 567 P.2d 817 (1977).

Thus, claim of unconstitutionality is not considered. The question of constitutionality of a statute under which the executive department is proceeding is a matter to be raised on appeal after the executive has performed its function. Colo. State Bd. of Med. Exam'rs v. District Court, 138 Colo. 227, 331 P.2d 502 (1958); People ex rel. Orcutt v. District Court, 167 Colo. 162, 445 P.2d 887 (1968); Colo. Dept. of Rev. v. District Court ex rel. County of Adams, 172 Colo. 144, 470 P.2d 864 (1970).

Where the only question before the Colorado courts was the validity of an ordinance, and plaintiff could obtain relief only if the ordinance were held to be invalid, and where his allegations were adequate for this purpose, and that was the issue upon which the case was tried and decided, this rule was not applicable. Heron v. City of Denver, 251 F.2d 119 (10th Cir. 1958).

Contentions of unconstitutionality under this rule provide no basis for jurisdiction in the district court under this rule. People ex rel. Orcutt v. District Court, 167 Colo. 162, 445 P.2d 887 (1968).

De novo review was impermissible under this rule. Hessling v. City of Broomfield, 193 Colo. 124, 563 P.2d 12 (1977).

A trial de novo of the issues in a municipal court cannot be had under the certiorari provisions of this rule. Serra v. Cameron, 133 Colo. 115, 292 P.2d 340 (1956).

In a certiorari proceeding, the reviewing court is to ascertain from the record of the lower tribunal alone whether the inferior tribunal regularly pursued its authority, and thereupon pronounce judgment accordingly. Johnston v. City Council, 177 Colo. 223, 493 P.2d 651 (1972).

In the absence of some showing of facts, either in the petition for review or in the supporting affidavits, which would tend to indicate that the city council's action was arbitrary or an abuse of discretion, the district court's review under subsection (a)(4) of this rule is limited to the record before it. City of Colo. Springs v. District Court, 184 Colo. 177, 519 P.2d 325 (1974).

Reviewing court on certiorari review of an administrative body's decision is limited to what appeared of record. Ford Leasing Dev. Co. v. Bd. of County Comm'rs, 186 Colo. 418, 528 P.2d 237 (1974).

District court review under this rule proceeding is limited to the record. Cline v. City of Boulder, 35 Colo. App. 349, 532 P.2d 770 (1975).

In a certiorari proceeding pursuant to subsection (a)(4), the district court's review is limited to a review of the record before it and introduction of new testimony is not appropriate. Hazelwood v. Saul, 619 P.2d 499 (Colo. 1980).

In reviewing a decision pursuant to this rule, an appellate court must review the decision of the agency rather than the decision of the district court; review of an agency's findings of fact is limited to whether the agency had competent evidence on which to base its decision. Save Park County v. Bd. of County Comm'rs, 969 P.2d 711 (Colo. App. 1998), aff'd on other grounds, 990 P.2d 35 (Colo. 1999).

The reviewing court must also determine whether an agency misconstrued or misapplied the law; the agency's interpretation of its own regulations must be reviewed to ensure that it does not amend its regulations in the guise of interpreting them. Save Park County v. Bd. of County Comm'rs, 969 P.2d 711 (Colo. App.

1998), aff'd on other grounds, 990 P.2d 35 (Colo. 1999).

Taking testimony is unnecessary for review. In the course of hearing under a writ of certiorari, this section sets up the correct procedure. Essentially it is a review proceeding of an inferior tribunal and thus testimony is not in order. Toland v. Strohl, 147 Colo. 577, 364 P.2d 588 (1961).

District court on its own motion may not order a remand to supplement the record where the evidence had been presented on all issues necessary for a determination of the validity of the action taken and the record is complete. Cline v. City of Boulder, 35 Colo. App. 349, 532 P.2d 770 (1975); Garland v. Bd. of County Comm'rs, 660 P.2d 20 (Colo. App. 1982).

Court cannot interfere with commission's findings if supported by competent evidence. The scope of review in certiorari proceedings, and the authority of courts to interfere with the findings of tribunals vested with exclusive jurisdiction to determine particular issues has been judicially defined. The reviewing court cannot consider whether the commission's findings are right or wrong, substitute its judgment for that of the commission, or interfere in any manner with the commission's findings if there is any competent evidence to support the same. State Civil Serv. Comm'n v. Hazlett, 119 Colo. 173, 201 P.2d 616 (1948).

The lawful determination of a properly constituted authority will not be interfered with when the record discloses competent evidence on which it is based, and the action of the inferior tribunal appears to be neither arbitrary nor capricious. Marker v. City of Colo. Springs, 138 Colo. 485, 336 P.2d 305 (1959).

Where civil service commission, acting in a quasi-judicial capacity, reviews record of proceedings before city manager of safety for purpose of determining whether police officers were properly discharged, and the evidence before the manager substantiated the charge and supported his findings and conclusions, the commission is bound by the manager's supported findings and may not adopt different conclusions to hold a de novo trial without expressly determining that the findings are not supported by the evidence, or that errors of law have occurred. Turner v. City & County of Denver, 146 Colo. 336, 361 P.2d 631 (1961).

The authority of the court and the scope of its review in certiorari proceedings is limited to a determination of whether there is any competent evidence to support the decision of the inferior tribunal. Civil Serv. Comm'n v. Doyle, 162 Colo. 1, 424 P.2d 368 (1967); Cooper v. Civil Serv. Comm'n, 43 Colo. App. 258, 604 P.2d 1186 (1979); Carney v. Civil Serv. Comm'n, 30 P.3d 861 (Colo. App. 2001).

While the reviewing court can determine that a portion of the test established by the civil service commission was arbitrary and capricious, the court cannot determine the remedy. Determination of a remedy is left to the commission. Carney v. Civil Serv. Comm'n, 30 P.3d 861 (Colo. App. 2001).

The proper function of a district court under this rule is to affirm a city council where there is "any competent evidence" to support the council's decision. Bauer v. City of Wheat Ridge, 182 Colo. 324, 513 P.2d 203 (1973).

A court subjecting a rezoning decision of a city zoning authority to this rule review must uphold the decision unless there is no competent evidence to support it. Corper v. City & County of Denver, 191 Colo. 252, 552 P.2d 13 (1976); Pub. Emp. Ret. Ass'n v. Stermole, 874 P.2d 444 (Colo. App. 1993); City of Colo. Springs v. Givan, 897 P.2d 753 (Colo. 1995); IBC Denver II, LLC v. City of Wheat Ridge, 183 P.3d 714 (Colo. App. 2008).

An administrative finding of fact must be upheld on review under subsection (a)(4) where competent evidence supports it in the record. Denver Center for Performing Arts v. Briggs, 696 P.2d 299 (Colo. 1985); Elec. Power Res. v. City and County of Denver, 737 P.2d 822 (Colo. 1987); Fedder v. McCurdy, 768 P.2d 711 (Colo. App. 1989); Neighbors For A Better Approach v. Nepa, 770 P.2d 1390 (Colo. 1989).

Record must clearly show abuse of discretion. To authorize a court finding that a municipal zoning board has grossly abused its discretion in failing to restrict an owner in the use of his property, the record should clearly show such abuse when the complaint is made by those who seek a benefit to their own properties by the imposition of restrictions on others. Bd. of Adjustment v. Handley, 105 Colo. 180, 95 P.2d 823 (1939).

In a proper case for the issuance of the writ, the extent of the review by the district court should have been to ascertain from the record whether the county court regularly pursued its authority. Morefield v. Koehn, 53 Colo. 367, 127 P. 234 (1912).

The determination of whether there is competent evidence to support a lower tribunal's decision is made upon examination of the record of administrative proceedings, including a transcript of the testimony and other evidence before the inferior tribunal. Civil Serv. Comm'n v. Doyle, 162 Colo. 1, 424 P.2d 368 (1967).

Abuse of discretion means there is no competent evidence to support the decision. Ross v. Fire & Police Pension Ass'n, 713 P.2d 1304 (Colo. 1986); Bentley v. Valco, Inc., 741 P.2d 1266 (Colo. App. 1987).

A petition for certiorari showing on its face that no relief could be granted, was properly dismissed without further inquiry. Berry v. State Bd. of Parole, 148 Colo. 547, 367 P.2d

338 (1961), cert. denied, 370 U.S. 927, 82 S. Ct. 1569, 8 L. Ed. 2d 507 (1962).

In order for a court to set aside a decision of an administrative body on certiorari review, there must be no competent evidence to support the decision. Ford Leasing Dev. Co. v. Bd. of County Comm'rs, 186 Colo. 418, 528 P.2d 237 (1974).

Court review of agency decision under this rule limited to matters contained within the record of the proceeding before the agency. Fedder v. McCurdy, 768 P.2d 711 (Colo. App. 1989).

Burden of providing record on petitioner. In appealing an administrative decision to the district court, the burden of providing an adequate record is upon the administrative agency on the order to show cause from the district court. Civil Serv. Comm'n v. Doyle, 174 Colo. 149, 483 P.2d 380 (1971).

Burden of proof on petitioner. A party seeking to invoke prohibition to restrain county court from proceeding in a pending action has the burden of establishing facts justifying its application. Bristol v. County Court, 143 Colo. 306, 352 P.2d 785 (1960).

A zoning ordinance is presumed to be valid, and one assailing it bears the burden of overcoming that presumption, and the courts must indulge every intendment in favor of its validity. Huneke v. Glaspy, 155 Colo. 593, 396 P.2d 453 (1964).

One claiming the invalidity of a rezoning ordinance has the burden of establishing its invalidity beyond a reasonable doubt. Corper v. City & County of Denver, 191 Colo. 252, 552 P.2d 13 (1976).

Before relief can be granted under subsection (a)(4), the plaintiff must prove that the inferior tribunal lacked jurisdiction or abused its discretion. Clary v. County Court, 651 P.2d 908 (Colo. App. 1982).

Threshold showing required to avoid strict application of rule requiring record review only. The burden is on the person seeking review to show that either there are imperfections in the record as well as resulting prejudice or that members of the board improperly considered evidence not before the board or that members engaged in improper conduct affecting the result of the board. Whelden v. Bd. of County Comm'rs, 782 P.2d 853 (Colo. App. 1989).

Incomplete record leaving nothing to review requires reversal. Imperfection of a determination of an administrative board which leaves no avenue for a court to take in reviewing the matter, and which furnishes no basis upon which to resolve whether the board may or may not be sustained, requires reversal. Bd. of County Comm'rs v. Salardino, 136 Colo. 421, 318 P.2d 596 (1957).

In absence of record, taking testimony on jurisdiction not improper. A district court could hardly determine whether a justice of the peace exceeded his jurisdiction when it has no record before it. In the circumstances, the court's action in hearing testimony bearing on the issue of jurisdiction alone was not improper. Toland v. Strohl, 147 Colo. 577, 364 P.2d 588 (1961).

Civil service commission disciplinary decision upheld unless gross abuse of discretion. The discipline imposed by a civil service commission is a matter peculiarly within its area of expertise, and will not be interfered with by the courts in the absence of a gross abuse of discretion. Ramirez v. Civil Serv. Comm'n, 42 Colo. App. 383, 594 P.2d 1067 (1979).

Review of quasi-judicial action. Decision of a hearing officer for the Denver career service board is sustained when it is shown that the findings are supported by "any competent evidence". Jimerson v. Prendergast, 697 P.2d 804 (Colo. App. 1985); Mayerle v. Civil Serv. Comm'n, 738 P.2d 1198 (Colo. App. 1987); Getsch v. Hawker, 748 P.2d 1304 (Colo. App. 1987).

Role of a district court on review of a rezoning application is to affirm the findings of fact of a city council if there is "any competent evidence" in the record to support the findings. Dillon Cos. v. City of Boulder, 183 Colo. 117, 515 P.2d 627 (1973).

Ex parte exchanges may not arbitrarily be screened from appellate scrutiny. Ex parte exchanges between an advocate and an adjudicatory tribunal may not arbitrarily be screened from appellate scrutiny. Peoples Natural Gas Div. v. Pub. Utils. Comm'n, 626 P.2d 159 (Colo. 1981).

Appellate court is in same position as district court when reviewing an administrative decision under this rule. The appropriate consideration for an appellate court is whether there is adequate evidentiary support for the decision reached by the administrative tribunal, not whether there is adequate evidentiary support for the lower court's decision on reviewing the record. City of Colo. Springs v. Givan, 897 P.2d 753 (Colo. 1995).

An administrative body's decision may be reversed only if there is no competent evidence to support the decision. McCann v. Lettig, 928 P.2d 816 (Colo. App. 1996).

"No competent evidence" means that there is an absence of evidence in the record to support the ultimate decision of the administrative body, and hence, the decision can only be explained as an arbitrary and capricious exercise of authority. McCann v. Lettig, 928 P.2d 816 (Colo. App. 1996).

"No competent evidence" means that the ultimate decision of the administrative body is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority. Cruzen v. Career Serv. Bd.

of City & County of Denver, 899 P.2d 373 (Colo. App. 1995); Bd. of County Comm'rs of Routt County v. O'Dell, 920 P.2d 48 (Colo. 1996); Carney v. Civil Serv. Comm'n, 30 P.3d 861 (Colo. App. 2001).

Court of appeals should not have reweighed the evidence in subsection (a)(4) action merely because the evidence considered by the board was documentary in nature. The competent evidence standard of review should have governed. Bd. of Comm'rs of Routt County v. O'Dell, 920 P.2d 48 (Colo. 1996).

A complete written transcript of the evidentiary phase of a proceeding before an agency is not required in order for the court to conduct a meaningful review of that agency's actions. Whether a review of an agency's actions is meaningful depends on whether the record contains sufficient competent evidence to support its decision. Martinez v. Bd. of Comm'rs of the Housing Auth. of the City of Pueblo, 992 P.2d 692 (Colo. App. 1999).

Meaningful review requires that there be a record that accurately and fully reflects the evidence relied upon and the findings of fact and conclusions of law from the agency's proceedings, so that a reviewing court is able to determine, upon the state of the record before it, whether the agency's actions were arbitrary and capricious. Martinez v. Bd. of Comm'rs of the Housing Auth. of the City of Pueblo, 992 P.2d 692 (Colo. App. 1999).

It is not unduly burdensome to require the plaintiff to produce an affidavit containing sufficient allegations and evidence to raise questions concerning whether competent evidence had been presented in support of an agency's decision. Martinez v. Bd. of Comm'rs of the Housing Auth. of the City of Pueblo, 992 P.2d 692 (Colo. App. 1999).

Scope of review on appeal is limited to determining whether the tribunal exceeded its jurisdiction or abused its discretion. Coates v. City of Cripple Creek, 865 P.2d 924 (Colo. App. 1993); Abbott v. Bd. of County Comm'rs of Weld County, 895 P.2d 1165 (Colo. App. 1995); McCann v. Lettig, 928 P.2d 816 (Colo. App. 1996).

Review of the decision of an administrative law judge is limited to a determination of whether the ALJ exceeded his or her jurisdiction or abused his or her authority. City & County of Denver v. Fey Concert Co., 960 P.2d 657 (Colo. 1998).

Subsection (a)(4)(I) does not provide the judicial standards of review of a decision of the public utilities commission; the controlling standards of a district court's review of a public utilities commission decision are provided in § 40-6-115. Ace West Trucking v. P.U.C., 788 P.2d 755 (Colo. 1990).

Inappropriate application of subsection (a)(4)(I) not reversible error. District court's use of incorrect standard of review of a decision of the public utilities commission did not constitute reversible error where record as a whole demonstrated that the court could not have otherwise resolved the issues applying the correct standard of review. Ace West Trucking v. Pub. Utils. Comm'n, 788 P.2d 755 (Colo. 1990).

The proceedings authorized by subsection (a)(4) cannot be substituted for regular appellate procedures and this rule may not be used to review pretrial evidentiary rulings. People v. Adams County Court, 793 P.2d 655 (Colo. App. 1990).

The trial court's scope of review in proceeding under this rule was strictly limited to determining whether the board for the fire and police pension association, in conducting a hearing under the Board's rules, exceeded its jurisdiction or abused its discretion. Pueblo v. Fire & Police Pension Ass'n, 827 P.2d 597 (Colo. App. 1992).

In reviewing action of administrative agency, court may consider whether agency's hearing officer misconstrued or misapplied law in making a determination as to abuse of discretion. Stamm v. City & County of Denver, 856 P.2d 54 (Colo. App. 1993).

When interpreting an ordinance, a court may review its other provisions in order to construe the disputed section in context. Humana, Inc. v. Bd. of Adjustment, 537 P.2d 741 (Colo. 1975); Abbott v. Bd. of County Comm'rs of Weld County, 895 P.2d 1165 (Colo. App. 1995).

The construction of an ordinance by administrative officials charged with its enforcement should be given deference by the courts and if there is a reasonable basis for the administrative agency's application of the law, the decision may not be set aside on review. Abbott v. Bd. of County Comm'rs of Weld County, 895 P.2d 1165 (Colo. App. 1995); Covered Bridge, Inc. v. Town of Vail, 197 P.3d 281 (Colo. App. 2008).

The court may not set aside an administrative board's interpretation of the law if it is supported by a reasonable basis. Lieb v. Trimble, 183 P.3d 702 (Colo. App. 2008); Covered Bridge, Inc. v. Town of Vail, 197 P.3d 281 (Colo. App. 2008).

Appeals involving sufficiency of the evidence determinations are generally discouraged. People v. Holder, 658 P.2d 870 (Colo. 1983); Abbott v. County Ct. in & for County of Grand, 886 P.2d 730 (Colo. 1994).

Judicial review of prison disciplinary proceedings must take into account the correctional setting of the proceeding and state's interest in safe and efficient operation of its prison system. Review of a prison disciplinary decision is limited to whether the prison officials exceeded their jurisdiction or abused their discretion. A reviewing court must uphold the de-

cision of the prison officials if the decision is supported by some evidence in the record. The scope of judicial review in this type of case is very limited. Thomas v. Colo. Dept. of Corr., 117 P.3d 7 (Colo. App. 2004).

C. Illustrative Cases.

Challenge must await exercise of statutory duties. In an action by package liquor licensees to compel the secretary of state to prohibit other licensees from making deliveries to customers, there was nothing upon which certiorari can operate where there are no proceedings before the secretary of state for the court to review, where there is no complaint of excess of jurisdiction, and the secretary of state not having acted at all, cannot be said to have abused his discretion. Ahern v. Baker, 148 Colo. 408, 366 P.2d 366 (1961).

After the agriculture commissioner has determined the amount of the assessment and called for collection, if payment is not forthcoming, then the commissioner may file a claim for collection of the assessment. It is at such time that the corporate respondents have a full and complete opportunity to challenge the assessment. Until the commissioner makes a determination of the amount of the assessment, the judiciary has no jurisdiction to interfere where the commissioner is merely exercising his statutory duties. People ex rel. Orcutt v. District Court, 167 Colo. 162, 445 P.2d 887 (1968).

Restricted statutory review was not adequate remedy at law. Where by the terms of the ordinance there could be no dispute but that the Denver board of adjustment, having resort solely to the terms of the ordinance, would be bound to find that the building permit was in error, and in any further "appeal" under the ordinance prescribed certiorari procedure, the court would be confined to a review of the record upon that same restricted issue under section (a) of this rule, and likewise could only affirm that the permit did not comply with the ordinance terms, plaintiff did not have an "adequate remedy at law" by an ordinance-appeal since the board was powerless, because of its restricted jurisdiction to reverse the revocation of the permit on the grounds of equitable estoppel due to advanced construction or to do anything other than affirm that the permit did not comply with the requirements of the ordinance. City & County of Denver v. Stackhouse, 135 Colo. 289, 310 P.2d 296 (1957).

Failure to exhaust statutory review bars remedy under rule. A claimant who fails to seek a review of an industrial commission order in the district court within the 20-day period specified by § 8-53-107 is thereafter barred from asking judicial review and cannot obtain what amounts to similar relief by asserting a right under subsection (a)(2) and section (4). Vigil v. Indus. Comm'n, 160 Colo. 23, 413 P.2d 904 (1966).

Not applicable where breach of contract alleged. Subsection (a)(4) of this rule, review in the nature of certiorari, is applicable where a party is attacking an action taken by a board. However, that rule is directed to an action against the board for exceeding its jurisdiction or abusing its discretion, but permits relief only where there is no "plain, speedy, and adequate remedy", and thus does not apply where the plaintiffs allege a breach of a preexisting contract. Ebke v. Julesburg Sch. Dist. No. RE-1, 37 Colo. App. 349, 50 P.2d 355 (1976), aff'd on other grounds, 193 Colo. 40, 562 P.2d 419 (1977).

Neither district court nor court of appeals can properly review county court's finding of probable cause in a proceeding under this rule. Zaharia v. County Court ex rel. County of Jefferson, 673 P.2d 378 (Colo. App. 1983).

District court may not review a county court's finding that no probable cause exists. Gallagher v. Arapahoe County Court, 772 P.2d 665 (Colo. App. 1989), cert. denied, 778 P.2d 1370 (Colo. 1989).

District court review of county court judge's denial of motion to recuse is proper under subsection (a)(4). Kane v. County Court Jefferson County, 192 P.3d 443 (Colo. App. 2008).

Action does not lie to the collector of taxes, either to review his action, or any prior action upon which his own is based, and it would be an anomalous practice to convert an action brought against a county treasurer to restrain the collection of a void tax into an action against the board of county commissioners to review its proceedings in levying the tax, even though, in a proper case, this remedy is appropriate. Insurance Co. of N. Am. v. Bonner, 24 Colo. 220, 49 P. 366 (1897).

No action to compel warrants for moral obligation. Where a city charter forbade the auditor to disburse city funds except in payment of legal obligations, an action could not be maintained to compel him to issue warrants as directed by the city council for the payment of a mere moral obligation. Cross v. McNichols, 118 Colo. 442, 195 P.2d 975 (1948).

District court has jurisdiction to enjoin city from requiring railroads to pay for viaduct construction. Where a city manager is directed to recommend a bill for an ordinance requiring the construction of a viaduct and apportioning the cost as he deems proper and reasonable among the railroads, although relief under this rule is inappropriate insofar as the manager may make changes in his plan for the viaduct or in his apportionment of costs, the district court has jurisdiction to declare that the city is proceeding without authority and to enjoin it from proceeding to require the railroads

to pay for construction of the viaduct. Denver & R. G. W. R. R. v. City & County of Denver, 673 P.2d 354 (Colo. 1983).

District court could not entertain city's action under this rule as the city was required to file appeal of county court's dismissal of traffic prosecution pursuant to municipal court rule rather than seek review in district court. City & County of Denver v. Harrell, 759 P.2d 847 (Colo. App. 1988).

Jurisdiction to restrain county judge under disqualification. Where motions were filed in county court to set aside judgments rendered by a former county judge before a presiding county judge who had acted as counsel for the judgment debtors, the presiding judge was disqualified to act on such motions, and it was his duty to certify the matter to the district court, and refusing to do so the district court had jurisdiction by writs of prohibition and certiorari to restrain the county judge from setting aside said judgments and to order him to certify the proceedings to the district court. People ex rel. Brown v. District Court, 26 Colo. 226, 56 P. 1115 (1899).

Judgments of justices of the peace may be reviewed by a proceeding under subsection (a)(4) from the county court where no appeal is provided by statute. Loloff v. Heath, 31 Colo. 172, 71 P. 1113 (1903).

Review of decision of state board of health. An action under § 13-45-113, providing for a review in the district court of a decision of the state board of health, is a statutory action and not controlled by this rule. Grimm v. State Bd. of Health, 121 Colo. 269, 215 P.2d 324 (1950).

Certiorari lies to state board of public welfare. The appropriate proceeding to review a determination of the state board of public welfare directing payment of benefits to a resident of a federal military reservation is certiorari. Bd. of County Comm'rs v. Donoho, 144 Colo. 321, 356 P.2d 267 (1960).

Interlocutory orders in eminent domain reviewable. In eminent domain proceedings, where an order for temporary possession was clearly interlocutory, and an appeal would not lie to review the same, complainants had no plain, speedy or adequate remedy at law, and certiorari will lie. Swift v. Smith, 119 Colo. 126, 201 P.2d 609 (1948); Potashnik v. Pub. Serv. Co., 126 Colo. 98, 247 P.2d 137 (1952).

The proper proceeding for relief from an interlocutory order in eminent domain actions is by certiorari, when directed to an endangered fundamentally substantive and substantial right. Town of Glendale v. City & County of Denver, 137 Colo. 188, 322 P.2d 1053 (1958).

Prison board proceedings reviewable. This section is an authorization to test the legality of the prison board proceedings in the state courts whereby good time credits were forfeited by the prison board following the return of the appellant to prison after an escape. Henry v. Patterson, 363 F.2d 443 (10th Cir. 1966).

Discretionary release of dangerous patient from state penitentiary reviewable. For a patient confined in the state penitentiary after being found not guilty of murder by reason of insanity and transferred from the state hospital as a dangerous patient, petitioner is entitled to attack the superintendent's good faith and discretion in failing to initiate the statutory proceedings to certify the patient sane by resort to the procedures outlined in Parker v. People (108 Colo. 362, 117 P.2d 316 (1941)) or in subsection (a)(4) of this rule. Pigg v. Patterson, 370 F.2d 101 (10th Cir. 1966).

Administrative acts of parole board not reviewable. The action of a parole board is type of administrative decision not reviewable by certiorari. Berry v. State Bd. of Parole, 148 Colo. 547, 367 P.2d 338 (1961), cert. denied, 370 U.S. 927, 82 S. Ct. 1569, 8 L. Ed. 2d 507 (1962).

The referral of an inmate for placement in a community corrections program is not reviewable under subsection (a)(4). Rivera-Bottzeck v. Ortiz, 134 P.3d 517 (Colo. App. 2006).

The dismissal of personnel under home rule charter not reviewable. Where the city charter of a home rule city does not provide for a civil service system, the charter places authority in the city manager for hiring and firing police department personnel, and there are no provisions in the charter for hearing or review of dismissals ordered by the city manager, the district court has no jurisdiction to review the city manager's action in dismissing a police officer on certiorari. Hoffman v. City of Fort Collins, 30 Colo. App. 123, 489 P.2d 355 (1971).

Whether county court abused its discretion in failing to allow a plaintiff to recall witnesses at a preliminary hearing is properly before district court. Zaharia v. County Court ex rel. County of Jefferson, 673 P.2d 378 (Colo. App. 1983).

Quasi-judicial acts of city council are properly reviewable. When deciding upon the proper form of judicial review, acts of a city council which had the earmarks of quasi-judicial proceedings, i.e., notice to individual landowners, hearings, and decision-making by the application of facts to specified criteria established by law, were properly reviewed under subsection (a)(4). Margolis v. District Court, 638 P.2d 297 (Colo. 1981).

Ordering cessation of waste disposal at landfill is quasi-judicial. In ordering the cessation of hazardous waste and sewage sludge disposal at a landfill, the county commissioners were adjudicating the rights and obligations of only the parties involved, which is quasi-judi-

cial action. City & County of Denver v. Eggert, 647 P.2d 216 (Colo. 1982).

Sale of real estate by city council not a judicial or quasi-judicial action subject to review because there is no state or local law requiring city council to apply certain criteria before selecting a buyer. Walsenburg Sand & Gravel Co. v. City Council of Walsenburg, 160 P.3d 297 (Colo. App. 2007).

Individual or public may exercise remedy from civil service orders. Certiorari from an order of the civil service commission of Denver is available on behalf of an aggrieved employee, and the public, the city and county of Denver, acting through its proper officers in the public interest, may exercise the remedy extended to individuals even though specific provision is not made therefor in the charter. The rules of civil procedure are broad enough to cover this condition. Turner v. City & County of Denver, 146 Colo. 336, 361 P.2d 631 (1961).

Plaintiffs' complaint for breach of contract should not have been dismissed based on exclusivity of review under this section because the board of county commissioners, who denied the plaintiffs' claim was not acting as a quasi-judicial body. Montez v. Bd. of County Comm'rs, 674 P.2d 973 (Colo. App. 1983).

It is the nature of the decision rendered by the governmental body and the process by which that decision was reached that is the predominant consideration in determining whether the body has exercised a quasi-judicial function, and not the existence of a legislative scheme mandating notice and a hearing. Cherry Hills Resort Dev. Co. v. City of Cherry Hills Vill., 757 P.2d 622 (Colo. 1988); Widder v. Durango Sch. Dist. No. 9-R, 85 P.3d 518 (Colo. 2004).

If the governmental decision is likely to adversely affect the protected interests of specific individuals, and if a decision is to be reached through the application of preexisting legal standards or policy considerations to present or past facts, then the governmental body appears to be acting in a quasi-judicial capacity. Cherry Hills Resort Dev. Co. v. City of Cherry Hills Vill., 757 P.2d 622 (Colo. 1988); Widder v. Durango Sch. Dist. No. 9-R, 85 P.3d 518 (Colo. 2004).

A school district's decision about whether to terminate an employee who claims that he acted in good faith and in compliance with a conduct and discipline code involves a determination of the rights, duties, or obligations of specific individuals on the basis of presently existing standards to past or present facts. Widder v. Durango Sch. Dist. No. 9-R, 85 P.3d 518 (Colo. 2004).

Dual incorporation subject to jurisdiction. The county court was acting improperly in allowing both incorporations to proceed simultaneously, and it was proper for the district court to entertain an action to enforce this priority of jurisdiction, and to enter its order staying proceedings. Wiltgen v. Berg, 164 Colo. 139, 435 P.2d 378 (1967).

Court cannot prohibit duties where statute provides for review. Where the state board of medical examiners is proceeding pursuant to its statutory authority, a trial court has no authority to issue an absolute writ prohibiting the board from performing the duties imposed upon it by law, where a statute provides for reconsideration by the board of any orders issued by it and court review of any action taken in revoking a physician's license. Colo. State Bd. of Med. Exam'rs v. District Court, 138 Colo. 227, 331 P.2d 502 (1958).

Court lacks jurisdiction to compel stay in violation of statute. No discretion is afforded the annexing municipality. Section 31-8-118 (1), providing that judicial review shall not stay the application of annexation ordinances, is mandatory and therefore, absent a finding of inapplicability or unconstitutionality, the district court lacks jurisdiction to order the city to disobey the clear mandate of the statute. City of Westminster v. District Court, 167 Colo. 263, 447 P.2d 537 (1968).

No abuse of discretion where commissioner had not yet acted. There could be no abuse of discretion by the agriculture commissioner in conducting a hearing, for he had not yet acted when the order in the nature of prohibition was issued by the district court. The only basis which would support the district court's action would be that the commissioner lacked jurisdiction to proceed, and it is clear that there could be no such finding for the reason that the commissioner did and does have jurisdiction — sole and exclusive original jurisdiction. People ex rel. Orcutt v. District Court, 167 Colo. 162, 445 P.2d 887 (1968).

By holding a suspension hearing upon being advised that gambling activities had occurred on the licensed premises in violation of statute and departmental rule and regulation, the director of revenue was proceeding within his power, authority, and jurisdiction. The director had not yet acted in any manner whatsoever to the prejudice of the rights of the licensees. The trial court's rule prohibiting the director from proceeding with the hearing presumed that respondents' constitutional rights might be violated because a criminal proceeding had been previously commenced. No court can presume public officers will, in the performance of their duties, conduct their offices in an unlawful manner so as to deprive affected persons of their constitutional rights. The writ of prohibition was prematurely invoked in the trial court by respondents. People ex rel. Heckers v. District Court, 170 Colo. 533, 463 P.2d 310 (1970).

Eminent domain order was not abuse of discretion. In a proceeding in the nature of

prohibition brought pursuant to this rule, the trial court was held not to have exceeded its jurisdiction or abused its discretion in denying motion to dismiss condemnation proceedings and in finding that the parties to the condemnation proceedings had failed to reach an agreement as to the purchase price of the land thereby giving the trial court jurisdiction over such proceedings. Old Timers Baseball Ass'n v. Housing Auth., 122 Colo. 597, 224 P.2d 219 (1950).

Denial of pension not supported by evidence. The firemen's pension fund board of trustees did not exceed its jurisdiction nor abuse its discretion in denying the application for retirement and pension where the findings were based on conflicting evidence. Hubbard v. Pueblo Firemen's Pension Fund, 150 Colo. 495, 374 P.2d 492 (1962).

Decision of zoning authority not beyond its jurisdiction. The district court correctly determined that the board of adjustment did not exceed its jurisdiction or abuse its discretion when it allowed homeowner to repair stock car in his garage. A reviewing court should not lightly find an abuse of discretion where a zoning authority refuses to restrict an owner's use of his property upon the complaint of persons seeking to benefit their own property by imposing restrictions on another's use of his property. Shumate v. Zimmerman, 166 Colo. 488, 444 P.2d 872 (1968).

The director of the building department lawfully issued the permit in conformance with the practice and ordinances in effect at the time of the application; that the director's letter attempting to limit the height of the contemplated structure, and thus give effect to the height limitations of the "mountain view ordinance" adopted after the permit was issued, was based upon a strained and unrealistic interpretation of the nature of the permit. The permittee justifiably changed his position in reliance on the permit to his detriment, thus, in ordering the director to recognize the construction permit as a general building permit, not foundation permit, the board of appeals was acting within its delegated jurisdiction, and in so doing it did not abuse its discretion. Crawford v. McLaughlin, 172 Colo. 366, 473 P.2d 725 (1970).

The record shows that proper notice was given, that full public hearings were held, and that all of the procedural aspects required by ordinance and due process of law were followed meticulously by the city. The hearings did not produce any unanimity of opinion as to the desirability of the rezoning, but there was more than ample support in the evidence to warrant the council's conclusion that the intent and aims of the ordinance were well met by the proposed plan of the church. Plaintiffs, on the other hand, fell far short of showing that they had been deprived of any reasonable use of their property by operation of the zoning ordinance. As a matter of law the city council did not act unreasonably, arbitrarily, or abuse its discretion. Moore v. City of Boulder, 29 Colo. App. 248, 484 P.2d 134 (1971).

Sufficient standards in county zoning resolution for denial of special use. Where a county zoning resolution sets out general standards for granting or denying a special use, which include the requirements that the proposed use: (1) Will be in harmony and compatible with the character of the surrounding areas and neighborhood; (2) will be consistent with the county comprehensive plan; (3) will not result in an over-intensive use of land; (4) will not have a material adverse effect on community capital improvement programs; (5) will not require a level of community facilities and services greater than that which is available; (6) will not result in undue traffic congestion or traffic hazards; (7) will not cause significant air, water, or noise pollution; (8) will be adequately landscaped, buffered, and screened; and (9) will not otherwise be detrimental to the health, safety, or welfare of the present or future inhabitants of the county; and also provides that if a special use is granted, the commissioners may impose such conditions and safeguards as are necessary to insure compliance with these standards, these provisions provide sufficient standards for the denial of a special use. C & M Sand & Gravel v. Bd. of County Comm'rs, 673 P.2d 1013 (Colo. App. 1983).

Rezoning decision. The determination of whether a council reasonably applied statutory criteria in exercising its statutory power to rezone involves a consideration of whether the council abused its discretion or exceeded the bounds of its jurisdiction and is properly resolved in a certiorari proceeding under subsection (a)(4). Snyder v. City of Lakewood, 189 Colo. 421, 542 P.2d 371 (1975).

Landowner with land adjacent to or in vicinity of rezoned land may proceed under this rule. A landowner has standing to challenge a rezoning and then to seek review of the zoning authority's action under subsection (a)(4) if his land is adjacent to or in the vicinity of the land being rezoned, even though he may not live within the territory of the zoning authority. City of Thornton v. Bd. of County Comm'rs, 42 Colo. App. 102, 595 P.2d 264 (1979), aff'd, 629 P.2d 605 (Colo. 1981).

Plain language of zoning code authorizes zoning authorities of municipality, including planning commission, to review and deny the development plan of a permitted use. Because zoning code can and does grant such authority to the planning commission, the commission was authorized to deny a permitted use by means of the review criteria and, in doing so, did not abuse its discretion or exceed its juris-

diction. City of Colo. Springs v. Securcare Self Storage, Inc., 10 P.3d 1244 (Colo. 2000).

In connection with subsection (a)(4) proceeding, trial court abused its discretion when it failed to adopt reasonable interpretation by county board of adjustment (BOA) of county land use code (code) and when it ordered a remand to the BOA for additional findings based on court's own interpretation of those provisions. BOA did not abuse its discretion when it ruled that a lapse provision in the code did not apply to a special use permit because the permit had been issued before the provision's enactment. The BOA had adopted the construction of the code provided by the director of the county's land use department, which is a reasonable construction of the code provisions especially in light of the record. Sierra Club v. Billingsley, 166 P.3d. 309 (Colo. App. 2007).

Even assuming withholding by county land use official of copy of e-mail was in violation of Colorado Open Records Act (CORA), neither CORA nor subsection (a)(4) contains any provision that would authorize remand for reconsideration of determination by BOA that lapse provision contained in county land use code did not apply to special use permit in light of withholding copy of e-mail. Moreover, inclusion of withheld e-mail in administrative record of BOA was irrelevant to court's determination under subsection (a)(4). Even if the appropriate remedy were to remand for inclusion of e-mail in BOA's administrative record, document would not affect conclusion that BOA did not abuse its discretion when it ruled lapse provision did not apply to permit. Because BOA determined lapse provision did not apply, e-mail's assertion that special use had lapsed was irrelevant. Sierra Club v. Billingsley, 166 P.3d. 309 (Colo. App. 2007).

Standing to challenge annexation lacking under this rule. Standing to challenge zoning and standing to challenge annexation are quite different matters; proceedings of the former may be, and proceedings of the latter may not be, attacked under this rule. City of Thornton v. Bd. of County Comm'rs, 42 Colo. App. 102, 595 P.2d 264 (1979), aff'd, 629 P.2d 605 (Colo. 1981).

Finding of temporary disability unsupported by evidence is arbitrary. There is credible evidence in the record showing a permanent disability status; there is no evidence whatsoever to support the pension board's supplemental finding of a temporary disability status. The board in making its award on a temporary disability basis rather than on a permanent disability basis exercised its discretion arbitrarily and capriciously. Putnam v. Trustees of Police Pension Bd., 170 Colo. 278, 460 P.2d 778 (1969).

Refusal to hear jurisdiction question was abuse. In an action against nonresident defendants who are served with process by service upon an alleged agent, where one defendant moves to quash the service and the other defendant moves to dismiss the action, granting a motion to strike the motion to quash and the motion to dismiss is an abuse of discretion under this rule, since it denies such defendants a right to be fully heard on the question of the court's jurisdiction of the person. Bardahl Mfg. Corp. v. District Court, 134 Colo. 112, 300 P.2d 524 (1956).

To favor one applicant over another is discriminatory and suggests the exercise of an unwarranted and uncontrolled discretion on the part of the licensing authority. Thus, the issuance of a license to another person in an area shortly after applicant's application was rejected on the ground that the needs of the neighborhood were satisfied is arbitrary. Geer v. Presto, 135 Colo. 536, 313 P.2d 980 (1957).

Prohibition issues where accused is charged with offense outside court's jurisdiction. The general rule is that the writ of prohibition may not be used to test the sufficiency of an information; but this is subject to qualification, recognized in almost every jurisdiction, that where the accusation is not merely defective or technically insufficient, nor merely demurrable or subject to a motion to quash or set aside, but is elementary and fundamentally defective in substance, so that it charges a crime in no manner or form, an accused is entitled to have a writ of prohibition issue, or where it appears that the information charges an offense not within the jurisdiction of a trial court. Bustamante v. District Court, 138 Colo. 97, 329 P.2d 1013 (1958).

Regulations by county commissioners designed to depress property values with a view to future acquisition thereof may form the basis of a cause of action for compensation on the theory of inverse condemnation against the public entity initiating the regulation. Hermanson v. Bd. of County Comm'rs, 42 Colo. App. 154, 595 P.2d 694 (1979).

Where a decision of a county board of adjustment is challenged, that board is the "inferior tribunal" that is the subject of a subsection (a)(4) proceeding. Benes v. Jefferson County Bd. of Adjustment, 36 Colo. App. 131, 537 P.2d 753 (1975).

In an action challenging the legality of a special assessment by a city council, judicial review is obtained and is limited to certiorari under this rule. City & County of Denver v. District Court, 189 Colo. 342, 540 P.2d 1088 (1975).

Where city code of home-rule city did not specify nature of review from special assessment, it is appropriate that review be had under subsection (a)(4), which is specifically autho-

rized where there is no available plain, speedy, or adequate remedy. Orchard Court Dev. Co. v. City of Boulder, 182 Colo. 361, 513 P.2d 199 (1973).

Subsection (a)(4), is a proper vehicle for judicial review of special assessments levied under Boulder's home-rule powers. Cline v. City of Boulder, 35 Colo. App. 349, 532 P.2d 770 (1975).

Attacks on application of historical preservation ordinance. An allegation that the vagueness of an historical preservation ordinance is indicated by the fact that it does not show which design the historical commission will approve is not a facial constitutional attack, but rather a challenge upon the application of the ordinance, which must be brought under this rule. South of Second Assocs. v. Georgetown, 196 Colo. 89, 580 P.2d 807 (1978).

Refusal of city to issue multiple licenses under state law was ultra vires. Where the state fermented malt beverages act permits a licensee to hold multiple licenses, the city of Denver may not prohibit the issuance of more than one license. When a city is vested with authority to administer a statute and adopt regulations to enforce it, regulation must be within the perimeter of the statute. In prohibiting what it could only regulate, the city acted ultra vires. Big Top, Inc. v. Schooley, 149 Colo. 116, 368 P.2d 201 (1962).

Residents of neighborhood affected by liquor licensing decision may seek judicial review. Residents of a neighborhood affected by the granting of a liquor license, by virtue of that fact alone, have a strong interest in insuring that the liquor licensing procedure is fairly and properly administered, and are persons who may seek judicial review of liquor licensing decisions under this rule. Norris v. Grimsley, 41 Colo. App. 231, 585 P.2d 925 (1978).

Operator of competing liquor store lacks standing to appeal liquor licensing decision of a local authority, either under § 12-47-101 or as a person "substantially aggrieved" by the disposition of the case in the lower court pursuant to this rule, since economic injury from lawful competition does not confer standing to question the legality of a competitor's operations. Norris v. Grimsley, 41 Colo. App. 231, 585 P.2d 925 (1978).

Default judgment exceeded court's discretion and authority. The grant of a default judgment for failure of the civil service commission to timely request an extension of time for filing the record on review exceeded its discretion and authority when at the time of the hearing in the lower court on the motion for default, the record had been lodged and the merits of the case had been put in issue. Civil Serv. Comm'n v. Doyle, 162 Colo. 1, 424 P.2d 368 (1967).

Grant of discovery was abuse of discretion. Where no facts were presented which tended to indicate that the city council's zoning decision was irregular, invalid, arbitrary, and capricious or the result of an abuse of discretion, the district court abused its discretion under subsection (a)(4) of this rule by granting discovery. City of Colo. Springs v. District Court, 184 Colo. 177, 519 P.2d 325 (1974).

Civil service commission order justified relief. Refusal by the civil service commission to restore a former policeman to his previous position on the police force of Denver after his honorable discharge from the armed forces of the United States because he volunteered when he was in no immediate danger of being drafted was an abuse of discretion as contemplated by this rule and hence the district court had jurisdiction to reinstate him. Hanebuth v. Patton, 115 Colo. 166, 170 P.2d 526 (1946).

Where civil service commission specifically upheld findings of police chief that police officer was guilty under disciplinary charges that demonstrated a direct disregard for the public good and purposes of the police department, the commission's decision to suspend the officer rather than to discharge him as police chief had ordered was an invasion of authority delegated to police chief by city charter and constituted an abuse of discretion. Thomas v. City & County of Denver, 29 Colo. App. 442, 487 P.2d 591 (1971).

Because the civil service commission failed to tell the applicant why she was disqualified from employment, the applicant could not submit reasons and documentation in support of her appeal. The commission's denial of her appeal was, therefore, an abuse of discretion. Carpenter v. Civil Serv. Comm'n, 813 P.2d 773 (Colo. App. 1990).

Civil service commission decision not arbitrary, capricious, or without justification where commission deemed an assault committed by the plaintiff involved the use of force, was a misdemeanor crime of violence barring possession of a firearm under federal law, and plaintiff was thus subject to disqualification from employment as a police officer. Even though the municipal assault statute was broad enough to be violated without the use of physical force, it is appropriate to look at the charging documents as a whole to determine the precise crime of which the defendant was convicted. Ward v. Tomsick, 30 P.3d 824 (Colo. App. 2001).

Where zoning ordinance authorizes continuance, in separate provisions of both nonconforming uses and nonconforming structures and allows for change of nonconforming use to another nonconforming use but contains no provision relating to change of nonconforming structure to another nonconforming structure, any use change is required to be effected within existing structures or not at all, and board of adjustment has no authority to grant permit to

allow razing of nonconforming greenhouse and construction on the site of four apartment buildings as more restrictive nonconforming structures. City & County of Denver v. Bd. of Adjustment, 31 Colo. App. 324, 505 P.2d 44 (1972).

Setting of salaries is a legislative function, and the establishment of prevailing rates as an incident to fixing salaries is a quasi-legislative rather than a judicial or quasi-judicial function. Denver Police Protective Ass'n v. City & County of Denver, 665 P.2d 150 (Colo. App. 1983).

Vacating a roadway is a legislative act, and is not subject to review under this rule. Sutphin v. Mourning, 642 P.2d 34 (Colo. App. 1981).

Review of water ratemaking proceeding. Because a water ratemaking proceeding is a legislative action, subsection (a)(4) is not the proper vehicle for review of a ratemaking order of the county commissioners. Talbott Farms, Inc. v. Bd. of County Comm'rs, 43 Colo. App. 131, 602 P.2d 886 (1979).

Decisions by college or its president not subject to review under subsection (a)(4). Van Pelt v. State Bd. for Cmty. Colls. & Occupational Educ., 195 Colo. 316, 577 P.2d 765 (1978).

Private hospital board not inferior tribunal. A private hospital board is not a public agency and, therefore, not an "inferior tribunal" within the scope of subsection (a)(4). Even v. Longmont United Hosp. Ass'n, 629 P.2d 1100 (Colo. App. 1981); Green v. Lutheran Med. Ctr. Bd. of Dirs., 739 P.2d 872 (Colo. App. 1987).

Actions of municipal advisory board not reviewable. Actions by an advisory board reporting to a city council in an effort to set salaries of certain municipal employees are not subject to review under subsection (a)(4). Reeve v. Career Serv. Bd., 636 P.2d 1307 (Colo. App. 1981).

County board of commissioners' actions were quasi-legislative and not quasi-judicial and therefore not subject to judicial review under the arbitrary and capricious standard of subsection (a)(4). Dill v. Bd. of County Comm'rs of Lincoln County, 928 P.2d 809 (Colo. App. 1996).

Defense attorney's conduct in contesting court's refusal to allow withdrawal of guilty plea based on sentencing not contemplated in plea agreement was zealous representation of the client and did not constitute contempt because it did not create an obstruction which hindered the performance of the court's judicial duty. Jordan v. County Court, 722 P.2d 450 (Colo. App. 1986).

Trial court applied proper standard of review. In considering decision of board of adjustment, the trial court found competent evidence in the record to support the board's decision and that there was a reasonable basis for the agency's application of the law. Platte River Environ'l Conservation Org. v. Nat'l Hog Farms, Inc., 804 P.2d 290 (Colo. App. 1990).

Trial court did not err in reviewing PERA board's decision under subsection (a)(4) where it was held that PERA trustees' fiduciary duties did not prevent them from performing quasi-judicial functions in determining member's eligibility for disability benefits, and thereby did not exceed its jurisdiction nor were certain board rules ultra vires. Tepley v. Pub. Emp. Retirement Ass'n, 955 P.2d 573 (Colo. App. 1997).

District court does not have jurisdiction to review a county court's finding of probable cause pursuant to this section. Defendant may seek extraordinary relief under C.A.R. 21. Abbott v. County Ct. in & for County of Grand, 886 P.2d 730 (Colo. 1994).

Review pursuant to this rule is available for nonfactual procedural matters in preliminary hearing. Abbott v. County Ct. in & for County of Grand, 886 P.2d 730 (Colo. 1994).

Action for review for an abuse of discretion under subsection (a)(4) of this rule was not appropriate where the statute limited the school district board of education's discretion in determining whether to renew a probationary teacher's employment contract. Section 22-32-110 (4)(c), prohibits the board from using as grounds for nonrenewal any actions taken by the probationary teacher in good faith and in compliance with the school district's discipline policy. Since there is no remedy provided if the school board violates this prohibition, the probationary teacher's action in seeking mandamus, rather than review of an abuse of discretion, was appropriate. McIntosh v. Bd. of Educ. of Sch. Dist. No. 1, 999 P.2d 224 (Colo. App. 2000).

District court has the authority to review an action of a board of education for an abuse of discretion under this rule and § 22-33-108. Nichols ex rel. Nichols v. DeStefano, 70 P.3d 505 (Colo. App. 2002), aff'd by operation of law, 84 P.3d 496 (Colo. 2004).

Applied in Protect Our Mountain v. District Court, 677 P.2d 1361 (Colo. 1984); Montoya v. Career Serv. Bd., 708 P.2d 478 (Colo. App. 1985); Fisher v. County Court, 718 P.2d 549 (Colo. App. 1986); Krupp v. Breckenridge Sanitation Dist., 1 P.3d 178 (Colo. App. 1999).

VI. OTHER WRITS.

Law reviews. For article, "One Year Review of Contracts", see 34 Dicta 85 (1957).

Annotator's note. Since subsection (a)(5) of this rule is similar to §§ 255 through 260 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant case construction of those sec-

tions have been included in the annotations to this rule.

Remedy is exclusive. The method provided by subsection (a)(5), whereby partners not served in an action against a partnership may be made individually liable on the judgment rendered therein against the partnership, is exclusive. Blythe v. Cordingly, 20 Colo. App. 508, 80 P. 495 (1905).

Subsection (a)(5) does not provide an "alternate, cumulative remedy" to § 13-50-105 that a party may elect in lieu of naming a defendant during the pendency of an action where a corporate respondent was a member of the partnership whose identity was known by plaintiff but not named in the original action based upon a friendship with plaintiff's counsel. Gutrich v. LaPlante, 942 P.2d 1266 (Colo. App. 1996), aff'd sub nom. Gutrich v. Cogswell & Wehrle, 961 P.2d 1115 (Colo. 1998).

Subsection (a)(5) may provide relief in the context of partnership law when: (1) The plaintiff could not have determined the existence or status of individual partners despite reasonable attempts to ascertain their identities; (2) the plaintiff could not bring about personal jurisdiction in the original action; or (3) some other reason beyond the plaintiff's control prevented the plaintiff from naming and serving the individual partners. Gutrich v. Cogswell & Wehrle, 961 P.2d 1115 (Colo. 1998).

Show cause rule remedies nondisclosure of partnership interest. Although application to add an additional party was not made at the time of the trial when the facts appeared, no injury could obtain by requiring the wife to show cause why she is not liable to answer under this judgment. Had she and her husband properly demeaned themselves concerning the matter of revealing to the public by proper affidavit the status of their partnership business interests, she would no doubt have been made a party defendant in the original action. The judgment creditor had a right to rely upon the record at the time of filing his action. To now deny plaintiff the right to discover the true interest entering into the judgment would be to reward people for misrepresentation and nondisclosure to the injury and detriment upon a relying public. Womack v. Grandbush, 134 Colo. 1, 298 P.2d 735 (1956).

Creditor entitled to rule against active partner not of record. Where a husband and wife were active partners in an enterprise, but the public records did not disclose that the wife had an interest therein, a creditor who obtains a judgment against the husband on a partnership obligation in an action to which the wife was not made a party is entitled to a rule on the wife under subsection (a)(5) to show cause why she should not be held to answer for the judgment. Womack v. Grandbush, 134 Colo. 1, 298 P.2d 735 (1956).

When judgment may be rendered. The only judgment which can be rendered against a copartnership on a firm debt or obligation is one against the copartnership jointly, and the partners summoned or appearing, whether the summons is served upon all or one or more of the defendants. Blythe v. Cordingly, 20 Colo. App. 508, 80 P. 495 (1905).

Partnership interest of nonparty subject to judgment lien. A judgment against one partner is not effective against another partner not made a party to the action, nor against the partnership where the partnership was not sued, except that the partnership interest of the partner sued is subject to the judgment lien to the extent of such interest and such partner's interest therein may be sold on execution. Womack v. Grandbush, 134 Colo. 1, 298 P.2d 735 (1956).

Subsection (a)(5) permits a trial court to issue a show-cause order, analogous to a writ of scire facias, to partners who were neither named nor served originally in an action against the partnership. Federal Deposit Ins. Corp. v. Wells Plaza Ltd. P'ship, 826 P.2d 427 (Colo. App. 1992).

Subsection (a)(5) was designed to provide relief, previously available under the writ of scire facias, as a post-judgment remedy permitting a creditor to collect on an existing yet unsatisfied judgment. It is not a substitute for maintaining an action where remedies are available to a person under statutory provisions. Gutrich v. Cogswell & Wehrle, 961 P.2d 1115 (Colo. 1998).

Because the fire and police pension association is not an agency of state government, the standard of review of a decision of the association is not whether there is "substantial evidence" under § 24-4-106 (7), of the State Administrative Procedure Act, but rather, whether there is "no competent evidence" under subsection (a)(4) to support the decision. Pueblo v. Fire & Police Pension Ass'n, 827 P.2d 597 (Colo. App. 1992).

This rule merely abolished the form and not the substance of remedial writs such as the writ of ne exeat. A district court still possesses the authority to issue a writ in the nature of ne exeat, which is designed to prevent a person from leaving the court's jurisdiction. In re People ex rel. B.C., 981 P.2d 145 (Colo. 1999).

Rule 106.5. Correctional Facility Quasi-Judicial Hearing Review

(a) Scope. This rule applies to every action brought by an inmate to review a decision resulting from a quasi-judicial hearing of any facility of the Colorado Department of

Corrections ("CDOC") or any private facility in Colorado involving a CDOC inmate for events that occurred at the facility. To the extent this rule does not cover procedures in such cases, the parties shall follow C.R.C.P. 106(a)(4). All other provisions of C.R.C.P. 106(a)(4) shall apply except where modified by this Rule 106.5. The provisions of C.R.C.P. 106(b) and C.R.C.P. 5 shall govern all cases brought under this Rule 106.5.

(b) Designation of Defendant. Only the Executive Director of the CDOC and the Warden of the facility shall be named as Defendants and shall be listed as such. The District Court shall dismiss any other Defendant.

(c) Venue. All actions under this rule shall be filed in the district court in the county in which the quasi-judicial agency action occurred, even if the inmate is no longer assigned to that facility at the time the complaint is filed.

(d) Service of Process.

(1) If the inmate does not qualify for *in forma pauperis* status, the rules relating to service of process set forth in C.R.C.P. 4(e)(10) shall apply, but only the Warden, the Executive Director of the Department of Corrections, and the Attorney General shall be served.

(2) If the inmate files a motion to proceed *in forma pauperis* status and that motion is granted, service of process shall be accomplished in the following manner: The clerk of the District Court shall scan the complaint and serve it by electronic means on the Attorney General, the Executive Director of the Department of Corrections, and the Warden of the Facility (or the designee of each of these officials), along with a notice indicating the fact of the inmate's filing and the date received by the Court. Each person notified shall send an acknowledgment by electronic means indicating that the specified official has received the electronic notice and the scanned copy of the complaint.

(e) Response of Defendant. Within 21 days after the date on which the Attorney General sends acknowledgment that it has received the notice and complaint from the Clerk of the District Court, the Defendants shall file either (1) an answer to the complaint and a certified copy of the record as explained below, or (2) a motion in response to the complaint.

(f) Notice to Submit Record. The facility shall file the certified record and affidavit of certification directly to the Court no later than the deadline to file an answer or motion as indicated above. This obligation to submit the record shall not apply if the Attorney General notifies the Warden within 14 days of the electronic service that a motion to dismiss the complaint for lack of subject matter jurisdiction has been filed, in which event the filing of the record shall be suspended pending disposition of the motion.

(g) Contents of the Record. The certified record submitted by the Warden to the District Court shall contain all material related to the proceeding at the facility to permit the Court to address the issues raised in the complaint. The record shall include the Notice of Charges, the Disposition of Charges, the Offender Appeal Form, all exhibits offered at the hearing, and the current applicable version of the Code of Penal Discipline. If any part of the proceeding was recorded, a copy of the recording shall be provided.

(h) Cost of the Record. The cost of preparation of the record shall initially be paid by the Warden but, upon the filing of the certified record with the Court, the Warden shall immediately deduct the cost of preparation of the record, including the recording, from the inmate's account. If there are insufficient funds in that account, the Warden shall apply a charge to that account. In no event shall the filing of the record be delayed because the inmate has no assets and no means by which to pay the cost of certification of the record.

(i) Briefs.

(1) If counsel for the Defendants files a motion to dismiss, the inmate shall have 14 days after service of the motion to file a brief in response, and the defense counsel shall have 14 days after service of the response to file a reply.

(2) If the defense counsel files an answer and the Warden files the certified record, the inmate shall have 42 days following notice of filing of the record in which to file a brief. In this event, the brief shall set forth the reasons why the inmate believes that the District Court should rule that the Warden has exceeded his or her jurisdiction or abused his or her discretion. The inmate must set forth in the brief specific references to the record that support the inmate's position. Defense counsel shall have 35 days after service of the brief

to file a response and the inmate shall have 14 days after service of the response to file a reply.

(j) Time Periods. The parties shall follow the time periods set forth above unless the Court, on motion and for good cause shown, enters an order altering those time periods.

(k) Promulgation of Rule. A copy of this Rule 106.5 shall be made available in the law library of every facility operated by the Colorado Department of Corrections and every private prison in Colorado that houses CDOC inmates.

Source: Entire rule added and effective February 7, 2008; (e), (f), and (i) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

ANNOTATION

Because private prison lacks authority to make a final determination on a disciplinary action that affects the liberty of an inmate, timely filing of an appeal is measured from the date of the private prisons monitoring unit's decision and not the date of the warden's decision. Geerdes v. Colo. Dept. of Corr., 226 P.3d 1261 (Colo. App. 2010).

Rule 107. Remedial and Punitive Sanctions for Contempt

(a) Definitions. (1) Contempt: Disorderly or disruptive behavior, a breach of the peace, boisterous conduct or violent disturbance toward the court, or conduct that unreasonably interrupts the due course of judicial proceedings; behavior that obstructs the administration of justice; disobedience or resistance by any person to or interference with any lawful writ, process, or order of the court; or any other act or omission designated as contempt by the statutes or these rules.

(2) Direct Contempt: Contempt that the court has seen or heard and is so extreme that no warning is necessary or that has been repeated despite the court's warning to desist.

(3) Indirect Contempt: Contempt that occurs out of the direct sight or hearing of the court.

(4) Punitive Sanctions for Contempt: Punishment by unconditional fine, fixed sentence of imprisonment, or both, for conduct that is found to be offensive to the authority and dignity of the court.

(5) Remedial Sanctions for Contempt: Sanctions imposed to force compliance with a lawful order or to compel performance of an act within the person's power or present ability to perform.

(6) Court: For purposes of this rule, "court" means any judge, magistrate, commissioner, referee, or a master while performing official duties.

(b) Direct Contempt Proceedings. When a direct contempt is committed, it may be punished summarily. In such case an order shall be made on the record or in writing reciting the facts constituting the contempt, including a description of the person's conduct, a finding that the conduct was so extreme that no warning was necessary or the person's conduct was repeated after the court's warning to desist, and a finding that the conduct is offensive to the authority and dignity of the court. Prior to the imposition of sanctions, the person shall have the right to make a statement in mitigation.

(c) Indirect Contempt Proceedings. When it appears to the court by motion supported by affidavit that indirect contempt has been committed, the court may ex parte order a citation to issue to the person so charged to appear and show cause at a date, time and place designated why the person should not be punished. The citation and a copy of the motion, affidavit and order shall be served directly upon such person at least 21 days before the time designated for the person to appear. If such person fails to appear at the time so designated, and it is evident to the court that the person was properly served with copies of the motion, affidavit, order, and citation, a warrant for the person's arrest may issue to the sheriff. The warrant shall fix the date, time and place for the production of the person in court. The court shall state on the warrant the amount and kind of bond required. The person shall be discharged upon delivery to and approval by the sheriff or clerk of the

bond directing the person to appear at the date, time and place designated in the warrant, and at any time to which the hearing may be continued, or pay the sum specified. If the person fails to appear at the time designated in the warrant, or at any time to which the hearing may be continued, the bond may be forfeited upon proper notice of hearing to the surety, if any, and to the extent of the damages suffered because of the contempt, the bond may be paid to the aggrieved party. If the person fails to make bond, the sheriff shall keep the person in custody subject to the order of the court.

(d) Trial and Punishment. (1) Punitive Sanctions. In an indirect contempt proceeding where punitive sanctions may be imposed, the court may appoint special counsel to prosecute the contempt action. If the judge initiates the contempt proceedings, the person shall be advised of the right to have the action heard by another judge. At the first appearance, the person shall be advised of the right to be represented by an attorney and, if indigent and if a jail sentence is contemplated, the court will appoint counsel. The maximum jail sentence shall not exceed six months unless the person has been advised of the right to a jury trial. The person shall also be advised of the right to plead either guilty or not guilty to the charges, the presumption of innocence, the right to require proof of the charge beyond a reasonable doubt, the right to present witnesses and evidence, the right to cross-examine all adverse witnesses, the right to have subpoenas issued to compel attendance of witnesses at trial, the right to remain silent, the right to testify at trial, and the right to appeal any adverse decision. The court may impose a fine or imprisonment or both if the court expressly finds that the person's conduct was offensive to the authority and dignity of the court. The person shall have the right to make a statement in mitigation prior to the imposition of sentence.

(2) Remedial Sanctions. In a contempt proceeding where remedial sanctions may be imposed, the court shall hear and consider the evidence for and against the person charged and it may find the person in contempt and order sanctions. The court shall enter an order in writing or on the record describing the means by which the person may purge the contempt and the sanctions that will be in effect until the contempt is purged. In all cases of indirect contempt where remedial sanctions are sought, the nature of the sanctions and remedies that may be imposed shall be described in the motion or citation. Costs and reasonable attorney's fees in connection with the contempt proceeding may be assessed in the discretion of the court. If the contempt consists of the failure to perform an act in the power of the person to perform and the court finds the person has the present ability to perform the act so ordered, the person may be fined or imprisoned until its performance.

(e) Limitations. The court shall not suspend any part of a punitive sanction based upon the performance or non-performance of any future acts. The court may reconsider any punitive sanction. Probation shall not be permitted as a condition of any punitive sanction. Remedial and punitive sanctions may be combined by the court, provided appropriate procedures are followed relative to each type of sanction and findings are made to support the adjudication of both types of sanctions.

(f) Appeal. For the purposes of appeal, an order deciding the issue of contempt and sanctions shall be final.

Source: Entire rule amended and adopted, January 26, 1995, effective April 1, 1995; (b) corrected and effective, June 15, 1995; (c) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Cross references: For failure to comply with deposition order, see C.R.C.P. 37(b)(1); for disobedience of writ of habeas corpus by jailer, see § 13-45-113, C.R.S.; for refusal to answer questions of the assessor concerning taxable property, see § 39-5-119, C.R.S.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For comment on Shapiro v. Shapiro, appearing below, see 20 Rocky Mt. L. Rev. 313 (1948). For article, "One Year Review of Civil Procedure and Appeals", see 39 Dicta 133 (1962). For article, "Enforcing Family Law Orders Through Contempt Proceedings Under C.R.C.P. 107", see 332 Colo. Law. 75 (March 2003). For article, "Proper Application of CRS § 15-12-723 for Recovery of Estate Assets", see 32 Colo. Law. 59 (May 2003). For article, "Advice to Attorneys on Contempt", see 41 Colo. Law. 79 (January 2012).

Annotator's note. Since C.R.C.P. 107, is similar to §§ 166 and 356 through 369 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing those sections have been included in the annotations to this rule.

This rule applies to both civil and criminal contempt. In re Stone, 703 P.2d 1319 (Colo. App. 1985).

As part of its inherent authority to issue orders that are necessary for the performance of judicial functions, a court has the power to enforce obedience to its orders through contempt sanctions. People v. McGlotten, 134 P.3d 487 (Colo. App. 2005).

The power to punish for contempt is a judicial power within the meaning of the constitution, and it belongs exclusively to the courts except in cases where the constitution confers such power upon some other body. People v. Swena, 88 Colo. 337, 296 P. 271 (1931).

A finding of contempt is within the discretion of the trial court, and its ruling will not be disturbed on appeal absent an abuse of discretion. In re Gomez, 728 P.2d 747 (Colo. App. 1986); In re Roberts, 757 P.2d 1108 (Colo. App. 1988).

Nothing in this rule or the forcible entry and detainer (FED) statute precludes the remedy of contempt in an FED action under appropriate circumstances. Hartsel Springs Ranch v. Cross Slash Ranch, 179 P.3d 237 (Colo. App. 2007).

A finding of contempt can be brought under this rule and proved with evidence other than jury deliberation, provided the prosecution can show beyond a reasonable doubt the following elements: (1) The prospective juror knowingly and willfully gave an untruthful answer or deliberately failed to disclose information during voir dire in response to a specific question asked; (2) the purpose of the juror's untruthful answer or nondisclosure was to gain acceptance on the jury and to obstruct the administration of justice; and (3) the juror's untruthful answer or nondisclosure did obstruct the administration of justice. People v. Kriho, 996 P.2d 158 (Colo. App. 1999).

Court must make findings in both types of contempt procedures. For contempt in the presence of the court, the judgment must recite the facts constituting the contempt. For contempt out of the presence of the court, the judgment must include, among other considerations, a finding that the court's order has not been complied with. In re McGinnis, 778 P.2d 281 (Colo. App. 1989).

The power to punish for contempt is inherent in all courts. Allen v. Bailey, 91 Colo. 260, 14 P.2d 1087 (1932).

Jurisdiction to punish contempt rests solely in contemned court; no court can try a contempt against another. Gonzales v. District Court, 629 P.2d 1074 (Colo. 1981).

A court's right of self-preservation is not limited by statutory enumeration of causes of contempts. Hughes v. People, 5 Colo. 436 (1880).

The power to punish for contempt should be used sparingly, with caution, deliberation, and due regard to constitutional rights; it should be exercised only when necessary to prevent actual, direct obstruction of, or interference with, the administration of justice. In re People in Interest of Murley, 124 Colo. 581, 239 P.2d 706 (1951); Conway v. Conway, 134 Colo. 79, 299 P.2d 509 (1956).

Intent to interfere with administration of justice not required for contempt finding; rather, the intent is a guide to be used by the trial court in exercising its discretion to punish. In re Stone, 703 P.2d 1319 (Colo. App. 1985).

This rule does not purport to limit the application of contempt to parties, officers of the court, or those subject to direct orders. Rather, the rule defines contempt broadly to include any conduct by any person that obstructs or interferes with judicial proceedings. In re Lopez, 109 P.3d 1021 (Colo. App. 2004).

Correction officials are officers of the court whose compliance with a mittimus directing them to take custody of a juvenile could be enforced by a contempt proceeding. People in Interest of S.C., 802 P.2d 1101 (Colo. App. 1989).

Judge conducting a settlement conference has the same authority to impose sanctions as the trial judge for conduct related to the settlement conference which interferes with the functions of the court. Halaby, McCrea & Cross v. Hoffman, 831 P.2d 902 (Colo. 1992).

Language in this rule authorizing district court to sanction an "officer of the court" does not include a judge who is presiding over the same case in which the alleged contempt has taken place. People v. Proffitt, 865 P.2d 929 (Colo. App. 1993).

A remedial contempt order only describes the means by which the contempt can be purged and the sanctions that will be in effect until the contempt is purged. Other than costs and reasonable attorney fees, a trial court is without authority to require, as a remedial sanction, monetary payments that do not force compliance with or performance of a court order. Sec. Investor Prot. Corp. v. First Entm't Holding Corp., 36 P.3d 175 (Colo. App. 2001).

Attorney fees can be awarded under subsection (d)(2) only as a component of remedial sanctions; however, under subsection (a)(1)(5), a remedial sanction must include a purge clause. Where the contemnor commits a one-time violation, incapable of being purged, attorney fees may not be assessed as a remedial sanction. Thus, a punitive sanction, such as a fine or imprisonment, is the only avenue for punishment. No remedial sanction was imposed, nor could one have been. The CAT scan contempt constituted a one-time violation of a 2007 order committed over a year before father even raised the issue with the court. By that time, mother could not undo what she had done. In re Webb, __ P.3d __ (Colo. App. 2011).

A pro se attorney litigant is not necessarily precluded from an attorney fee award under either section (d)(2) of this rule or § 13-17-102 in a contempt proceeding. Wimmershoff v. Finger, 74 P.3d 529 (Colo. App. 2003).

Not error for defendants' counsel to have been permitted to prosecute the contempt proceedings. Conduct that is found to be offensive to the authority and dignity of the court pursuant to this rule is not criminal conduct, and contempt is not a statutory criminal offense. The power to impose punitive sanctions for such conduct is an inherent and indispensable power of the court. It is not derived from statute and exists independent of legislative authority. Eichhorn v. Kelley, 111 P.3d 544 (Colo. App. 2004).

Lack of an express grant of authority in the Colorado Rules for Magistrates to award attorney fees on review does not divest or otherwise curtail the district court's already existing authority to make such an award under section (d)(2). In re Naekel, 181 P.3d 1177 (Colo. App. 2008).

Applied in Catron v. Catron, 40 Colo. App. 476, 577 P.2d 322 (1978); Cavanaugh v. State, Dept. of Soc. Servs., 644 P.2d 1 (Colo. 1982); People v. Coyle, 654 P.2d 815 (Colo. 1982); Menin v. County Court, 697 P.2d 398 (Colo. App. 1984).

II. DEFINITION.

A. In General.

Contempt consists as well in the manner of the person committing it as in the subject-matter of its foundation. Matters which, if true, would in their very nature be scandalous may be presented, hinted at, or brought to the attention of the court in so respectful a manner that no judge would ever think to construe a contempt therefrom; while, on the other hand, it is easy to see when, under the guise and pretense of setting out privilege and necessary matters, circumstances are detailed, and scandalous and insulting charges and innuendos are made and insinuated upon pretended "information and belief" in manner that bears the unmistakable earmarks of malice and deliberate contempt. Hughes v. People, 5 Colo. 436 (1880).

The question of contempt does not depend on intention, although, where the contempt was intended, this is an aggravating feature which goes to the gravamen of the offense. Hughes v. People, 5 Colo. 436 (1880); In re People in Interest of Murley, 124 Colo. 581, 239 P.2d 706 (1951).

Rule is applicable to criminal contempt. This rule clearly includes a definition encompassing, and procedures governing, both civil and criminal contempt. People v. Razatos, 699 P.2d 970 (Colo. 1985).

Distinction between civil and criminal contempts. Contempts of court are civil where they consist in the disobedience of some judicial order entered for the benefit or advantage of another party to the proceeding and criminal where there are acts disrespectful to the court or its process, or obstructing the administration of justice, or tending to bring the court into disrepute. Wyatt v. People, 17 Colo. 252, 28 P. 961 (1892).

Two types of civil contempt are recognized: One, consisting of a present refusal to perform an act in the power of the person to perform, which normally constitutes injury to others for whose benefit it is required; the other, conduct which is derogatory to the authority or dignity of the court. In the former case, the court may order the respondent imprisoned, not for a definite time, but until he performs the act which he is commanded and is able to perform; in the latter case, the court may order punishment to vindicate the dignity of the court by fine or imprisonment, or both, which should be definite as to amount and time, regardless of subsequent compliance with the court order. In the former case, the court must, upon hearing, make a finding both of the facts constituting contempt and of a present duty and ability to perform; in the latter case, the court must make a finding of facts constituting misbehavior and that the conduct is offensive to the authority and dignity of the court. In re People in Interest of Murley, 124 Colo. 581, 239 P.2d 706 (1951).

Rules for civil contempt may guide, but do not control, procedures for prosecuting criminal contempt. People v. Tyer, 796 P.2d 15 (Colo. App. 1990).

B. Misbehavior.

There is no exact rule to define such contempts; but any disorderly conduct calculated to interrupt the proceedings; any disrespect or insolent behavior toward the judges presiding; any breach of order, decency, decorum, either by parties and persons connected with the tribunal, or by strangers present; or, a fortiori, any assault made in view of the court is punishable in this summary way. Hughes v. People, 5 Colo. 436 (1880).

Contempt by press. Courts have the inherent power to summarily convict and punish for a contempt of court those responsible for articles published in reference to a cause pending when such articles are calculated to interfere with the due administration of justice in such cause. Neither the statutes nor the constitution present any barrier to the exercise of such powers, and the power to punish summarily in such cases is essential to the very existence of a court, since the contrary rule would place it in the power of a vicious person to so conduct himself as to prevent any kind of a trial. Cooper v. People ex rel. Wyatt, 13 Colo. 337, 22 P. 790 (1889).

The press may without liability to punishment for contempt challenge, in the interest of the public good, the conduct of judges and other court officers and also of parties, jurors, and witnesses in connection with causes that have been wholly determined. It may also fairly and reasonably review and comment upon court proceedings from day to day as they take place. Cooper v. People ex rel. Wyatt, 13 Colo. 337, 22 P. 790 (1889).

C. Disobedience of Court Orders.

Law reviews. For article, "The Enforcement of Divorce Decrees in Colorado", see 21 Rocky Mt. L. Rev. 364 (1949).

Refusal to obey an order of court entered in connection with a criminal investigation is a criminal contempt. Mainland v. People, 111 Colo. 198, 139 P.2d 366 (1943).

In order for court to enter punitive order in a criminal contempt proceeding, the court must find that the alleged contemner's behavior constitutes noncompliance with the court order and that such conduct is offensive to the authority and dignity of the court. Griffin v. Jackson, 759 P.2d 839 (Colo. App. 1988).

Where an order of the court is made in a civil action, its violation constitutes a civil, not a criminal, contempt. Zobel v. People ex rel. Kyle, 49 Colo. 142, 111 P. 846 (1910).

Disobedience of a lawful order made by the court for the benefit of a private litigant comes clearly within this rule. Zobel v. People ex rel. Kyle, 49 Colo. 142, 111 P. 846 (1910).

Contempt of supreme court rule is punishable and enforceable by lower court before whom contempt occurred. Wooden v. Park Sch. District, 748 P.2d 1311 (Colo. App. 1987).

A person who has actual notice of an injunctive order violates it at his peril. People ex rel. Darby v. District Court, 19 Colo. 343, 35 P. 731 (1894).

Contempt proceedings are equally available to enforce a judgment determining the property rights of the parties to a divorce proceeding, as are orders for the payment of alimony, counsel fees, and other costs. Harvey v. Harvey, 153 Colo. 15, 384 P.2d 265 (1963).

Court may exercise power of contempt to enforce orders entered in a dissolution of marriage proceeding. Gonzales v. District Court, 629 P.2d 1074 (Colo. 1981).

A district court which has entered a decree of dissolution possesses continuing in personam and subject matter jurisdiction to enforce its child support orders by punishing a noncomplying obligor for contempt of court. Gonzales v. District Court, 629 P.2d 1074 (Colo. 1981).

There is a distinction between a contempt proceeding and an action to collect accrued alimony or support installments. Hauck v. Schuck, 143 Colo. 324, 353 P.2d 79 (1960).

One who refuses to pay money belonging to an estate into court in compliance with a judicial order is guilty of civil contempt. Munson v. Luxford, 95 Colo. 12, 34 P.2d 91 (1934).

Where the contempt order is based on the failure of the husband to obtain drug counseling, the order is remedial in nature and the trial court must specify how the husband may purge himself of that contempt. In re Zebedee, 778 P.2d 694 (Colo. App. 1988).

Post-dissolution contempt proceeding to enforce permanent orders is remedial in nature if the court's order imposes remedial sanctions such as an attorney fees award, a requirement to pay amounts due plus arrearages, and the initial suspension of a sentence to imprisonment, but the order does not contain language concerning vindication of the court's authority and dignity. In re Lodeski, 107 P.3d 1097 (Colo. App. 2004).

Court reporters may be held in contempt for failing to produce transcripts in a timely manner. People v. McGlotten, 134 P.3d 487 (Colo. App. 2005).

Constructive contempt. Where a court having jurisdiction has ordered the payment of money into the registry of the court and the person to whom the order is directed fails to make the payment as commanded and contempt proceedings are instituted, the alleged contempt is constructive or indirect. Urbancich v. Mayberry, 124 Colo. 311, 236 P.2d 535 (1951).

The violation of the term of a decree in a quiet-title action is not contempt of court unless the decree contained a mandatory or pro-

hibitive provision. McMullin v. City & County of Denver, 125 Colo. 231, 242 P.2d 240 (1952).

Interference with a water commissioner in the discharge of his official duties does not constitute contempt of court within this rule declaring disobedience to any lawful writ, order, rule, or process issued by the court to be a contempt, since he is not an officer of the court in which the decree of priorities is entered under which he is distributing water, being appointed by the governor and, to a certain extent, being under the control and direction of the irrigation division engineer and the state engineer. Roberson v. People ex rel. Soule, 40 Colo. 119, 90 P. 79 (1907).

No contempt where one is unable to comply with court order. There was insufficient evidence, as a matter of law, to support the conclusion of the judge that the respondents had neglected or refused to comply with the writs of habeas corpus, which was the contempt with which they were charged, where the respondents could not produce children in court against the wishes of the mother, who had continuous control and custody. Eatchel v. Lanphere, 170 Colo. 545, 463 P.2d 457 (1970).

A mittimus issued by the district court ordering corrections officials to take custody of state prisoners is not a basis for contempt where the corrections officials lack the ability to admit the prisoners. People v. Lockhart, 699 P.2d 1332 (Colo. 1985).

Correction officials were guilty of contempt for disobeying a mittimus directing them to take custody of a juvenile, where their duty to take custody of the juvenile was statutorily mandated and adequate funds would have been available throughout the juvenile's period of commitment to enable the officials to take custody of the juvenile. Under such circumstances, the existence of a blanket administrative policy of refusing admittance to such juveniles, which was instituted because the department was running out of money, is not a defense. People in Interest of S.C., 802 P.2d 1101 (Colo. App. 1989).

Insufficient basis for contempt and abuse of trial court's discretion where attorney made a single comment, "Sir, it does not.", to the judge concerning a reference in the Code of Professional Responsibility. The test is whether or not the comment constitutes an obstruction of the court's administration of justice or operates to bring the judiciary into disrespect or disregard. Hill v. Boatright, 890 P.2d 180 (Colo. App. 1994), aff'd in part and rev'd in part on other grounds sub nom. Boatright v. Derr, 919 P.2d 221 (Colo. 1996).

Record does not support judge's finding that defense counsel violated the court's previous rulings. Therefore, the court abused its discretion in finding defense counsel in contempt. People v. Jones, 262 P.3d 982 (Colo. App. 2011).

Contempt of a court order does not supercede requirement to set a hearing pursuant to § 13-54.5-109 (1)(a). The court may not sanction a party for his or her failure to comply with a court order by refusing to set or by suspending a hearing on an objection or claim of exemption. The setting of a hearing is mandatory, not discretionary. Borrayo v. Lefever, 159 P.3d 657 (Colo. App. 2006).

Bankruptcy stay applicable to civil contempt action for post-divorce enforcement of separation agreement. The nature of the contempt action is determined by review of the purpose and character of the sanctions imposed against the contemnor. Where the contemnor had the ability to request reconsideration of the jail time once payment was made; the sanctions were designed to force payment to a third party, not to uphold the dignity of the court; the court imposed attorney fees for the enforcement proceeding; and the court's primary consideration was the impact on third parties, the contempt action was remedial in nature. In re Weis, 232 P.3d 789 (Colo. 2010).

Contemnor cannot turn an enforcement action into a criminal matter outside of the automatic bankruptcy stay simply by requesting punitive sanctions. In re Weis, 232 P.3d 789 (Colo. 2010).

III. DIRECT CONTEMPT.

In the absence of statutory regulation, courts may deal with matter of contempt in a summary manner. Guiraud v. Nevada Canal Co., 79 Colo. 289, 245 P. 485 (1926).

This rule permits summary punishment of a contemner for acts committed in the court's presence. DeMott v. Smith, 29 Colo. App. 531, 486 P.2d 451 (1971).

The summary contempt power may be used to punish acts or conduct which take place in the immediate presence of the court and are witnessed by the trial judge. Losavio v. District Court, 182 Colo. 180, 512 P.2d 266 (1973).

The summary contempt power is necessary to insure and preserve decorum in the courtroom. People v. Ellis, 189 Colo. 378, 540 P.2d 1082 (1975).

The summary contempt power is ample to prevent disruption and provides the trial judge with the power to punish contemptuous conduct which occurs in his presence. People v. Ellis, 189 Colo. 378, 540 P.2d 1082 (1975).

Design of contempt power. The power of a judge to punish contempt committed in his presence is not designed to protect his own dignity or person, but to protect the rights of litigants and the public by ensuring that the administration of justice shall not be thwarted

or obstructed. Losavio v. District Court, 182 Colo. 180, 512 P.2d 266 (1973).

Summary punishment for contempt is permitted because a court could not properly administer justice if disturbances within the courtroom could not be suppressed by immediate punishment. Losavio v. District Court, 182 Colo. 180, 512 P.2d 266 (1973).

Punishment for contempt can only be imposed summarily when a direct contempt is committed; that is, when the judge has personal knowledge of the act which has disrupted court proceedings or demonstrated the contemner's disrespect for the court. Losavio v. District Court, 182 Colo. 180, 512 P.2d 266 (1973).

Summary punishment for contempt of court must be strictly confined to those instances where the contemptuous conduct occurs in open court and is seen or heard by the trial judge. Losavio v. District Court, 182 Colo. 180, 512 P.2d 266 (1973); Dooley v. District Court, 811 P.2d 809 (Colo. 1991).

Attorney's alleged lack of preparation for a hearing was indirect, not direct, contempt, and therefore summary punishment was improper. Dooley v. District Court, 811 P.2d 809 (Colo. 1991).

Fact that judge ordered a hearing two days after occurrence of allegedly contemptuous behavior was evidence that judge considered the contempt indirect rather than direct. Dooley v. District Court, 811 P.2d 809 (Colo. 1991).

A court may hold a person in direct contempt only when the court has either given prior warning that a person's behavior, if repeated, will constitute contempt and the contemnor persists in such behavior or the person's conduct is so extreme that no warning is necessary. People v. Aleem, 149 P.3d 765 (Colo. 2007).

If conduct amounts to a direct contempt committed in the presence of the court, the record must show, with reference to the matter allegedly constituting the contempt, what actually happened with particularity. Pittman v. District Court, 149 Colo. 380, 369 P.2d 85 (1962).

Where full evidentiary hearing not necessary. Where the judge is aware of the contemptuous conduct from personal observation, where no lawful justification exists for the contemptuous behavior, and where the penalty is not of the type that can be mitigated by any evidence offered, a full-fledged evidentiary hearing is not necessary and summary procedure is appropriate. People v. Lucero, 196 Colo. 276, 584 P.2d 1208 (1978).

Where a judgment does not recite the facts constituting the contempt, the judgment is not properly supported. Handler v. Gordon, 108 Colo. 501, 120 P.2d 205 (1941).

This rule requires the order of commitment to recite the facts only where summary punishment is inflicted. Shore v. People, 26 Colo. 516, 59 P. 49 (1899); Eykelboom v. People, 71 Colo. 318, 206 P. 388 (1922).

Cases of criminal contempt are not within the provisions of this rule requiring the order of commitment to recite the facts only where summary punishment is inflicted. Eykelboom v. People, 71 Colo. 318, 206 P. 388 (1922).

For cases of criminal contempt for refusal to answer to grand jury question analogized to this rule, see Smaldone v. People, 158 Colo. 7, 405 P.2d 208 (1965), cert. denied, 382 U.S. 1012, 86 S. Ct. 616, 15 L. Ed. 2d 527 (1966); see also Salardino v. People, 158 Colo. 12, 405 P.2d 211 (1965), cert. denied, 382 U.S. 1012, 86 S. Ct. 617, 15 L. Ed. 2d 527 (1966); Quintana v. People, 158 Colo. 14, 405 P.2d 212 (1965), cert. denied, 382 U.S. 1013, 86 S. Ct. 618, 15 L. Ed. 2d 527 (1966); Smaldone v. People, 158 Colo. 16, 404 P.2d 276 (1965); Smaldone v. People, 158 Colo. 21, 404 P.2d 279 (1965); Tomeo v. People, 158 Colo. 26, 404 P.2d 287 (1965).

Trial judge has power to punish summarily for contempt any lawyer who in his presence willfully contributes to disorder or disruption in the courtroom. Losavio v. District Court, 182 Colo. 180, 512 P.2d 266 (1973).

Voluntary appearance in court subjects one to contempt power of court. Where defendant was served an unsigned copy of summons and default judgment was therefore rendered invalid, defendant's voluntary appearance in court submitted him nevertheless to the jurisdiction of the court and would support a contempt judgment where he was found to have committed perjury in the presence of the court. Brown v. Amen, 147 Colo. 468, 364 P.2d 735 (1961).

Contempt sentence of contemnor who has left the court will be upheld. Where the contempt is a direct one made in the presence of the court and the court proceeds at once to try the contemnor and sentence him, such sentence will be upheld, though made after the contemnor has left the presence of the court. Shotkin v. Atchison, T. & S. F. R. R., 124 Colo. 141, 235 P.2d 990 (1951), cert. denied, 343 U.S. 906, 72 S. Ct. 638, 96 L. Ed. 1325 (1952).

Refusal of witness receiving immunity to supply grand jury testimony. A witness who, despite receiving immunity, persists before a trial court judge in refusing on fifth amendment grounds to supply grand jury testimony, commits contempt "in the presence of the court" and may be punished summarily. People v. Lucero, 196 Colo. 276, 584 P.2d 1208 (1978).

A court has the right to punish one summarily for contempt for manifest perjury committed in the court's presence where it knows judicially that his testimony was false. Eykelboom v. People, 71 Colo. 318, 206 P. 388 (1922); Murer v. Rogowski, 29 Colo. App. 235, 480 P.2d 853 (1971).

In order that perjury may be a contempt of court it must appear that: (1) The alleged

false answers had an obstructive effect, (2) that there existed judicial knowledge of the falsity of the testimony, and (3) that the question was pertinent to the issue. Handler v. Gordon, 111 Colo. 234, 140 P.2d 622 (1943).

Perjurious statements do not by themselves substantially obstruct or halt a trial or demonstrate contempt for the judicial process if the court cannot judicially know that the testimony is false without the presentation of collateral evidence to establish such falsity. Murer v. Rogowski, 29 Colo. App. 235, 480 P.2d 853 (1971).

Where the trial court's finding of perjury is based on collateral evidence introduced by a party to impeach the other party's testimony, and not upon anything inherently incredible or self-contradictory in the other party's testimony itself, such perjury does not have the effect of substantially obstructing or halting the judicial process, and thus a contempt finding would be in error. Murer v. Rogowski, 29 Colo. App. 235, 480 P.2d 853 (1971).

Where a party is using delaying tactics in his request for continuance, the court should deny request rather than holding him in contempt. Altobella v. Priest, 153 Colo. 309, 385 P.2d 585 (1963).

Facts would not support a finding of direct contempt, where no warning was given at the time defendant allegedly made offensive statement to the court, and the primary factual foundation consisted of the defendant's responses to the courts questions. People v. Ellis, 189 Colo. 378, 540 P.2d 1082 (1975).

Facts supported finding of direct contempt when defendant admittedly made offensive statement during the course of proceedings even though obscenity was directed toward counsel for the People and merely overheard by the court. There was no abuse of discretion by the trial court given the fact that the defendant admitted it was inappropriate and an affront to the dignity of the court and its proceedings, and given the fact that defendant was an attorney admitted to the Bar. People v. Holmes, 967 P.2d 192 (Colo. App. 1998).

Oral stipulations rescinded. Behavior was not direct contempt punishable by summary proceedings, where all respondent did was to rescind a previous oral stipulation entered into in open court by directing her attorney to repudiate the stipulation. Ealy v. District Court, 189 Colo. 308, 539 P.2d 1244 (1975).

Provision in this rule that judgments shall be "final" refers only to extent of review. Cooper v. People ex rel. Wyatt, 13 Colo. 337, 22 P. 790 (1889).

IV. INDIRECT CONTEMPT.

Law reviews. For article, "The Nuts and Bolts of Collecting Support", see 19 Colo. Law. 1595 (1990).

Contempt, which does not occur in the presence of the court, is either criminal or civil, depending on the purpose and character of the sanctions sought to be imposed in the citation. People v. Razatos, 699 P.2d 970 (Colo. 1985); Groves v. District Court, 806 P.2d 947 (Colo. 1991).

A delay in trial caused by counsel's preparation of jury instructions should have been evaluated as indirect contempt rather than direct contempt because the court did not observe or hear any of the offending behavior. The order for sanctions was set aside because none of the procedures for a hearing and the imposition of sanctions was followed by the trial court. Martinez v. Affordable Hous. Network, Inc., 109 P.3d 983 (Colo. App. 2004), rev'd on other grounds, 121 P.3d 1201 (Colo. 2005).

This rule is applicable to civil contempt for violating an injunction. Shore v. People, 26 Colo. 516, 59 P. 49 (1899).

Those to be adjudged in contempt must be subject to court's jurisdiction. Where contempt citations were issued to officers of home for the mentally defective because they had refused admission of child ordered there by court, said officials were parties to no proceeding and had not submitted themselves to jurisdiction of court and consequently were not amenable to its commands. People ex rel. Dunbar v. County Court, 128 Colo. 374, 262 P.2d 550 (1953).

A court which acquires personal jurisdiction over party in divorce proceedings has continuing "in personam" jurisdiction to modify child support orders and to enforce original custody orders through exercise power of contempt; therefore, personal service on party out of state is sufficient and party's failure to appear does not deprive court of jurisdiction or power to punish for contempt. Brown v. Brown, 31 Colo. App. 557, 506 P.2d 386 (1972), modified, 183 Colo. 356, 516 P.2d 1129 (1974).

Compliance with the procedure governing contempt matters is essential before jurisdiction to punish for contempt attaches. Urbancich v. Mayberry, 124 Colo. 311, 236 P.2d 535 (1951).

The procedural provisions of section (c) are not exclusive. In re Peper, 38 Colo. App. 177, 554 P.2d 727 (1976).

There is no fixed procedural formula for contempt proceedings; rather the polestar in determining the validity of contempt procedures is whether due process of law is accorded. In re Peper, 38 Colo. App. 177, 554 P.2d 727 (1976).

Section (c) does not mandate a conference with opposing counsel before filing a motion for an indirect contempt citation, although doing so could be useful, or even advisable. In re Cyr, 186 P.3d 88 (Colo. App. 2008).

The provision in this rule, requiring an affidavit of facts constituting contempt, is de-

signed to meet actual contemptuous acts committed out of the presence of the court; it has no application to contempt committed in the immediate presence of the court. Jensen v. Jensen, 96 Colo. 151, 40 P.2d 238 (1935).

A constructive contempt must be brought to the court's attention by affidavit; this affidavit must state facts which, if established, would constitute a contempt, and if it does not do so the court is without jurisdiction to proceed. Wyatt v. People, 17 Colo. 252, 28 P. 961 (1892).

This provision as to affidavits is simply declaratory common-law practice, and the rule concerning the materiality of the affidavit should prevail to the same extent in the absence of statute. Wyatt v. People, 17 Colo. 252, 28 P. 961 (1892).

The affidavit must contain an averment that the charges were false as well as malicious. Fort v. Coop. Farmers' Exch., Inc., 81 Colo. 431, 256 P. 319 (1927).

It is not necessary that the affidavit charging the offense set forth the evidence by which the general declarations therein are to be established; general declarations or ultimate facts only are required. Guiraud v. Nevada Canal Co., 79 Colo. 289, 245 P. 485 (1926); In re Roberts, 757 P.2d 1108 (Colo. App. 1988).

If the petition and affidavit state facts which if true show that a contempt was committed, the court acquires jurisdiction, otherwise not. Fort v. People ex rel. Coop. Farmers' Exch., Inc., 81 Colo. 420, 256 P. 325 (1927).

Where affidavit fails to state facts showing contempt, court is without jurisdiction. When an affidavit is presented as a basis of a proceeding for contempt, the court must, in the first instance, examine the same, and, if the facts presented do not show that a contempt has been committed, the court will be without jurisdiction to proceed; but if the facts are sufficient, the court may take jurisdiction, and its subsequent orders will not be reviewed for mere errors. Cooper v. People ex rel. Wyatt, 13 Colo. 337, 22 P. 790 (1889).

Notice of charge required. A contempt sanction may not be imposed until the alleged contemner has received notice of the charge, including the nature of the act of contempt that he is alleged to have committed. Griffin v. Jackson, 759 P.2d 839 (Colo. App. 1988); Dooley v. District Court, 811 P.2d 809 (Colo. 1991).

Right to notice of purpose of hearing. Under section (c), a defendant has the right to have notice of the purpose of the hearing and to have an opportunity to be heard. Wright v. District Court, 192 Colo. 553, 561 P.2d 15 (1977).

Essential to due process in contempt proceedings is the right of one to know that the purpose of the hearing is the ascertainment of whether he is guilty of contempt. In re Peper, 38 Colo. App. 177, 554 P.2d 727 (1976).

A judgment of contempt entered without affidavit, notice, or hearing is void for want of jurisdiction. Pomeranz v. Class, 82 Colo. 173, 257 P. 1086 (1927).

Direct criminal contempts are punishable summarily without affidavit, notice, rule to show cause, or other process. Shotkin v. Atchison, T. & S. F. R. R., 124 Colo. 141, 235 P.2d 990 (1951), cert. denied, 343 U.S. 906, 72 S. Ct. 638, 96 L. Ed. 1325 (1952).

Jurisdiction over a criminal contempt charge was not lost because it was initiated by the filing of a verified information rather than by the citation procedure under this rule, which would have been the better practice. People v. Barron, 677 P.2d 1370 (Colo. 1984).

Motion may be included in affidavit. An affidavit containing a statement equivalent to a motion for the issuance of a citation is a sufficient "motion supported by affidavit"; the fact that the motion is included in the affidavit instead of being presented as a separate document does not invalidate it. Shapiro v. Shapiro, 115 Colo. 501, 175 P.2d 387 (1946).

Court must issue a citation in order to obtain jurisdiction. To obtain jurisdiction to punish for contempt based on interference with the execution of legal process or the administration of justice, it is necessary for the trial court to issue a citation commanding the respondents to show cause why they should not be held in contempt for interfering with the execution of legal process or obstructing the administration of justice. Where this is not done, the trial court has no power to punish for contempt based on the grounds of interference and obstruction. Eatchel v. Lanphere, 170 Colo. 545, 463 P.2d 457 (1970).

The accused can be convicted of no contempt other than that charged in the citation, since the citation for contempt plays a very important role in enabling the person charged to understandingly shape his course and prepare his defense. Eatchel v. Lanphere, 170 Colo. 545, 463 P.2d 457 (1970); Wright v. District Court, 192 Colo. 553, 561 P.2d 15 (1977); Dooley v. District Court, 811 P.2d 809 (Colo. 1991).

Where contempt citation alleged only that attorney failed to prepare for hearing, court's findings referring to attorney's habits in courtroom and in his preparation and filing of motions and briefs could not stand. Dooley v. District Court, 811 P.2d 809 (Colo. 1991).

Even though the citation did not include all of the grounds for contempt that were specified in the verified motion attached to the citation, the court held that the issues specified in the motion could be raised as grounds for contempt because the husband received full notice of them through the motion and was not denied due process. In re Lamutt, 881 P.2d 445 (Colo. App. 1994).

Citation for failing to appear in court as directed is specific enough. A citation reciting that one is to appear on a certain day to show cause why he should not be adjudged in contempt in accordance with an attached court order citing him for contempt for failure to appear in court as directed is specific enough to enable him either to defend or explain in mitigation his absence from court. Harthun v. District Court, 178 Colo. 118, 495 P.2d 539 (1972).

Hearing necessary for out-of-court contempt. In those cases where the judge did not personally observe the contemptuous conduct, a hearing is necessary to find the facts, and the hearing enables the judge to ascertain the facts of the occurrence and permits the defendant to explain his behavior and offer evidence to mitigate the penalty. People v. Lucero, 196 Colo. 276, 584 P.2d 1208 (1978).

A hearing is essential to due process. When it is clear that matters happened outside the presence of the court, it is necessary to hold a hearing on the contempt charge, for a procedure which accords with due process of law is essential. Harthun v. District Court, 178 Colo. 118, 495 P.2d 539 (1972).

A situation, involving a possible indirect contempt, requires, as a minimum, notice of the charge, the right to be represented by counsel, a hearing, the right to call and confront witnesses, and specific findings by the court. Losavio v. District Court, 182 Colo. 180, 512 P.2d 266 (1973).

Due process is a sham when a judge is both prosecutor and judge in an indirect contempt case. Harthun v. District Court, 178 Colo. 118, 495 P.2d 539 (1972).

Procedure held violative of provisions of this rule. Where the only citation served upon the defendant was that which commanded him to appear before the court "for examination upon oath on the matter of said complaint and to abide by the orders of this court entered upon said hearing"; at the time he appeared he was not informed by the citation that he was being subjected to proceedings in contempt; no order of the court had as yet been entered requiring any act on his part; on the date of his appearance, the court at one and the same time, entered the order requiring the performance of an act within 30 days, and erroneously adjudged that a warrant for the imprisonment might issue at the expiration of that time if the act commanded was not performed; this procedure was in violation of the mandatory provisions of this rule. Urbancich v. Mayberry, 124 Colo. 311, 236 P.2d 535 (1951).

Failure of defendant to appear as ordered by the court may constitute an indirect contempt of court. As an indirect contempt, the procedure prescribed by sections (c) and (d) must be followed. People v. Madonna, 651 P.2d 378 (Colo. 1982).

Attorney's appearance by telephone rather than in person at court hearing constituted indirect contempt instead of direct contempt. Attorney did nothing during telephone call to disrupt court proceedings and attorney's alleged violation was her failure to appear at a scheduled hearing. In re Johnson, 939 P.2d 479 (Colo. App. 1997).

An alleged assault by a third party could in no way constitute contempt by defendant either within or without the presence of the court, even if he "instigated" or was indirectly involved in the attack, such behavior (occurring in front of the courthouse, outside of the judge's view) would in no event be punishable under the summary procedures of this rule. Duran v. District Court, 190 Colo. 272, 545 P.2d 1365 (1976).

Rule held not complied with. McMullin v. City & County of Denver, 125 Colo. 231, 242 P.2d 240 (1952).

V. TRIAL AND PUNISHMENT.

Law reviews. For note, "Trial by Jury in Contempt Cases", see 2 Rocky Mt. L. Rev. 115 (1930). For article, "Expediting Court Procedure", see 10 Dicta 113 (1933).

Two types of civil contempt are provided for by section (d). Marshall v. Marshall, 35 Colo. App. 442, 536 P.2d 845 (1975), modified, 191 Colo. 165, 551 P.2d 709 (1976).

The first type of civil contempt consists of a present refusal to perform an act in the power of the person to perform, normally constituting injury to others for whose benefit the act is required. Where such contempt is found, a court may enter a remedial order to enforce obedience consisting of an imposition of imprisonment, not for a definite time, but only until respondent performs the act which he is commanded and is able to perform. However, before a court can make a finding of contempt which would justify a remedial order, it must make findings which are supported by evidence that there is a refusal to perform the act in question, that there is a present duty to perform such act, and that there is a present ability to perform. Marshall v. Marshall, 35 Colo. App. 442, 536 P.2d 845 (1975), modified, 191 Colo. 165, 551 P.2d 709 (1976); In re Hartt, 43 Colo. App. 335, 603 P.2d 970 (1979).

To justify punishment for civil contempt consisting of a refusal to perform a required act for the benefit of others, the trial court must upon hearing make a finding both of the facts constituting contempt and of the present duty and ability to perform. Marshall v. Marshall, 191 Colo. 165, 551 P.2d 709 (1976).

There must be two findings of present duty and ability to pay: one which supports the contempt finding, and a second which justifies the

imposition of a remedial order. In re Hartt, 43 Colo. App. 335, 603 P.2d 970 (1979).

The second type of civil contempt consists of conduct derogatory to the authority or dignity of the court. For such contempt, the court may enter a punitive order to vindicate its dignity, imposing a fine or imprisonment, or both, but that punishment should be definite as to amount and time, regardless of subsequent compliance with the court order. The court must, however, make findings of fact which are supported by evidence that respondent's conduct constitutes misbehavior and that such conduct is offensive to the authority and dignity of the court. Furthermore, before a court may consider the issue of contempt which would support a punitive order the citation issued to the respondent must state that punishment may be imposed to vindicate the dignity of the court. Marshall v. Marshall, 35 Colo. App. 442, 536 P.2d 845 (1975), modified, 191 Colo. 165, 551 P.2d 709 (1976).

Requirement of finding that conduct offends court's dignity constitutionally grounded. Although there is no fixed procedural formula for contempt proceeding, the requirement that there be an explicit finding by the trial court that the contemner's conduct offends the dignity of the court is grounded in constitutional principles. Lobb v. Hodges, 641 P.2d 310 (Colo. App. 1982).

Finding need not be in exact language of rule. Although a trial court need not make a finding in the exact language of section (d), i.e., "to vindicate the dignity of the court," nevertheless, the language used must be sufficient to comply with the rule. Lobb v. Hodges, 641 P.2d 310 (Colo. App. 1982).

Contempt proceedings should accord due process. Although there is no fixed procedural formula for contempt proceedings, so that technical nicety is not required, courts should improvise a procedure which accords with due process of law. Essential to due process in contempt proceedings is the right of one to know that the purpose of a hearing is the ascertainment of whether he is guilty of contempt. Austin v. City & County of Denver, 156 Colo. 180, 397 P.2d 743 (1964).

A court violates an attorney's due process rights if the court does not provide reasonable notice of the charges and an opportunity to be heard when it delays final adjudication and sentencing on a contempt charge until after the trial that created the contempt situation. People v. Jones, 262 P.3d 982 (Colo. App. 2011).

Fifth amendment protection against self-incrimination operates in a contempt proceeding. Griffin v. Western Realty Sales Corp., 665 P.2d 1031 (Colo. App. 1983); People v. Razatos, 699 P.2d 970 (Colo. 1985).

Sixth amendment right to be present at trial applies to criminal contempt proceedings. The conclusions and findings made by a presiding disciplinary judge when the respondent was not present were rejected by the court. While the record indicated that respondent had proper notice of the hearing, it contained no affirmative waiver of his right to be present, and no findings that respondent knowingly, intelligently, and voluntarily waived his right to be present and participate at the hearing. In re Bauer, 30 P.3d 185 (Colo. 2001).

Although punitive contempt is not a common law or statutory crime, the possibility of incarceration associated with such proceedings is sufficient to require recognition and protection of the rights afforded to criminal defendants, including the right not to be called as a witness. In re Alverson, 981 P.2d 1123 (Colo. App. 1999).

Magistrate's error of requiring father to take the stand to invoke the privilege on a question by question basis after magistrate had been informed that father would assert the privilege violated father's fifth amendment right not to be called as a witness, and because the magistrate error was not harmless beyond a reasonable doubt, it required reversal of the contempt order. In re Alverson, 981 P.2d 1123 (Colo. App. 1999).

Petitioner is entitled to detailed notice and an opportunity to be heard before a contempt sanction can be imposed against her. Ealy v. District Court, 189 Colo. 308, 539 P.2d 1244 (1975); Wright v. District Court, 192 Colo. 553, 561 P.2d 15 (1977); People in Interest of S.C., 802 P.2d 1101 (Colo. App. 1989).

Defendant's due process rights were not violated when trial court entered judgment in the amount of accrued fines under contempt order without conducting an additional hearing. Due process entitles contemnor to an evidentiary hearing only if, in response to county's motion, he raised a genuine issue of material fact as to whether he complied with original order. Court's November 2003 contempt order put defendant on notice that remedial fines would accrue until he had complied with original July 2003 order, and county's motion in April 2006 put defendant on notice that fines had accrued for noncompliance with original order and that county had asked court to enter judgment in that amount. Defendant's response to county's motion failed to raise genuine issues of material fact that required trial court to conduct an evidentiary hearing. Bd. of County Comm'rs for Larimer v. Gurtler, 181 P.3d 315 (Colo. App. 2007).

Where a jail sentence may be imposed in a contempt proceeding, the alleged contemnor, if indigent, is entitled to the appointment of counsel. If a husband cited for contempt for failure to make child support payments to his

former wife was refused legal services by at least two private attorneys because he was unable to pay requested fee, he was entitled to have his assets examined and considered by court in determining eligibility for court-appointed counsel under supreme court indigency guidelines. In re Wyatt, 728 P.2d 734 (Colo. App. 1986).

The question of whether there was any willful intent to interfere with the administration of justice requires a notice and hearing as a prerequisite to a judgment of contempt. District Att'y v. District Court, 150 Colo. 136, 371 P.2d 271 (1962).

When a trial court renders judgment "regardless of intent", it commits error in failing to determine intent because willful intent to inconvenience and delay the court is essential to a finding of contempt where an attorney fails to appear. Harthun v. District Court, 178 Colo. 118, 495 P.2d 539 (1972).

It is error for a judge who cites one for indirect contempt to also act as trial judge and prosecutor in a later hearing on the charge. Harthun v. District Court, 178 Colo. 118, 495 P.2d 539 (1972).

It is proper to ask a fellow judge to take his place. Where conditions do not make it impracticable, or where the delay may not injure public or private right, a judge called upon to act in a case of contempt in which he is involved may, without flinching from his duty, properly ask that one of his fellow judges take his place. Harthun v. District Court, 178 Colo. 118, 495 P.2d 539 (1972).

A person is entitled to have a different judge hear a contempt proceeding than the judge who issued the contempt charge if there is actual bias or the appearance of bias. The appearance of bias may be shown by a running controversy between the judge and the accused. People v. Jones, 262 P.3d 982 (Colo. App. 2011).

Where the contempt is charged by affidavit and the contemner makes no denial thereof, the court need not examine witnesses, in the absence of a request therefor by the accused. Zobel v. People ex rel. Kyle, 49 Colo. 142, 111 P. 846 (1910).

In any event, the right of trial by jury does not extend to cases of contempt. Cooper v. People ex rel. Wyatt, 13 Colo. 337, 22 P. 790 (1889).

Statutory provisions relating to change of venue have no application to proceedings to punish contempts unless such proceedings are expressly included in the written law. Guiraud v. Nevada Canal Co., 79 Colo. 289, 245 P. 485 (1926).

One charged with contempt of court has no right to a change of venue. Guiraud v. Nevada Canal Co., 79 Colo. 289, 245 P. 485 (1926).

The doctrine of laches is applicable to enforcement procedures for contempt. Hauck v. Schuck, 143 Colo. 324, 353 P.2d 79 (1960).

An accused can be convicted of no contempt other than that charged in the citation. Harthun v. District Court, 178 Colo. 118, 495 P.2d 539 (1972).

An order for attorney's fees is an adjunct of a finding of guilty of contempt, and so an award of attorney's fees by the trial court must be set aside if the judgment of contempt cannot stand. Eatchel v. Lanphere, 170 Colo. 545, 463 P.2d 457 (1970).

Awards of reasonable attorneys' fees to the person damaged by the contemner's behavior are an adjunct of a finding that the contemner is guilty of contempt and are not conditioned upon the ability to pay. In re Weisbart, 39 Colo. App. 115, 564 P.2d 961 (1977).

Imposition of attorney's fees limited. This rule does not authorize imposition of attorney's fees to recompense the contemnor, no matter how inappropriate may be the contempt proceeding initiated by the person claiming damage. Avco Fin. Servs. of Colo., Inc. v. Gonzales, 653 P.2d 751 (Colo. App. 1982).

This rule does not extend beyond authorization for imposition of attorney's fees against a contemnor for the benefit of the person damaged by the contempt. Avco Fin. Servs. of Colo., Inc. v. Gonzales, 653 P.2d 751 (Colo. App. 1982).

Attorney fees cannot be awarded as a punitive sanction in a contempt proceeding. Eichhorn v. Kelley, 56 P.3d 124 (Colo. App. 2002); In re Lopez, 109 P.3d 1021 (Colo. App. 2004).

Although attorney fees cannot be awarded as a punitive sanction in a contempt proceeding, attorney fees can be awarded if the case involves an agreement or contract for an award of such fees to the prevailing party. This rule does not preclude the trial court from enforcing a valid fee-shifting agreement. In re Sanchez-Vigil, 151 P.3d 621 (Colo. App. 2006).

Specific findings as to the reasonableness of attorney fees not required. In re Bernardoni, 731 P.2d 146 (Colo. App. 1986).

Trial court did not abuse its discretion in awarding plaintiff costs for travel and meal expenses related to contempt order because the costs were reasonable and necessary. Madison Capital Co., LLC v. Star Acquisition VIII, 214 P.3d 557 (Colo. App. 2009).

Trial court abused its discretion in awarding plaintiff costs for a client fee related to contempt order because the affidavit submitted for recovery of the fee failed to establish that it was incurred solely for the related litigation. At least some portion of the fee was for general business costs; therefore, the fee is not recoverable. Madison Capital Co., LLC v. Star Acquisition VIII, 214 P.3d 557 (Colo. App. 2009).

Plaintiff's costs and attorney fees incurred in connection with defendants' appeal of contempt order may be awarded under section (d)(2) rule since they were incurred in connection with the contempt proceedings. However, plaintiff's fees and costs incurred in connection with defendants' appeal of award of said attorney fees may not be awarded under section (d)(2) because they were not incurred in connection with the related contempt proceedings. Rather, they were incurred as a consequence of defendants' appeal of the standards applied by the trial court in awarding said fees and costs. Madison Capital Co., LLC v. Star Acquisition VIII, 214 P.3d 557 (Colo. App. 2009).

Words apparently scandalous or offensive, but susceptible of a different construction, may be explained by the speaker or writer, and he be relieved of the charge of contempt on sworn disavowal of intent to commit it; but when the words are necessarily offensive and insulting, such disavowal, while it may excuse, cannot justify. Hughes v. People, 5 Colo. 436 (1880).

No contempt where "not in the power of the person to perform". Where evidence disclosed that parent was unable to make immediate payment of support for minor child ordered by juvenile court, there was no failure to perform "an act in the power of the person to perform", and contempt proceeding should have been dismissed. In re People in Interest of Murley, 124 Colo. 581, 239 P.2d 706 (1951).

If the evidence in a contempt proceeding discloses that a party is unable to make the payments required by a support order, there is no refusal to perform an act within his power under section (d) and the contempt proceeding must be dismissed. In re Crowley, 663 P.2d 267 (Colo. App. 1983); McVay v. Johnson, 727 P.2d 416 (Colo. App. 1986).

Remedial contempt sanctions cannot be imposed on an attorney who failed to pay restitution ordered by the court when the master's findings did not establish the attorney's present ability to pay the ordered restitution. People v. Razatos, 699 P.2d 970 (Colo. 1985).

Before a remedial contempt order under section (c) can enter, the court must find that the contemnor has the ability to comply with its order and make findings that justify the imposition of the remedial sanction. Wilkinson v. Bd. of County Comm'rs, 872 P.2d 1269 (Colo. App. 1993); In re Estate of Elliott, 993 P.2d 474 (Colo. 2000).

A court may not impose remedial contempt sanctions without making the required finding of a present ability to comply or without including a purge clause. In re Lodeski, 107 P.3d 1097 (Colo. App. 2004).

Exclusive penalties. Since section (d) precisely delineates the penalties to be assessed for the purpose of vindicating the dignity of the court, the only remedies available are a fine or imprisonment. Blank v. District Court, 190 Colo. 114, 543 P.2d 1255 (1975).

Remedial orders and punitive orders distinguished. Under section (d) of this rule, there is recognized the distinction between a remedial order, the purpose of which is primarily to enforce obedience to a writ, and a punitive order to vindicate the authority of the law and uphold the dignity of the court. In the former case the fine which may be imposed is limited to the damages and expense resulting from the contempt and is payable to the person damaged thereby, and the imprisonment which may be imposed may continue only until the contemnor shall comply with the order of the court. In the latter case the fine or imprisonment is not dependent on damage or subsequent performance but is a matter solely within judicial discretion. Shapiro v. Shapiro, 115 Colo. 501, 175 P.2d 387 (1946).

If punishment for contempt of court is conditioned upon the contemner's future performance of a duty he has to another person, then the contempt order is no longer punitive, but becomes remedial. In re Crowley, 663 P.2d 267 (Colo. App. 1983); McVay v. Johnson, 727 P.2d 416 (Colo. App. 1986).

Where sanctions could not be clearly categorized as punitive or remedial, but appeared to contain attributes of both, order was vacated and remanded. People ex rel. Pub. Utils. Comm'n v. Entrup, 143 P.3d 1120 (Colo. App. 2006).

One thousand dollar fine for attorney's failure to timely file jury instructions is necessary to vindicate dignity of court and is not arbitrary or vindictive. Wooden v. Park Sch. District, 748 P.2d 1311 (Colo. App. 1987).

Proof of willfulness need not predicate a court's order for remedial contempt sanctions. In re Cyr, 186 P.3d 88 (Colo. App. 2008).

Contempt order cannot be construed to constitute both a punitive and remedial contempt order where single sanction was imposed to compel performance of act. McVay v. Johnson, 727 P.2d 416 (Colo. App. 1986).

Fine in any amount is permissible for vindication of the dignity of the court, but it is made payable to the court, not to the parties. Brown v. Brown, 183 Colo. 356, 516 P.2d 1129 (1973).

When court levies fine, it must make findings of fact that the parties' conduct constituted misbehavior which offended the court's authority and dignity. Bd. of Water Works v. Pueblo Water Works Employees Local 1045, 196 Colo. 308, 586 P.2d 18 (1978).

Imposition of jail sentence could not be sustained when the trial court did not make any finding that appellant had the present ability to comply with its remedial orders for the payment

of money. In re Roberts, 757 P.2d 1108 (Colo. App. 1988).

A court may imprison a receiver for contempt for failure to pay over funds as ordered. Taylor v. Taylor, 79 Colo. 487, 247 P. 174 (1926).

Penal sanctions imposed only to prevent obstruction of justice. A court before imposing penal sanctions for contempt should proceed with caution and deliberation as the power should be exercised only when necessary to prevent obstruction or interference with the administration of justice. Lobb v. Hodges, 641 P.2d 310 (Colo. App. 1982).

Confinement for contempt for longer than six months is constitutionally impermissible unless the person has been given the opportunity for a jury trial. People v. Zamora, 665 P.2d 153 (Colo. App. 1983).

Language of court imposing jail term for punitive contempt complies with rule. Language of trial court imposing jail term for punitive contempt that: "The reason for the punitive finding or punitive order of the court was to vindicate the dignity of this court and I think that vindication is long overdue in this case" was sufficient to comply with the requirements of this rule. In re Joseph, 44 Colo. App. 128, 613 P.2d 344 (1980).

A commitment to jail for contempt is justified for failure to pay alimony and attorneys' fees in a divorce action, but any commitment for failure of the defendant-husband to pay the plaintiff-wife for money loaned is not justified. Harvey v. Harvey, 153 Colo. 15, 384 P.2d 265 (1963).

Trial court can enforce its temporary maintenance and child support orders through punitive contempt proceedings, despite the fact that a judgment had entered on amounts due and not paid under such orders. In re Nussbeck, 974 P.2d 493 (Colo. 1999).

An order of imprisonment for making false report held unauthorized. An order imprisoning a quasi-receiver for making false reports, unless she pay a judgment rendered against her based in part, at least, on rents and issues received from the property under claim of right is unauthorized. Taylor v. Taylor, 79 Colo. 487, 247 P. 174 (1926).

One may be imprisoned until he performs instead of a term certain. This rule, by providing that a party guilty of contempt consisting of failure to perform an act in the power of such person to perform may be imprisoned until its performance, negates a claim that one may be committed only for a term certain. Harvey v. Harvey, 153 Colo. 15, 384 P.2d 265 (1963).

When imprisonment of contemnor for indefinite period prohibited. Where the trial court fails to find that contemnor had resources at the time of sentence with which he could purge himself of contempt, it may not order his imprisonment for an indefinite period. In re Hartt, 43 Colo. App. 335, 603 P.2d 970 (1979).

A punitive fine or imprisonment may be imposed only if the citation so states. Shapiro v. Shapiro, 115 Colo. 501, 175 P.2d 387 (1946); People v. Razatos, 699 P.2d 970 (Colo. 1985).

Unconditional fine imposed as punitive sanction in remedial contempt proceeding was error because a separate contempt proceeding to address the failure to submit a financial affidavit as ordered was never commenced. In re Lodeski, 107 P.3d 1097 (Colo. App. 2004).

Finding required to enter punitive order. In order for a court to enter a punitive order for contempt, it must, on supporting evidence, find that the alleged contemner's conduct constitutes misbehavior and that such conduct is offensive to the authority and dignity of the court. Lobb v. Hodges, 641 P.2d 310 (Colo. App. 1982).

Damages and attorney fees. Awards of attorney fees are incidental to a finding of contempt and are not conditioned upon the ability to pay. Likewise, awards of damages suffered by the contempt, plus costs, are incidental to the contempt finding and are not conditioned upon the ability to pay. In re Harris, 670 P.2d 446 (Colo. App. 1983).

In a proceeding involving only contempt for violation of a temporary restraining order, it is not proper for a court to make a restraining order permanent. Renner v. Williams, 140 Colo. 432, 344 P.2d 966 (1959).

The matter of dealing with contempt is within the sound discretion of the trial court, and its determination is final unless an abuse of such discretion is clearly shown. Conway v. Conway, 134 Colo. 79, 299 P.2d 509 (1956); DeMott v. Smith, 29 Colo. App. 531, 486 P.2d 451 (1971).

Trial court's decision on facts is conclusive. Where the trial court has jurisdiction, regularly pursues its authority, and there is evidence of contempt, its decision on the facts is conclusive. Wall v. District Court, 146 Colo. 74, 360 P.2d 452 (1961).

In the review of judgments in contempt, the supreme court goes no farther than to inquire if the court pronouncing sentence had jurisdiction of the parties and of the offense charged. Wall v. District Court, 146 Colo. 74, 360 P.2d 452 (1961).

Hearing required before revocation of suspended contempt sentence. In re Bernardoni, 731 P.2d 146 (Colo. App. 1986).

Review must be within the appellate court's jurisdiction. The supreme court has no jurisdiction to review the judgment of the district court imposing a penalty for a contempt of court civil in character, unless some question is involved such as is required to give the supreme court jurisdiction in other civil actions. Naturita Canal & Reservoir Co. v. People ex rel. Meenan, 30 Colo. 407, 70 P. 691 (1902).

Appellate court lacked jurisdiction to consider defendants' appeal of contempt order because defendants did not file a timely appeal of the order. Order entering remedial sanctions against defendant was final and appealable under this rule, but defendants failed to file appeal within 45 days after the order was entered pursuant to C.A.R. 4(a) and section (f) of this rule. Madison Capital Co., LLC v. Star Acquisition VIII, 214 P.3d 557 (Colo. App. 2009).

Review is confined to whether the trial court had jurisdiction and regularly pursued its authority. Cooper v. People ex rel. Wyatt, 13 Colo. 337, 22 P. 790 (1889); Guiraud v. Nevada Canal Co., 79 Colo. 289, 245 P. 485 (1926); Clear Creek Power & Dev. Co. v. Cutler, 79 Colo. 355, 245 P. 939 (1926); Fort v. Coop. Farmers' Exch., Inc., 81 Colo. 431, 256 P. 319 (1927); Fort v. People ex rel. Coop. Farmers' Exch., Inc., 81 Colo. 420, 256 P. 325 (1927).

An order in contempt proceedings, if beyond the power of the trial court to enter, is subject to review. Wyatt v. People, 17 Colo. 252, 28 P. 961 (1892); Taylor v. Taylor, 79 Colo. 487, 247 P. 174 (1926).

Although, in reviewing a contempt proceeding, the appellate court is not privileged to pass upon the weight or sufficiency of the evidence but is limited to the question of whether the trial court had jurisdiction. Coolidge v. People ex rel. District Att'y, 72 Colo. 35, 209 P. 504 (1922).

Mere irregularities are not reviewable. Where in a proceeding to punish a contempt the court acts within its jurisdiction, mere irregularities are not reviewable on error. Zobel v. People ex rel. Kyle, 49 Colo. 142, 111 P. 846 (1910).

However, the punishment may be reviewed to determine whether excessive or arbitrary. While punishment for contempt which consists of conduct derogatory is discretionary, the supreme court not only may inquire as to jurisdiction and regularity of procedure, but also may determine whether or not the punishment imposed is so excessive and incommensurate with the gravity of the offense as to be arbitrary and vindictive. In re People in Interest of Murley, 124 Colo. 581, 239 P.2d 706 (1951).

Combining contempt and alimony findings inappropriate. Where respondent court combined its ruling on contempt issue with its decision to terminate alimony, there is no alternative but to remand this case to the trial court to take further evidence on the alimony issue and to make more appropriate findings. Blank v. District Court, 190 Colo. 114, 543 P.2d 1255 (1975).

Punishment held excessive. Shotkin v. Atchison, T. & S. F. R. R., 124 Colo. 141, 235 P.2d 990 (1951), cert. denied, 343 U.S. 906, 72 S. Ct. 638, 96 L. Ed. 1325, reh'g denied, 343 U.S. 937, 970, 72 S. Ct. 772, 1062, 96 L. Ed. 1350, 1365 (1952).

Punishment held arbitrary and oppressive. In re People in Interest of Murley, 124 Colo. 581, 239 P.2d 706 (1951).

Applied in Schnier v. District Court, 696 P.2d 264 (Colo. 1985).

CHAPTER 16

Affidavits, Arbitration, Miscellaneous

CHAPTER 16

AFFIDAVITS, ARBITRATION, MISCELLANEOUS

Rule 108. Affidavits

An affidavit may be sworn to either within or without this state before any officer authorized by law to take and certify the acknowledgment of deeds conveying lands.

Cross references: For officers authorized to take acknowledgments of deeds, see §§ 24-12-104, 24-12-105, and 38-30-126 to 38-30-135, C.R.S.

ANNOTATION

Annotator's note. Since C.R.C.P. 108 is similar to § 373 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant case construction of that section has been included in the annotations to this rule.

An officer of a foreign jurisdiction administering an oath to an affiant is presumed to be acting within the territorial jurisdiction for which he was appointed. Tucker v. Tucker, 21 Colo. App. 94, 121 P. 125 (1912).

That in the caption of an affidavit the venue as laid in Colorado is not sufficient to overcome this presumption. Tucker v. Tucker, 21 Colo. App. 94, 121 P. 125 (1912).

Rule 109. Arbitration

Repealed March 17, 1994, as to cases filed on or after July 1, 1994.

Rule 109.1. Mandatory Arbitration

Repealed May 30, 1991, as to cases filed on and after July 1, 1991.

Rule 110. Miscellaneous

(a) Amendments. No writ or process shall be quashed, nor any order or decree set aside, nor any undertaking be held invalid, nor any affidavit, traverse, or other paper be held insufficient if the same is corrected within the time and manner prescribed by the court, which shall be liberal in permitting amendments.

(b) Use of Terms. Words used in the present tense shall include the future; singular shall include the plural; masculine shall include the feminine; person or party shall include all manner of organizations which may sue or be sued. The use of the word clerk, sheriff, marshal, or other officer means such officer or his deputy or other person authorized to perform his duties. The word "oath" includes the word "affirmation"; and the phrase "to swear" includes "to affirm"; signature or subscription shall include mark, when the person is unable to write, his name being written near it and witnessed by a person who writes his own name as a witness. A superintendent, overseer, foreman, sales director, or person occupying a similar position, may be considered a managing agent for the purposes of these rules.

(c) Certificates. Certificates shall be made in the name of the officer either by the officer or by his deputy.

(d) Cross Claimants, Counterclaimants and Third-Party Claimants. Where a cross claim, counterclaim or third-party claim is filed, the claimant thereunder shall have the same rights and remedies as if a plaintiff.

ANNOTATION

In construing section 128 of the former Code of Civil Procedure, relating to affidavits or bonds, the court held that amendments under that section must be confined to cases in which the insufficiency was not jurisdictional, and that the section was not intended to permit interposing of affidavit where there was either none at all or its equivalent. Mentzer v. Ellison, 7 Colo. App. 315, 43 P. 464 (1896).

Prior to the adoption of this rule general assembly endeavored to make it plain that substance, not form, was the controlling consideration. Waite v. People, 83 Colo. 162, 262 P. 1009 (1928) (decided under § 478 of the former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941).

Rules 111 to 119.

Rules 111 to 119, inclusive, Supreme Court Proceedings, are deleted and are replaced by Chapter 32, Colorado Appellate Rules 1 through 58.

CHAPTER 17

Court Proceedings: Sales Under Powers

CHAPTER 17

COURT PROCEEDINGS: SALES UNDER POWERS

Rule 120. Orders Authorizing Sales Under Powers

(a) Motion; Contents. Whenever an order of court is desired authorizing a sale under a power of sale contained in an instrument, any interested person or someone on such person's behalf may file a verified motion in a district court seeking such order. The motion shall be accompanied by a copy of the instrument containing the power of sale, shall describe the property to be sold, and shall specify the default or other facts claimed by the moving party to justify invocation of the power of sale. When the property to be sold is personal property, the motion shall state the names and last known addresses, as shown by the records of the moving party, of all persons known or believed by the moving party to have an interest in such property which may be materially affected by such sale. When the property to be sold is real property and the power of sale is contained in a deed of trust to a public trustee, the motion shall state the name and last known address, as shown by the records of the moving party, of the grantor of such deed of trust, of the current record owner of the property to be sold, and of any person known or believed by the moving party to be personally liable upon the indebtedness secured by the deed of trust, as well as the names and addresses of those persons who appear to have acquired a record interest in such real property, subsequent to the recording of such deed of trust and prior to the recording of the notice of election and demand for sale, whether by deed, mortgage, judgment or any other instrument of record. In giving notice to persons who appear to have acquired a record interest in real property, the address of each such person shall be the address which is given in the recorded instrument evidencing such person's interest, except that if such recorded instrument does not give an address or if only the county and state are given as the address of such person, no address need be stated for such person in the motion. The clerk shall fix a time not less than 21 nor more than 35 days after the filing of the motion and a place for the hearing of such motion.

(b) Notice; Contents; Service. The moving party shall issue a notice describing the instrument containing the power of sale, the property sought to be sold thereunder, and the default or other facts upon which the power of sale is invoked. The notice shall also state the time and place set for the hearing and shall refer to the right to file and serve responses as provided in section (c), including a reference to the last day for filing such responses and the addresses at which such responses must be filed and served. The notice shall contain the following advisement: "If this case is not filed in the county where your property is located, you have the right to ask the court to move the case to that county. Your request may be made as a part of your response or any paper you file with the court at least 7 days before the hearing." The notice shall contain the return address of the moving party. Such notice shall be served by the moving party not less than 14 days prior to the date set for the hearing, by: (1) mailing a true copy thereof to each person named in the motion (other than persons for whom no address is stated) at the address or addresses stated in the motion; (2) and by filing a copy with the clerk and by delivering a second copy to the clerk for posting by the clerk; and (3) if a residential property as defined by statute, by posting a true copy in a conspicuous place on the subject property as required by statute. Such mailing and delivery to the clerk for posting, and property posting shall be evidenced by the certificate of the moving party or moving party's agent. For the purpose of this section, posting may be electronic on the court's public website so long as the electronic address for the posting is displayed conspicuously at the courthouse.

(c) Response; Contents; Filing and Service. Any interested person who disputes, on grounds within the scope of the hearing provided for in section (d), the moving party's entitlement to an order authorizing sale may file and serve a response to the motion,

verified by the oath of such person, setting forth the facts upon which he relies and attaching copies of all documents which support his position. The response shall be filed and served not less than 7 days prior to the date set for the hearing, said interval including intermediate Saturdays, Sundays, and legal holidays, C.R.C.P. 6(a) notwithstanding, unless the last day of the period so computed is a Saturday, a Sunday or a legal holiday, in which event the period runs until the end of the next succeeding day which is not a Saturday, Sunday or a legal holiday. Service of such response upon the moving party shall be made in accordance with C.R.C.P. 5(b). C.R.C.P. 6(e) shall not apply to computation of time periods under this section (c).

(d) Hearing; Scope of Issues; Order; Effect. At the time and place set for the hearing or to which the hearing may have been continued, the court shall examine the motion and the responses, if any. The scope of inquiry at such hearing shall not extend beyond the existence of a default or other circumstances authorizing, under the terms of the instrument described in the motion, exercise of a power of sale contained therein, and such other issues required by the Service Member Civil Relief Act (SCRA), 50 U.S.C. § 520, as amended. The court shall determine whether there is a reasonable probability that such default or other circumstance has occurred, and whether an order authorizing sale is otherwise proper under said Service Member Civil Relief Act, and shall summarily grant or deny the motion in accordance with such determination. Neither the granting nor the denial of a motion under this Rule shall constitute an appealable order or judgment. The granting of any such motion shall be without prejudice to the right of any person aggrieved to seek injunctive or other relief in any court of competent jurisdiction, and the denial of any such motion shall be without prejudice to any right or remedy of the moving party. The court shall not require the appointment of an attorney to represent any interested person as a condition of granting such motion, unless it appears from the motion or other papers filed with the court that there is a reasonable probability that the interested person is in the military service.

(e) Hearing Dispensed with if no Response Filed. If no response has been filed within the time permitted by section (c), the court shall examine the motion and, if satisfied that venue is proper and the moving party is entitled to an order authorizing sale upon the facts stated therein, the court shall dispense with the hearing and forthwith enter an order authorizing sale.

(f) Venue. For the purposes of this section, a consumer obligation is any obligation (i) as to which the obligor is a natural person, and (ii) is incurred primarily for a personal, family, or household purpose. Any proceeding under this Rule involving a consumer obligation shall be brought in and heard in the county in which such consumer signed the obligation or in which the property or a substantial part thereof is located. Any proceeding under this Rule which does not involve a consumer obligation or an instrument securing a consumer obligation may be brought and heard in any county. However, in any proceeding under this Rule, if a response is filed, and if in the response or in any other writing filed with the court, the responding party requests a change of venue to the county in which the encumbered property or a substantial part thereof is situated, the court shall order transfer of the proceeding to such county.

(g) Return of Sale. The court shall require a return of such sale to be made to the court, and if it appears therefrom that such sale was conducted in conformity with the order authorizing the sale, the court shall thereupon enter an order approving the sale.

(h) Docket Fee. A docket fee in the amount specified by law shall be paid by the person filing such motion. Unless the court shall otherwise order, any person filing a response to the motion shall pay, at the time of the filing of such response, a docket fee in the amount specified by law for a defendant or respondent in a civil action under section 13-32-101 (1) (d), C.R.S.

COMMITTEE COMMENT

The 1989 amendment to C.R.C.P. 120 (Sales Under Powers) is a composite of changes necessary to update the Rule and make it more workable. The amendment was developed by a special committee made up of practitioners and judges having expertise in that area of practice,

with both creditor and debtor interests represented.

The changes are in three categories. There are changes that permit court clerks to perform many of the tasks that were previously required to be accomplished by the Court and thus save valuable Court time. There are changes to venue provisions of the Rule for compliance with the Federal Fair Debt Collection Practices Act. There are also a number of editorial changes to improve the language of the Rule.

There was considerable debate concerning whether the Federal "Fair Debt Collection Practices Act" is applicable to a C.R.C.P. 120 proceeding. Rather than attempting to mandate compliance with that federal statute by specific rule provision, the Committee recommends that a person acting as a debt collector in a matter covered by the provisions of the Federal "Fair Debt Collection Practices Act" be aware of the potential applicability of the Act and comply with it, notwithstanding any provision of this Rule.

Source: (b), (e), and (f) amended February 7, 1991, effective June 1, 1991; (a) amended February 17, 1993, effective April 1, 1993; (a) amended and adopted, effective November 16, 1995; (c) and (d) amended and effective June 28, 2007; (d) corrected and effective November 5, 2007; (b) amended and effective January 7, 2010; (b) amended and effective October 14, 2010; (a), (b), and (c) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

ANNOTATION

Law reviews. For article, "War Legislation Affecting Titles to Real Estate", see 21 Dicta 11 (1944). For article, "Notes on Proposed Amendments to Colorado Rules of Civil Procedure", see 27 Dicta 165 (1950). For article, "Foreclosure by Sale by Public Trustee of Deeds of Trust in Colorado", see 28 Dicta 437 (1951). For article, "Forms Committee Presents Standard Pleading Samples to Be Used in Foreclosures Through Public Trustee", see 28 Dicta 461 (1951). For article, "Amendments to the Colorado Rules of Civil Procedure", see 28 Dicta 242 (1951). For article, "Additional Real Estate Standards", see 30 Dicta 431 (1953). For article, "One Year Review of Civil Procedure and Appeals", see 38 Dicta 133 (1961). For comment, "The Effect of Certified Realty Corp. v. Smith on Mortgage Foreclosure in Colorado", see 52 U. Colo. L. Rev. 301 (1981). For article, "Inadequacy of Sales Price at Judicially Ordered Sales of Real Property", see 12 Colo. Law, 1435 (1983). For article, "Marshalling in Judicial or Nonjudicial Foreclosure in Colorado", see 13 Colo. Law. 1809 (1984). For article, "Foreclosure by Private Trustee: Now Is the Time for Colorado", see 65 Den. U. L. Rev. 41 (1988). For article, "Rule 120: Relocation of the Meaningful Hearing", see 20 Colo. Law. 495 (1991).

This rule was repealed and readopted to provide for due process safeguards to one who challenges the entitlement to foreclose a deed of trust containing a power of sale to the public trustee. Valley Dev. at Vail, Inc. v. Warder, 192 Colo. 316, 557 P.2d 1180 (1976).

Due process requires opportunity to be heard. Due process under section (d) requires only that the respondents to the motion be given an opportunity to be heard on their contentions. Moreland v. Marwich, Ltd., 629 P.2d 1095 (Colo. App. 1981), rev'd on other grounds, 665 P.2d 613 (Colo. 1983).

Provisions of this rule must be strictly complied with by one seeking foreclosure under a power of sale through the public trustee. Dews v. District Court, 648 P.2d 662 (Colo. 1982).

A completed foreclosure need not be set aside where the complaining party received timely actual notice and was not prejudiced. Amos v. Aspen Alps 123, LLC, __ P.3d __ (Colo. App. 2010).

The provisions of this rule are predicated upon the requirements of the soldiers' and sailors' civil relief act, and the rule was adopted for the purpose of establishing a procedure for compliance therewith. That act by its plain provisions does not prevent the foreclosure of security for any obligation pursuant to a written agreement of the parties executed during the period of military service. Whitaker v. Hearnsberger, 123 Colo. 545, 233 P.2d 389 (1951).

The purpose of the rule is only to establish the status of the debtor with respect to military service. Hastings v. Security Thrift & Mtg. Co., 145 Colo. 36, 357 P.2d 919 (1960).

Proceedings under this rule are designed to afford holders of notes secured by deeds of trust a means of avoiding questions of marketability of title derived from sales thereunder. Where the debtor was not in military service, the sale by the public trustee could have proceeded without reference to this rule without prejudice

to the debtor. Hastings v. Security Thrift & Mtg. Co., 145 Colo. 36, 357 P.2d 919 (1960).

This rule implements the statutory public trustee foreclosure system. Bakers Park Mining & Milling Co. v. District Court, 662 P.2d 483 (Colo. 1983).

Proceedings under this rule are not adversary proceedings in which the court determines issues and enters a final judgment, and no appeal may be taken to review the same. Hastings v. Security Thrift & Mtg. Co., 145 Colo. 36, 357 P.2d 919 (1960).

When hearing required. If a response to the motion seeking sale under the public trustee's deed is timely filed, the court should conduct a hearing on the existence of the default, and other relevant issues if raised in the response. Dews v. District Court, 648 P.2d 662 (Colo. 1982).

The scope of inquiry for a hearing held pursuant to this rule is limited to the existence of a default or other circumstances authorizing the sale, and action collateral to such hearing is necessary to resolve all other issues. Ragsdale Bros. Roofing v. United Bank, 744 P.2d 750 (Colo. App. 1987); In re Carpenter, 200 Bankr. 47 (D. Colo. 1996).

The purpose and scope of a hearing pursuant to this rule are very narrow: the trial court must determine whether there is a reasonable probability that a default or other circumstance authorizing exercise of a power of sale has occurred. The test is whether, considering all relevant evidence, there is a reasonable probability that a default exists. United Guar. Residential Ins. Co. v. Vanderlaan, 819 P.2d 1103 (Colo. App. 1991); Plymouth Capital Co. v. District Court, 955 P.2d 1014 (Colo. 1998).

Determination of real party in interest. The trial court in a proceeding under this rule must consider whether the moving parties are the real parties in interest when the issue is properly raised by the debtors. Goodwin v. District Court, 779 P.2d 837 (Colo. 1989).

The defenses of waiver and estoppel are valid defenses that should be considered by the trial court in a proceeding under this rule if properly raised by the debtor. Goodwin v. District Court, 779 P.2d 837 (Colo. 1989).

There is no requirement that an order directing foreclosure be filed in the county where the property affected is located. Hastings v. Security Thrift & Mtg. Co., 145 Colo. 36, 357 P.2d 919 (1960).

The notice procedure requires nothing more than that the notices be mailed to the mortgagee at the address given in the deed of trust. Motlong v. World Sav. & Loan Ass'n, 168 Colo. 540, 452 P.2d 384 (1969).

Certificate of mailing not conclusive. Although section (b) states that "mailing and posting shall be evidenced by the certificate of the clerk", the certificate is not conclusive proof of compliance with the rule but only creates a presumption which may be rebutted with evidence of noncompliance. Dews v. District Court, 648 P.2d 662 (Colo. 1982).

Court may retain supervisory jurisdiction over proposed foreclosure. The narrowly circumscribed scope of a proceeding under this rule does not preclude the court from retaining supervisory jurisdiction over a proposed foreclosure for purposes of ensuring that due process is accorded to the parties. Bakers Park Mining & Milling Co. v. District Court, 662 P.2d 483 (Colo. 1983).

Ex parte appointment of receiver. While the ex parte appointment of a receiver may be permissible under emergency circumstances or where notice is impractical, a case must be pending at the time of the appointment. Johnson v. McCaughan, Carter & Scharrer, 672 P.2d 221 (Colo. App. 1983).

A receivership hearing did not provide petitioners with an effective opportunity to be heard on the issue of foreclosure. Valley Dev. at Vail, Inc. v. Warder, 192 Colo. 316, 557 P.2d 1180 (1976).

Injunctive action is not the exclusive action which may be taken under this rule as an aggrieved person may also seek other relief in any court having jurisdiction. Ragsdale Bros. Roofing v. United Bank, 744 P.2d 750 (Colo. App. 1987).

Foreclosure sale must be scheduled within seven days of hearing. When a creditor seeks to foreclose a deed of trust or mortgage, the foreclosure sale must be scheduled not less than seven days after the hearing conducted under this rule. Kirchner v. Sanchez, 661 P.2d 1161 (Colo. 1983).

Petitioners may be allowed additional time to redeem. The trial court acts within the limits of its discretion when it allows the petitioners additional time to redeem from the foreclosure sales. Moreland v. Marwich, Ltd., 665 P.2d 613 (Colo. 1983).

Attorney's fees not provided for. The determination of whether attorneys' fees can be recovered and the amount that is due is not within the permissible scope of a rule 120 proceeding. Bakers Park Mining & Milling Co. v. District Court, 662 P.2d 483 (Colo. 1983).

Proceedings under this rule are a "judicial proceeding" and, therefore, "legal action" for the purposes of the federal Fair Debt Collection Practices Act. Thus, former section (f) of this rule, which permitted an action to be filed in any county, was preempted by federal law. But acceptance by district court clerks of improperly filed actions was not "state action" for the purposes of 42 U.S.C. § 1983. Zartman v. Shapiro and Meinhold, 811 P.2d 409 (Colo. App. 1990) (decided under rule in effect prior to 1989 amendment), aff'd, 823 P.2d 120 (Colo. 1992).

The federal Fair Debt Collection Practices Act requires that an action to enforce an interest in real property securing a consumer's obligation, brought by a debt collector, must be brought only in a judicial district in which the real property is located. For purposes of the federal act an attorney who qualifies under the first sentence of the definition in 15 U.S.C. § 1692a(6) is a debt collector. Shapiro and Meinhold v. Zartman, 823 P.2d 120 (Colo. 1992) (decided under rule in effect prior to 1989 amendment).

Court order under this rule to reform a bid ex post facto was beyond its authority. United Guar. Res. Ins. v. Vanderlaan, 819 P.2d 1103 (Colo. App. 1991).

The statute of limitations applies to each installment due on a note separately and does not begin to run on any one installment until that installment is due. Right to foreclose on note pursuant to this rule 120 is not extinguished because recovery on certain payments is barred by the statute of limitations. Application of Church, 833 P.2d 813 (Colo. App. 1992).

Plaintiffs' due process rights not violated where claim of insufficient notice arises out of their own failure to comply with the change of address requirements in the deed of trust. Plaintiffs failed to provide to defendant, in writing, a notice of change of address. Defendant thus utilized address specified in the deed of trust to serve its motion and notice under this rule and to provide the public trustee with plaintiffs' most current address. The plain language of the deed of trust expresses the parties' intentions concerning notice and changes of address. Defendant's adherence to the deed of trust' notice provision complied with the notice requirements of section (a). Thus, the notice provision in the deed of trust and defendant's compliance with that provision comported with the requirements of section (a). Estates in Eagle Ridge, LLLP v. Valley Bank & Trust, 141 P.3d 838 (Colo. App. 2005).

Denver district court had jurisdiction to enter order authorizing foreclosure sale in proceeding filed in that court under this rule notwithstanding pending Larimer County proceeding. Under the circumstances of this case, the rule of priority of jurisdiction did not divest the Denver district court of jurisdiction to enter the order authorizing sale. There was no risk of inconsistent decision or duplicative efforts, because defendant had abandoned its efforts to obtain an order authorizing sale from the Larimer county district court and, indeed, had not even filed the necessary documentation to allow it to obtain such an order from the court. Thus, policy reasons supporting rule of priority of jurisdiction are not implicated here. Estates in Eagle Ridge, LLLP v. Valley Bank & Trust, 141 P.3d 838 (Colo. App. 2005).

Applied in Good Fund, Ltd.-1972 v. Church, 40 Colo. App. 403, 579 P.2d 1174 (1978); Boulder Lumber Co. v. Alpine of Nederland, Inc., 626 P.2d 724 (Colo. App. 1981); Krause v. Columbia Sav. & Loan Ass'n, 631 P.2d 1158 (Colo. App. 1981); Wiley v. Bank of Fountain Valley, 632 P.2d 282 (Colo. App. 1981); Kemp v. Empire Sav., Bldg. & Loan Ass'n, 660 P.2d 899 (Colo. 1983); Rustic Hills Shopping Plaza, Inc. v. Columbia Sav. & Loan Ass'n 661 P.2d 254 (Colo. 1983); Krause v. Columbia Sav. & Loan Ass'n, 661 P.2d 265 (Colo. 1983); Klingensmith v. Serafini, 663 P.2d 1058 (Colo. App. 1983).

Rule 120.1. Order Authorizing Expedited Sale Pursuant to Statute

(a) Motion; Contents. An order of the court authorizing an expedited sale may be sought in conjunction with the order authorizing sale. An eligible holder as defined by statute may file a verified motion, together with a supporting affidavit, in a district court seeking an order authorizing an expedited sale together with the motion for order authorizing sale pursuant to C.R.C.P. Rule 120. The affidavit shall state the following: (1) The moving party is an eligible holder as that term is defined by statute; (2) the subject deed of trust secures an eligible evidence of debt as that term is defined by statute; and (3) the property has been abandoned as defined by statute, or in the alternative, the grantor of the deed of trust requests an order for expedited foreclosure sale.

(b) Notice; Contents; Service. The moving party shall issue a combined notice, which shall include the provisions as specified in C.R.C.P. Rule 120(b) and add a statement that the moving party is seeking in addition to the order authorizing sale, an order for expedited foreclosure sale. The moving party shall additionally state that the property is abandoned, or in the alternative that the grantor of the deed of trust has requested the order for expedited foreclosure sale. Such combined notice shall be prepared and served in Spanish and English. Such combined notice shall be served by the moving party as required by C.R.C.P. Rule 120(b). In addition to the mailing of such combined notice, filing of such combined notice with the clerk and providing a second copy for the clerk to post, the combined notice shall be either personally served on the grantor of the deed of

trust, or alternatively such combined notice shall be posted at the real property as provided in C.R.C.P. Rule 120(b). Such mailing, delivery to the clerk for posting, and property posting shall be evidenced by the certificate of the moving party or the moving party's agent.

(c) Response; Contents; Filing and Service. The grantor of the deed of trust may dispute the moving party's motion for expedited sale in the same time frame as provided in C.R.C.P. Rule 120.

(d) Hearing; Scope of Issues; Order; Effect. At the time and place set for the hearing or to which the hearing may have been continued, the court shall examine the motion and responses, if any. The scope of inquiry under this section shall not extend beyond the determination that the property is abandoned as that term is defined by statute, or that the grantor requests for an order for expedited sale. The court shall enter the order for expedited sale if there is clear and convincing evidence that the property has been abandoned or that the grantor of the deed of trust has requested such order. In order to establish clear and convincing evidence that the property has been abandoned, the moving party shall file an affidavit with the court as provided by statute. The court shall determine whether there is clear and convincing evidence that the property is abandoned.

(e) Hearing Dispensed with if no Response Filed. If no response has been filed within the time permitted by C.R.C.P. Rule 120(c), the court shall examine the motion and, if satisfied that the moving party is entitled to an order for expedited sale upon the facts stated in the motion and affidavit, the court shall dispense with the hearing and forthwith enter the order for expedited sale.

Source: Entire rule added and effective October 14, 2010.

CHAPTER 17A

Practice Standards and Local Court Rules

CHAPTER 17A

PRACTICE STANDARDS AND LOCAL COURT RULES

Rule 121. Local Rules — Statewide Practice Standards

(a) Repeal of local rules. All District Court local rules, including local procedures and standing orders having the effect of local rules, enacted before April 1, 1988 are hereby repealed.

(b) Authority to enact local rules on matters which are strictly local. Each court by action of a majority of its judges may from time to time propose local rules and amendments of local rules not inconsistent with the Colorado Rules of Civil Procedure or Practice Standards set forth in C.R.C.P. 121(c), nor inconsistent with any directive of the Supreme Court. A proposed rule or amendment shall not be effective until approved by the Supreme Court. No local procedure shall be effective unless adopted as a local rule in accordance with this Section (b) of C.R.C.P. 121. To obtain approval, three copies of any proposed local rule or amendment of a local rule shall be submitted to the Supreme Court through the office of the State Court Administrator. Reasonable uniformity of local rules is required. Numbering and format of any proposed local rule or amendment of a local rule shall be as prescribed by the Supreme Court. The Supreme Court's approval of a local rule or local procedure shall not preclude review of that rule or procedure under the law of circumstances of a particular case.

(c) Matters of statewide concern. The Colorado Rules of Civil Procedure and the following rule subject areas called "Practice Standards" are declared to be of statewide concern and shall preempt and control in their form and content over any differing local rule:

DISTRICT COURT* PRACTICE STANDARDS

§§ 1-1 to End

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*Includes Denver Probate Court where applicable.

Section 1-1

ENTRY OF APPEARANCE AND WITHDRAWAL

1. Entry of Appearance.

No attorney shall appear in any matter before the court unless that attorney has entered an appearance by filing an Entry of Appearance or signing a pleading. An entry of appearance shall state (a) the identity of the party for whom the appearance is made; (b) the attorney's office address; (c) the attorney's telephone number; (d) the attorney's E-Mail address; and (e) the attorney's registration number.

2. Withdrawal From an Active Case.

(a) An attorney may withdraw from a case, without leave of court where the withdrawing attorney has complied with all outstanding orders of the court and either files a notice of withdrawal where there is active co-counsel for the party represented by the withdrawing attorney, or files a substitution of counsel, signed by both the withdrawing and replacement attorney, containing the information required for an Entry of Appearance under subsection 1 of this Practice Standard as to the replacement attorney.

(b) Otherwise an attorney may withdraw from a case only upon approval of the court. Such approval shall rest in the discretion of the court, but shall not be granted until a motion to withdraw has been filed and served on the client and the other parties of record or their attorneys and either both the client and all counsel for the other parties consent in writing at or after the time of the service of said motion, or at least 14 days have expired after service of said motion. Every motion to withdraw shall contain the following advisements:

(I) the client has the burden of keeping the court and the other parties informed where notices, pleadings or other papers may be served;

(II) if the client fails or refuses to comply with all court rules and orders, the client may suffer possible dismissal, default or other sanctions;

(III) the dates of any proceedings, including trial, which dates will not be delayed nor proceedings affected by the withdrawal of counsel;

(IV) the client's and the other parties' right to object to the motion to withdraw within 14 days after service of the motion;

(V) if the client is not a natural person, that it must be represented by counsel in any court proceedings unless it is a closely held entity and first complies with section 13-1-127, C.R.S.; and

(VI) the client's last known address and telephone number.

(c) The client and the opposing parties shall have 14 days after service of a motion to withdraw within which to file objections to the withdrawal.

(d) If the motion to withdraw is granted, the withdrawing attorney shall promptly notify the client and the other parties of the effective date of the withdrawal.

3. Withdrawal From Completed Cases.

In any civil case which is concluded and in which all related orders have been submitted and entered by the court and complied with by the withdrawing attorney, an attorney may withdraw from the case without leave of court by filing a notice in the form and content of Appendix to Chapters 1 to 17A, Form 36, C.R.C.P. [JDF Form 83], which shall be served upon the client and all other parties of record or their attorneys, pursuant to C.R.C.P. 5. The withdrawal shall automatically become effective 14 days after service upon the client and all other parties of record or their attorneys unless there is an objection filed, in which event the matter shall be assigned to an appropriate judicial officer for determination.

4. Entries of Appearance and Withdrawals by Members or Employees of Law Firms, Professional Corporations or Clinics.

The entry of an appearance or withdrawal by an attorney who is a member or an employee of a law firm, professional corporation or clinic shall relieve other members or employees of the same law firm, professional corporation or clinic from the necessity of filing additional entries of appearance or withdrawal in the same litigation unless otherwise indicated.

5. Notice of Limited Representation Entry of Appearance and Withdrawal.

In accordance with C.R.C.P. 11(b) and C.R.C.P. Rule 311(b), an attorney may undertake to provide limited representation to a pro se party involved in a court proceeding. Upon the request and with the consent of a pro se party, an attorney may make a limited appearance for the pro se party in one or more specified proceedings, if the attorney files and serves with the court and the other parties and attorneys (if any) a notice of the limited appearance prior to or simultaneous with the proceeding(s) for which the attorney appears. At the conclusion of such proceeding(s), the attorney's appearance terminates without the necessity of leave of court, upon the attorney filing a notice of completion of limited appearance. Service on an attorney who makes a limited appearance for a party shall be valid only in connection with the specific proceeding(s) for which the attorney appears.

COMMITTEE COMMENT

The purpose of section 1-1(5) is to implement Colorado Rules of Civil Procedure 11(b) and 311(b), which authorize limited representation of a pro se party either on a pro bono or fee basis, in accordance with Colorado Rule of Professional Conduct 1.2. This provision provides assurance that an attorney who makes a limited appearance for a pro se party in a specified case

proceeding(s), at the request of and with the consent of the pro se party, can withdraw from the case upon filing a notice of completion of the limited appearance, without leave of court.

Source: Committee comment amended and adopted June 17, 1999, effective July 1, 1999; entire section and committee comment repealed and readopted October 20, 2005, effective January 1, 2006; 2.(b) amended and effective January 7, 2010; 5. added and effective October 20, 2011; IP 2.(b), 2.(b)(IV), 2.(c), and 3. amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

COMMITTEE COMMENT

An "active case" is any case other than a "completed case" as described in subsection 3 of the Practice Standard.

Section 1-2

SPECIAL ADMISSION OF OUT-OF-STATE ATTORNEYS

Special admission of an out-of-state attorney shall be in accordance with C.R.C.P. Chapter 18, Rules Governing Admission to the Bar 220 and 221.

Source: Entire section amended and adopted and committee comment repealed October 20, 2005, effective January 1, 2006.

Section 1-3

JURY FEES

Each party exercising the right to trial by jury shall file and serve a demand therefor and simultaneously pay the requisite jury fee. The demand and payment of the jury fee shall be in accordance with Rule 38. The jury fee shall not be returned under any circumstances. Failure of a party to timely file and serve a demand for trial by jury and pay the jury fee shall constitute a waiver of that party's right to trial by jury. When any party exercises the right to trial by jury, every other party to the action must pay the requisite jury fee unless such other party files a notice of waiver of the right to trial by jury pursuant to Rule 38(a)(2). Any party who has demanded a trial by jury and has paid the requisite jury fee and any party who has not waived the right to trial by jury and has paid the requisite jury fee is entitled to trial by jury of all issues properly designated for trial by jury unless that party waives such right pursuant to Rule 38(e).

Source: Entire section repealed and reenacted July 12, 1990, effective September 1, 1990.

COMMITTEE COMMENT

Amendment of this practice standard is to conform it to the requirements of C.R.S. 13-71-144 (1989) and amended C.R.C.P 38. Under that statutory requirement, each party who wishes to be assured of having a jury trial, must demand a jury trial and pay a jury fee within the time specified. The case will be tried to a jury if the party demanding a jury trial makes a timely demand, pays the jury fee at the time of the demand and does not later waive a jury trial. If a demand is timely made and the jury fee timely paid, the right to jury trial cannot be withdrawn as against a party who has demanded a jury trial and timely paid a jury fee. For a party to be certain of having a jury trial, that party must demand it and timely pay a jury fee.

Section 1-4

SUPPRESSION FOR SERVICE OF PROCESS

In any civil action, upon written request of the claiming party, the fact of the filing of a case shall be suppressed by the clerk only upon order of the court to secure service of summons or other process and such order shall expire upon service of such summons or other process.

COMMITTEE COMMENT

This Practice Standard was a local rule found in most districts. It provides the machinery for the clerk to temporarily suppress the fact of filing of a case temporarily to avoid publicity that may affect ability to serve process. Such temporary suppression in aid of service of process, is different from the Practice Standard pertaining to limitation of access to court files.

Section 1-5

LIMITATION OF ACCESS TO COURT FILES

1. **Nature of Order.** Upon motion by any party named in any civil action, the court may limit access to court files. The order of limitation shall specify the nature of limitation, the duration of the limitation, and the reason for limitation.
2. **When Order Granted.** An order limiting access shall not be granted except upon a finding that the harm to the privacy of a person in interest outweighs the public interest.
3. **Application for Order.** A motion for limitation of access may be granted, **ex parte**, upon motion filed with the complaint, accompanied by supporting affidavit or at a hearing concerning the motion.
4. **Review by Order.** Upon notice to all parties of record, and after hearing, an order limiting access may be reviewed by the court at any time on its own motion or upon the motion of any person.

COMMITTEE COMMENT

This Practice Standard was made necessary by lack of uniformity throughout the districts concerning access to court files. Some districts permitted free access after service of process was obtained. Others, particularly in malpractice or domestic relations cases, almost routinely prohibited access to court file information. The committee deemed it preferable to have machinery available for limitation in an appropriate case, but also a means for other entities having interest in the litigation, including the media, to have access.

Section 1-6

SETTINGS FOR TRIALS OR HEARINGS/SETTINGS BY TELEPHONE

1. All settings of trials and hearings, other than those set on the initiative of the court, shall be by the courtroom clerk upon notice to all other parties. Settings by telephone are encouraged. The original or a copy of the notice shall be on file with the courtroom clerk before the setting and shall contain the following:

(a) The caption of the case with designation "Notice to Set" or "Notice to Set by Telephone."

(b) The nature of the matter being set.

(c) The date and time at which the setting will occur.

(d) The courtroom clerk's address, by division or courtroom number if applicable and telephone number.

(e) A statement that the party or attorney being notified may appear or if not present, will be called at or about the time specified.

(f) A statement if the setting is to be by telephone.

2. The party issuing the notice to set shall be responsible for contacting all other counsel and clearing available dates with them.

3. Any attorney receiving the notice to set who does not personally appear at the setting shall have personnel at his or her office, supplied with a current appointment calendar and authorized to make settings for that attorney, at the date and time in the notice.

4. The party requesting the setting shall immediately confirm in writing the date and time of the matter that has been set with all other parties or their attorneys and shall file that confirmation with the court.

COMMITTEE COMMENT

The change in Standard 1-6 is to allow for settings on initiative of the Court. This change is to resolve the question raised by several districts as to whether the Court had the power to initiate its own settings. There has also been a slight tidying-up of language of the first sentence.

Section 1-7

AUDIO-VISUAL DEVICES

The photographing, broadcasting, televising or recording of court proceedings in any courtroom shall be governed in accordance with Canon 3 of the Code of Judicial Conduct of the State of Colorado.

COMMITTEE COMMENT

This Practice Standard was deemed necessary because it was apparent from local rules of a number of counties that there was a general lack of awareness of Canon 3 of the Code of Judicial Conduct pertaining to photographing, broadcasting, televising or recording court proceedings. This Practice Standard draws attention to Canon 3 and incorporates its provisions by reference.

Section 1-8

CONSOLIDATION

A party seeking consolidation shall file a motion to consolidate in each case sought to be consolidated. The motion shall be determined by the court in the case first filed in accordance with Practice Standard § 1-15. If consolidation is ordered, all subsequent filings shall be in the case first filed and all previous filings related to the consolidated cases placed together under that case number, unless otherwise ordered by the court.

Section 1-9

MULTI-DISTRICT LITIGATION

Consolidation of matters pending in other districts shall be determined in accordance with C.R.C.P. 42.1.

Section 1-10

DISMISSAL FOR FAILURE TO PROSECUTE

1. Upon due notice to the opposite party, any party to a civil action may apply to have any action dismissed when such action has not been prosecuted or brought to trial with due diligence.

2. The court, on its own motion, may dismiss any action not prosecuted with due diligence, upon 35 days' notice in writing to each attorney of record and each appearing party not represented by counsel, or require the parties to show cause in writing why the case should not be dismissed. Showing of cause and objections thereto shall be determined in accordance with Practice Standard § 1-15 (Determination of motions).

3. If the case has not been set for trial, no activity of record in excess of 12 continuous months shall be deemed prima facie failure to prosecute.

4. Failure to show cause on or before the date set forth in the court's notice shall justify dismissal without further proceedings.

5. Any dismissal under this rule shall be without prejudice unless otherwise specified by the court.

Source: 2. amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

COMMITTEE COMMENT

The purpose of this Practice Standard is to encourage prosecution of pending cases and permit machinery to dispose of matters which are not being prosecuted. Dismissal is without prejudice, and there are sufficient safeguards incorporated into the Practice Standard to permit retention on the docket if cause for the delay and interest in the case is shown. The Practice Standard does not mandate that the court search its files and send out notices, but permits such action if the court wishes. The Practice Standard also permits initiation of the procedure by motion.

Section 1-11

CONTINUANCES

Motions for continuances of hearings or trials shall be determined in accordance with Practice Standard 1-15 and shall be granted only for good cause. Stipulations for continuance shall not be effective unless and until approved by the court. A motion for continuance or request for extension of time will not be considered without a certificate that a copy of the motion has also been served upon the moving attorney's client.

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

Section 1-12

MATTERS RELATED TO DISCOVERY

1. Unless otherwise ordered by the court, reasonable notice for the taking of depositions pursuant to C.R.C.P. 30(b)(1) shall not be less than 7 days. Before serving a notice to take a deposition, counsel seeking the deposition shall make a good faith effort to schedule it by agreement at a time reasonably convenient and economically efficient to the proposed deponent and counsel for all parties. Prior to scheduling or noticing any deposition, all counsel shall confer in a good faith effort to agree on a reasonable means of limiting the time and expense of that deposition. Pending resolution of any motion pursuant to C.R.C.P. 26(c), the filing of the motion shall stay the discovery at which the motion is directed.

2. Motions under Rules 26(c) and 37(a), C.R.C.P., shall set forth the interrogatory, request, question or response constituting the subject matter of the motion.

3. Interrogatories and requests under Rules 33, 34, and 36, C.R.C.P., and the responses thereto shall be served upon other counsel or parties, but shall not be filed with the court. If relief is sought under Rule 26(c), C.R.C.P., or Rule 37(a), C.R.C.P., copies of the portions of the interrogatories, requests, answers or responses in dispute shall be filed with the court contemporaneously with the motion. If interrogatories, requests, answers or responses are to be used at trial, the portions to be used shall be made available and placed,

but not filed, with the trial judge at the outset of the trial insofar as their use reasonably can be anticipated.

4. The originals of all stenographically reported depositions shall be delivered to the party taking the deposition after submission to the deponent as required by Rule 30(e), C.R.C.P. The original of the deposition shall be retained by the party to whom it is delivered to be available for appropriate use by any party in a hearing or trial of the case. If a deposition is to be used at trial, it shall be made available for inspection and placed, but not filed with the trial judge at the outset of the trial insofar as its use reasonably can be anticipated.

5. Unless otherwise ordered, the court will not entertain any motion under Rule 37(a), C.R.C.P., unless counsel for the moving party has conferred or made reasonable effort to confer with opposing counsel concerning the matter in dispute before the filing of the motion. Counsel for the moving party shall file a certificate of compliance with this rule at the time the motion under Rule 37(a), C.R.C.P., is filed.

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

COMMITTEE COMMENT

Provisions of the practice standard are patterned in part after the local rule now in effect in the United States District court for the District of Colorado. This practice standard specifies the minimum time for the serving of a notice to take deposition. Before serving a notice, however, counsel are required to make a good faith effort to schedule the deposition by agreement at a time reasonably convenient and economically efficient to the deponent and all counsel. Counsel are also required to confer in a good faith effort to agree on a reasonable means of limiting the time and expense of any deposition. The provisions of this Practice Standard are also designed to lessen paper mass/filing space problems and resolve various general problems related to discovery.

Section 1-13

DEPOSITION BY AUDIO TAPE RECORDING

When a deposition is taken by audio tape recording under C.R.C.P. 30(b)(4), the following procedures shall be followed:

(a) An oath or affirmation shall be administered to the witness by a notary public or other officer authorized to administer oaths.

(b) Two tape recorders with separate microphones shall be used.

(c) Speakers shall identify themselves before each statement except during extended colloquy between examiner and deponent.

(d) The recording shall be transcribed at the expense of the party taking the deposition.

(e) The transcribed testimony shall be made available for correction and signature by the deponent in accordance with Rule 30(e), C.R.C.P.

(f) The tape from which the transcription is made shall be retained by the party taking the deposition. The second tape shall be retained by the adverse party. Both tapes shall be preserved until the litigation is concluded.

(g) The party responsible for the transcription shall make available to the other parties upon request copies of the transcription at a reasonable charge and shall also submit to the other parties copies of changes, if any, which are made by the deponent and shall also inform the other parties of the date when the deposition is available for signature and whether signature is obtained.

(h) The transcription shall be retained by the party taking the deposition and made available in accordance with Paragraph 4 Practice Standard 1-12 (Matters Related To Discovery).

Source: Entire section amended and adopted October 20, 2005, effective January 1, 2006.

COMMITTEE COMMENT

This Practice Standard sets forth detailed procedural safeguards for taking of depositions by tape recording as set out in **Sanchez v. District Court**, 200 Colo. 33, 624 P.2d 1314 (1981).

Section 1-14

DEFAULT JUDGMENTS

1. To enter a default judgment under C.R.C.P. 55(b) of the Colorado Rules of Civil Procedure, the following documents in addition to the motion for default judgment are necessary:

(a) The original summons showing valid service on the particular defendant in accordance with Rule 4, C.R.C.P.

(b) An affidavit stating facts showing that venue of the action is proper. The affidavit may be executed by the attorney for the moving party.

(c) An affidavit or affidavits establishing that the particular defendant is not a minor, an incapacitated person, an officer or agency of the State of Colorado, or in the military service. The affidavit must be executed by the attorney for the moving party on the basis of reasonable inquiry.

(d) An affidavit or affidavits or exhibits establishing the amount of damages and interest, if any, for which judgment is being sought. The affidavit may not be executed by the attorney for the moving party. The affidavit must be executed by a person with knowledge of the damages and the basis therefor.

(e) If attorney fees are requested, an affidavit that the defendant agreed to pay attorney fees or that they are provided by statute; that they have been paid or incurred; and that they are reasonable. The attorney for the moving party may execute the affidavit setting forth those matters listed in or required by Colorado Rule of Professional Conduct 1.5.

(f) If the action is on a promissory note, the original note shall be presented to the court in order that the court may make a notation of the judgment on the face of the note. If the note is to be withdrawn, a photocopy shall be substituted.

(g) A proposed form of judgment which shall recite in the body of the judgment:

(1) The name of the party or parties to whom the judgment is to be granted;

(2) The name of the party or the parties against whom judgment is being taken;

(3) Venue has been considered and is proper;

(4) When there are multiple parties against whom judgment is taken, whether the relief is intended to be a joint and several obligation;

(5) Where multiple parties are involved, language to comply with C.R.C.P. 54(b), if final judgment is sought against less than all the defendants;

(6) The principal amount, interest and attorney's fees, if applicable, and costs which shall be separately stated.

2. If further documentation, proof or hearing is required, the court shall so notify the moving party.

3. If the party against whom default judgment is sought is in the military service, or his status cannot be shown, the court shall require such additional evidence or proceeding as will protect the interests of such party in accordance with the Service Member Civil Relief Act (SCRA), 50 USC § 520, including the appointment of an attorney when necessary. The appointment of an attorney shall be made upon application of the moving party, and expense of such appointment shall be borne by the moving party, but taxable as costs awarded to the moving party as part of the judgment except as prohibited by law.

4. In proceedings which come within the provisions of Rules 55 or 120, C.R.C.P., attendance by the moving party or his attorney shall not be necessary in any instance in which all necessary elements for entry of default under those rules are self-evident from verified motion in the court file. When such matter comes up on the docket with no party

or attorney appearing and the court is of the opinion that necessary elements are not so established, the court shall continue or vacate the hearing and advise the moving party or attorney accordingly.

Source: 1., 3., and committee comment amended and adopted October 20, 2005, effective January 1, 2006.

COMMITTEE COMMENT

This Practice Standard was needed because neither C.R.C.P. 55, nor any local rule specified the elements necessary to obtain a default judgment and each court was left to determine what was necessary. One faced with the task of attempting to obtain a default judgment usually found themselves making several trips to the courthouse, numerous phone calls and redoing needed documents several times. The Practice Standard is designed to minimize both court and attorney time. The Practice Standard sets forth a standardized check list which designates particular items needed for obtaining a default judgment. For guidance on affidavits, see C.R.C.P. 108. See also Section 13-63-101, C.R.S., concerning affidavits and requirements by the court.

Section 1-15

DETERMINATION OF MOTIONS

1. Briefs; When Required; Time for Serving and Filing — Length. (a) Except motions during trial or where the court deems an oral motion to be appropriate, any motions involving a contested issue of law shall be supported by a recitation of legal authority incorporated into the motion except for a motion pursuant to C.R.C.P. 56. Motions or briefs in excess of 10 pages in length, exclusive of tables and appendices, are discouraged. Except for electronic filings made pursuant to Section 1-26 of this Rule, the original and one copy of all motions and briefs shall be filed with the court, and a copy served as required by law.

(b) The responding party shall have 21 days after the filing of the motion or such lesser or greater time as the court may allow in which to file a responsive brief. If a motion is filed 42 days or less before the trial date, the responding party shall have 14 days after the filing of the motion or such lesser or greater time as the court may allow in which to file a responsive brief.

(c) Except for a motion pursuant to C.R.C.P. 56, the moving party shall have 7 days after the filing of the responsive brief or such greater or lesser time as the court may allow to file a reply brief. For a motion pursuant to C.R.C.P. 56, the moving party shall have 14 days after the filing of the responsive brief or such greater or lesser time as the court may allow to file a reply brief.

2. Affidavits. If facts not appearing of record may be considered in disposition of the motion, the parties may file affidavits within the time specified in Rules 6(d), 56 or 59, C.R.C.P. Copies of such affidavits and any documentary evidence used in connection with the motion shall be served on all other parties.

3. Effect of Failure to File Legal Authority. If the moving party fails to incorporate legal authority into the motion or fails to file a brief with a C.R.C.P. 56 motion, the court may deem the motion abandoned and may enter an order denying the motion. Failure of a responding party to file a responsive brief may be considered a confession of the motion.

4. Motions to be Determined on Briefs, When Oral Argument is Allowed; Motions Requiring Immediate Attention. If possible, motions shall be determined promptly upon the written motion and briefs submitted. However, the court may order oral argument or an evidentiary hearing, or if the request for oral argument or an evidentiary hearing is requested in a motion, or any brief, oral argument may be allowed by the court at its discretion. Any motion requiring immediate disposition shall be called to the attention of the courtroom clerk by the party filing such motion.

5. Notification of Court's Ruling; Setting of Argument or Hearing When Ordered. Whenever the court enters an order denying or granting a motion without a hearing,

all parties shall be forthwith notified by the court of such order. If the court desires or authorizes oral argument or an evidentiary hearing, all parties shall be so notified by the court. After notification, it shall be the responsibility of the moving party to have the motion set for oral argument or hearing. A notice to set oral argument or hearing shall be filed in accordance with Practice Standard § 1-6 within 7 days of notification that oral argument or hearing is required or authorized.

6. Effect of Failure to Appear at Oral Argument or Hearing. If any of the parties fails to appear at an oral argument or hearing, without prior showing of good cause for non-appearance, the court may proceed to hear and rule on the motion.

7. Sanctions. If a frivolous motion is filed or if frivolous opposition to a motion is interposed, the court may assess reasonable attorney's fees against the party or attorney filing such motion or interposing such opposition.

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

9. Unopposed Motions. All unopposed motions shall be so designated in the title of the motion.

10. Proposed Order. Each motion shall be accompanied by a proposed order submitted in editable format. The proposed order complies with this provision if it states that the requested relief be granted or denied.

Source: 1. amended and effective September 6, 1990; 1. and committee comment amended July 9, 1992, effective October 1, 1992; 1., 3., and 8. amended and adopted April 14, 1994, effective January 1, 1995, for all cases filed on or after that date; committee comment approved June 10, 1994; committee comment corrected May 14, 1996; 1. and 8. amended and adopted and 9. added and adopted October 20, 2005, effective January 1, 2006; 1. amended and effective June 28, 2007; 1. corrected and effective November 5, 2007; 8. and committee comment para. 2 amended and effective October 12, 2009; 1. and 5. amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); 10. added and effective February 29, 2012.

COMMITTEE COMMENT

This Practice Standard was necessary because of lack of uniformity among the districts concerning how motions were to be made, set and determined. The Practice Standard recognizes that oral argument and hearings are not necessary in all cases, and encourages disposition of motions upon written submissions. The standard also sets forth the uniform requirements concerning filing of legal authority, filing of matters not already of record necessary to determination of motions, and the manner of setting an oral argument if argument is permitted. The practice standard is broad enough to include all motions, including venue motions. Some motions will not require extended legal analysis or affidavits. Obviously, if the basis for a motion is simple and routine, the citation of authorities can be correspondingly simple. Motions or briefs in excess of 10 pages are discouraged.

This standard specifies contemporaneous recitation of legal authority either in the motion itself for all motions except those under C.R.C.P. Rule 56. Moving counsel should confer with opposing counsel before filing a motion to attempt to work out the difference prompting the motion. Every motion must, at the beginning, contain a certification that the movant, in good faith, has conferred with opposing counsel about the motion. If there has been no conference, the reason why must be stated. To assist the court, if the relief sought by the motion has been agreed to or will not be opposed, the court is to be so advised in the motion.

Paragraph 4 of the standard contains an important feature. Any matter requiring immediate action should be called to the attention of the courtroom clerk by the party filing a motion for forthwith disposition. Calling the urgency of a matter to the attention of the court is a responsibility of the parties. The court should permit a forthwith determination.

Section 1-16

PREPARATION OF ORDERS AND OBJECTIONS AS TO FORM

1. When directed by the court, the attorney for the prevailing party or such attorney as the court directs shall file and serve a proposed order within 14 days of such direction or such other time as the court directs. Prior to filing the proposed order, the attorney shall submit it to all other parties for approval as to form. The proposed order shall be timely filed even if all parties have not approved it as to form. A party objecting to the form of the proposed order as filed with court shall have 7 days after service of the proposed order to file and serve objections and suggested modifications to the form of the proposed order.

2. Alternatively, when directed by the court, the attorney for the prevailing party or such attorney as the court directs shall file and serve a stipulated order within 14 days after the ruling, or such other time as the court directs. Any matter upon which the parties cannot agree as to form shall be designated in the proposed order as "disputed." The proposed order shall set forth each party's specific alternative proposal for each disputed matter.

3. Objecting, proposing modification or agreeing to the form of a proposed order or stipulated order, shall not affect a party's rights to appeal the substance of the order.

Source: Entire section repealed and readopted October 20, 2005, effective January 1, 2006; 1. and 2. amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Section 1-17

COURT SETTLEMENT CONFERENCES

1. At any time after the filing of Disclosure Certificates as required by C.R.C.P. 16, any party may file with the courtroom clerk and serve a request for a court settlement conference, together with a notice for setting of such request. The court settlement conference shall, if the request is granted, be conducted by any available judge other than the assigned judge. In all instances, the assigned judge shall arrange for the availability of a different judge to conduct the court settlement conference.

2. All discussions at the settlement conference shall remain confidential and shall not be disclosed to the judge who presides at trial. Statements at the settlement conference shall not be admissible evidence for any purpose in any other proceeding.

3. This Rule shall not apply to proceedings conducted pursuant to Rule 16.2(i).

Source: Entire section amended and adopted September 30, 2004, effective for Domestic Relations Cases as defined in 16.2(a) filed on or after January 1, 2005, and for post-decree motions filed on or after January 1, 2005.

COMMITTEE COMMENT

This Practice Standard provides machinery for settlement conference upon request of the parties. The Practice Standard was deemed necessary because it was previously not possible to have a settlement conference in some districts. The committee recognized that there may be practical difficulties in a particular district because of nonavailability of a separate judge. It was felt that this problem could perhaps be largely overcome by cooperation between several districts or by use of a retired judge to make the service available.

Part 2 of the Practice Standard was deemed necessary to encourage settlement conference participation by litigants. Confidentiality and nonadmissibility of statements or communications made at settlement conference should override and prevail as a matter of policy over any asserted right or interest to the contrary.

Section 1-18

PRETRIAL PROCEDURE, CASE MANAGEMENT, DISCLOSURE AND SIMPLIFICATION OF ISSUES

Pretrial procedure, case management, disclosure and simplification of issues shall be in accordance with C.R.C.P. 16.

Editor's note: The Committee Comment to this section, was deleted from these rules when changes were made to this section November 12, 1987, pursuant to Court change #1987 (17).

Section 1-19

JURY INSTRUCTIONS

Jury instructions shall be prepared and tendered to the court pursuant to C.R.C.P. 16(d).

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

Section 1-20

SIZE, AND FORMAT OF DOCUMENTS

All court documents shall be prepared in 8-1/2" x 11" format with black type or print and conform to the format, and spacing requirements specified in C.R.C.P. 10(d). Except documents filed by E-Filing or facsimile copy, all court documents shall be on recycled white paper. Any form required by these rules may be reproduced by word processor or other means, provided that the reproduction substantially follows the format of the form and indicates the effective date of the form which it reproduces.

Source: Entire section amended and effective September 6, 1990; entire section and committee comment amended July 9, 1992, effective October 1, 1992; entire section amended March 17, 1994, effective July 1, 1994; entire section and committee comment amended and adopted October 20, 2005, effective January 1, 2006.

COMMITTEE COMMENT

This standard draws attention to the requirements of C.R.C.P. 10(d) pertaining to paper size, paper quality, format and spacing of court documents. Color of paper and print requirements for documents not filed by E-Filing or facsimile copy were made necessary because colors other than black and white create photocopying and microfilming difficulties. Provision is also made to clarify that forms reproduced by word processor are acceptable if they follow the format of the form and state the effective date of the form which it reproduces.

Section 1-21

COURT TRANSCRIPTS

1. A party requesting a transcript shall arrange for preparation of the transcript directly with the reporter, or if the session or proceeding was recorded by mechanical or electronic means, the courtroom clerk. Where a transcript is to be made a part of the record on appeal, a party shall request preparation of the transcript by reference in the Designation of Record and by direct arrangement with the court reporter or courtroom clerk as provided herein.
2. Unless otherwise ordered by the court, a court reporter may require a deposit of sufficient money to cover the estimated cost of preparation before preparing the transcript.
3. The transcript shall be signed and certified by the person preparing the transcript. A transcript lodged with the court shall not be removed from the court without court order except when transmitted to the appellate court.

Source: 1. and 3. amended and adopted October 20, 2005, effective January 1, 2006.

COMMITTEE COMMENT

This Practice Standard sets forth uniform requirements for obtaining, paying for, certification and removal of court reporter transcripts.

Section 1-22

COSTS AND ATTORNEY FEES

1. **COSTS.** A party claiming costs shall file a Bill of Costs within 21 days of the entry of order or judgment, or within such greater time as the court may allow. The Bill of Costs shall itemize and total costs being claimed. Taxing and determination of costs shall be in accordance with C.R.C.P. 54(d) and Practice Standard § 1-15.

2. **ATTORNEY FEES.** (a) **Scope.** This practice standard applies to requests for attorney fees made at the conclusion of the action, including attorney fee awards requested pursuant to Section 13-17-102, C.R.S. It also includes awards of fees made to the prevailing party pursuant to a contract or statute where the award is dependent upon the achievement of a successful result in the litigation in which fees are to be awarded and the fees are for services rendered in connection with that litigation. This practice standard does not apply to attorney fees which are part of a judgment for damages and incurred as a result of other proceedings, or for services rendered other than in connection with the proceeding in which judgment is entered. This practice standard also does not apply to requests for attorney fees on matters relating to pre-trial sanctions and motions for default judgment unless otherwise ordered by the court.

(b) **Motion and Response.** Any party seeking attorney fees under this practice standard shall file and serve a motion for attorney fees within 21 days of entry of judgment or such greater time as the court may allow. The motion shall explain the basis upon which fees are sought, the amount of fees sought, and the method by which those fees were calculated. The motion shall be accompanied by any supporting documentation, including materials evidencing the attorney's time spent, the fee agreement between the attorney and client, and the reasonableness of the fees. Any response and reply, including any supporting documentation, shall be filed within the time allowed in practice standard § 1-15. The court may permit discovery on the issue of attorney fees only upon good cause shown when requested by any party.

(c) **Hearing; Determination of Motion.** Any party which may be affected by the motion for attorney fees may request a hearing within the time permitted to file a reply. Any request shall identify those issues which the party believes should be addressed at the hearing. When required to do so by law, the court shall grant a party's timely request for a hearing. In other cases where a party has made a timely request for a hearing, the court shall hold a hearing if it determines in its discretion that a hearing would materially assist the court in ruling on the motion. In exercising its discretion as to whether to hold a hearing in these cases, the court shall consider the amount of fees sought, the sufficiency of the disclosures made by the moving party in its motion and supporting documentation, and the extent and nature of the objections made in response to the motion. The court shall make findings of fact to support its determination of the motion. Attorney fees awarded under this practice standard shall be taxed as costs.

Source: Amended and committee comment added, July 9, 1992, effective October 1, 1992; 1. and 2.(b) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

COMMITTEE COMMENT

1. COSTS. This Standard establishes a uniform, optimum time within which to claim costs. The 15 day requirement encourages prompt filings so that disputes on costs can be determined with other post-trial motions. This Standard also requires itemization and totaling of cost items and reminds practitioners of the means of determining disputes on costs. C.R.S. 13-16-122 (1981) sets forth those items generally awardable as costs.

2. ATTORNEY FEES. Subject to certain exceptions, this Standard establishes a uniform procedure for resolving attorney fee disputes in matters where the request for attorney fees is made at the conclusion of an action of where attorney fees are awarded to the prevailing party (see "Scope"). Unless otherwise ordered by the court, attorney fees under C.R.S. 14-10-119 should be heard at the time of the hearing on the motion or proceeding for which they are requested.

Section 1-23

BONDS IN CIVIL ACTIONS

1. Bonds Which Are Automatically Effective Upon Filing With The Court. The following bonds are automatically effective upon filing with the clerk of the court:

(a) Cash bonds in the amount set by court order, subsection 3 of this rule, or any applicable statute.

(b) Certificates of deposit issued by a bank chartered by either the United States government or the State of Colorado, in the amount set by court order, subsection 3 of this rule, or any applicable statute. The certificate of deposit shall be issued in the name of the clerk of the court and payable to the clerk of the court, and the original of the certificate of deposit must be deposited with the clerk of the court.

(c) Corporate surety bonds issued by corporate sureties presently authorized to do business in the State of Colorado in the amount set by court order, subsection 3 of this rule, or any applicable statute. A power of attorney showing the present or current authority of the agent for the surety signing the bond shall be filed with the bond.

2. Bonds Which Are Effective Only Upon Entry of an Order Approving the Bond.

(a) Letters of credit issued by a bank chartered by either the United States government or the State of Colorado, in the amount set by court order, subsection 3 of this rule, or any applicable statute. The beneficiary of the letter of credit shall be the clerk of the district court. The original of the letter of credit shall be deposited with the clerk of the court.

(b) Any Other Proposed Bond.

3. Amounts of Bond.

(a) Supersedeas Bonds. Unless the court otherwise orders, or any applicable statute directs a higher amount, the amount of a supersedeas bond to stay execution of a money judgment shall be 125% of the total amount of the judgment entered by the court (including any prejudgment interest, costs and attorneys fees awarded by the court). The amount of a supersedeas bond to stay execution of a non-money judgment shall be determined by the court. Nothing in this rule is intended to limit the court's discretion to deny a stay with respect to non-money judgments. Any interested party may move the trial court (which shall have jurisdiction not withstanding the pendency of an appeal) for an increase in the amount of the bond to reflect the anticipated time for completion of appellate proceedings or any increase in the amount of judgment.

(b) Other Bonds. The amounts of all other bonds shall be determined by the court or by any applicable statute.

4. Service of Bonds Upon All Parties of Record. A copy of all bonds or proposed bonds filed with the court shall be served on all parties of record in accordance with C.R.C.P. 5(b).

5. No Unsecured Bonds. Except as expressly provided by statute, and except with respect to appearance bonds, no unsecured bond shall be accepted by the court.

6. Objections to Bonds. Any party in interest may file an objection to any bond which is automatically effective under subsection 1 of this rule or to any proposed bond subject

to subsection 2 of this rule. A bond, which is automatically effective under subsection 1 remains in effect unless the court orders otherwise. Any objections shall be filed not later than 14 days after service of the bond or proposed bond except that objections based upon the entry of any amended or additional judgment shall be made not later than 14 days after entry of any such amended or additional judgment.

Source: Entire section and committee comment repealed and readopted October 20, 2005, effective January 1, 2006; 6. amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

COMMITTEE COMMENT

The Committee is aware that issues have arisen regarding the effective date of a bond, and thus the effectiveness of injunction orders and other orders which are conditioned upon the filing of an acceptable bond. Certain types of bonds are almost always acceptable and thus, under this rule, are automatically effective upon filing with the Court subject to the consideration of timely filed objections. Other types of bonds may or may not be acceptable and should not be effective until the Court determines the sufficiency of the bond. The court may permit property bonds upon such conditions as are appropriate to protect the judgment creditor (or other party sought to be protected). Such conditions may include an appraisal by a qualified appraiser, information regarding liens and encumbrances against the property, and title insurance.

This rule also sets the presumptive amount of a supersedeas bond for a money judgment. The amount of a supersedeas bond for a non-money judgment must be determined in the particular case by the court and this rule is not intended to affect the court's discretion to deny a supersedeas bond in the case of a non-money judgment.

Section 1-24

SETTING OF DEADLINES

[Practice Standard on Setting of Deadlines being prepared.]

Section 1-25

FACSIMILE COPIES

1. Facsimile copy, defined. A facsimile copy is a copy generated by a system that encodes a document into electrical signals, transmits these electrical signals over a telephone/data line, then reconstructs the signals to print an exact duplicate of the original document at the receiving end.

2. Facsimile copies which conform with the quality requirements specified in C.R.C.P. 10(d)(1) may be filed with the court in lieu of the original document. Once filed with the court, the facsimile copy shall be treated as an original for all court purposes. If a facsimile copy is filed in lieu of the original document, the attorney or party filing the facsimile shall retain the original document for production to the court, if requested to do so.

3. The court is not required to provide confirmation that it has received a facsimile transmission.

4. Any facsimile copy transmitted directly to the court shall be accompanied by a cover sheet which states the title of the document, case number, number of pages, identity and voice telephone number of transmitter and any instructions.

5. Payment of any required filing fees shall not be deferred for documents filed with the court by facsimile transmission.

6. This rule shall not require courts to have a fascimile machine nor shall the court be required to transmit orders or other material to attorneys or parties via facsimile transmission.

Source: Entire section and committee comment added and effective September 6, 1990.

COMMITTEE COMMENT

Facsimile transmissions are becoming commonplace in the business world. It was therefore deemed reasonable that the court system adapt to accommodate the use of this technology. Use of the technology, however, should not create more work for court staff. In order not to add to the duties of overburdened court personnel, provision is made that court personnel need not provide confirmation that a facsimile transmission has been received. This should not create difficulty for attorneys because almost all equipment manufactured today provides confirmation that a document has been received. This confirmation should be attached to the document sent and retained with the original document in the party's file.

The committee envisioned at least two ways in which facsimile filings could be accomplished. The first would be an arrangement where the facsimile machine would be located in a court clerk's office. The other would be where transmissions would be made to a machine outside the courthouse and then delivered to the clerk for filing. These rules were designed to accommodate both kinds of filings.

Ordinary thermofax paper fades in sunlight, deteriorates with handling and has a short shelf life. Therefore, only permanent plain paper which is not subject to these infirmities is acceptable for court purposes.

The committee also recognized that a requirement for filing of the original after filing of a facsimile copy would create more work for court staff. The committee therefore decided to accept facsimile copies in lieu of the original with the provision that the original would be maintained if it were ever needed for any purpose.

The requirement under C.R.C.P. 121, Sec. 1-15 for filing of a copy of any motions or briefs has been modified so that a copy is also filed with the clerk of the court. The clerk of the court is then responsible for distributing the copy to the courtroom clerk. This change is necessary because the courtroom clerk will ordinarily not have a separate facsimile machine.

Some judicial districts have or are acquiring the ability to accept credit cards or bank cards for payment of fees and fines. In the judicial districts where bank cards can be used for payment, parties may file complaints, answers and other pleadings which require a filing fee by faxing an appropriate bank card authorization along with the pleadings. If a judicial district does not accept payment by bank card, those types of pleadings cannot be filed by facsimile transmission because payment of filing fees will not be deferred.

The committee believes that reasonable fees can be charged for the costs associated with facsimile filings. However, the setting of such fees is not within the scope of the Rules of Civil Procedure.

The adoption of this rule does not require an attorney to have a designated facsimile telephone number.

Section 1-26

ELECTRONIC FILING AND SERVICE SYSTEM

1. Definitions:

(a) **Document:** A pleading, motion, writing or other paper filed or served under the E-System.

(b) **E-Filing/Service System:** The E-Filing/Service System ("**E-System**") approved by the Colorado Supreme Court for filing and service of documents via the Internet through the Court-authorized E-System provider.

(c) **Electronic Filing:** Electronic filing ("**E-Filing**") is the transmission of documents to the clerk of the court, and from the court, via the E-System.

(d) **Electronic Service:** Electronic service ("**E-Service**") is the transmission of documents to any party in a case via the E-System. Parties who have subscribed to the E-System have agreed to receive service, other than service of a summons, via the E-System.

(e) **E-System Provider:** The E-Service/E-Filing System Provider authorized by the Colorado Supreme Court.

(f) **Signatures:**

(I) Electronic Signature: an electronic sound, symbol, or process attached to or logically associated with an electronic record and executed or adopted by the person with the intent to sign the E-filed or E-served document.

(II) Scanned Signature: A graphic image of a handwritten signature.

2. Types of Cases Applicable: E-Filing and E-Service may be used for certain cases filed in the courts of Colorado as the service becomes available. The availability of the

E-System will be determined by the Colorado Supreme Court and announced through its web site http://www.courts.state.co.us/supct/supct.htm and through published directives to the clerks of the affected court systems. E-Filing and E-Service may be mandated pursuant to Subsection 13 of this Practice Standard 1-26.

3. To Whom Applicable:

(a) Attorneys licensed to practice law in Colorado may register to use the E-System. Any attorney so registered may enter an appearance pursuant to Rule 121, Section 1-1, through E-Filing. In districts where E-Filing is mandated pursuant to Subsection 13 of this Practice Standard 1-26, attorneys must register and use the E-System.

(b) Where the system and necessary equipment are in place to permit it, pro se parties and government entities and agencies may register to use the E-System.

4. Commencement of Action—Service of Summons: Cases may be commenced under C.R.C.P. 3 by E-Filing the initial pleading. Service of a summons shall be made in accordance with C.R.C.P. 4. The serving party or the party's attorney shall enter into the e-system the best known address for each served party as that party is served.

5. E-Filing—Date and Time of Filing: Documents filed in cases on the E-System may be filed under C.R.C.P. 5 through an E-Filing. A document transmitted to the E-System Provider by 11:59 p.m. Colorado time shall be deemed to have been filed with the clerk of the court on that date.

6. E-Service—When Required - Date and Time of Service: Documents submitted to the court through E-Filing shall be served under C.R.C.P. 5 by E-Service. Parties shall keep their address and contact information updated in the e-system. A filing party shall enter or confirm the served party's last known address in the e-system. A document transmitted to the E-System Provider for service by 11:59 p.m. Colorado time shall be deemed to have been served on that date.

7. Filing Party to Maintain the Signed Copy—Paper Document Not to Be Filed—Duration of Maintaining of Document: A printed or printable copy of an E-Filed or E-Served document with original, electronic, or scanned signatures shall be maintained by the filing party and made available for inspection by other parties or the court upon request, but shall not be filed with the court. When these rules require a party to maintain a document, the filer is required to maintain the document for a period of two years after the final resolution of the action, including the final resolution of all appeals. For domestic relations decrees, separation agreements and parenting plans, original signature pages bearing the attorneys, parties', and notaries' signatures must be scanned and E-filed. For probate of a will, the original must be lodged with the court.

8. Documents Requiring E-Filed Signatures: For E-Filed and E-Served documents, signatures of attorneys, parties, witnesses, notaries and notary stamps may be affixed electronically or documents with signatures obtained on a paper form scanned.

9. C.R.C.P. 11 Compliance: An e-signature is a signature for the purposes of C.R.C.P. 11.

10. Documents under Seal: A motion for leave to file documents under seal may be E-Filed. Documents to be filed under seal pursuant to an order of the court may be E-Filed at the direction of the court; however, the filing party may object to this procedure.

11. Transmitting of Orders, Notices and Other Court Entries: Beginning January 1, 2006, courts shall distribute orders, notices, and other court entries using the E-System in cases where E-Filings were received from any party.

12. Form of E-Filed Documents: C.R.C.P. 10 shall apply to E-Filed documents. A document shall not be transmitted to the clerk of the court by any other means unless the court at any later time requests a printed copy.

13. E-Filing May be Mandated: With the permission of the Chief Justice, a chief judge may mandate E-Filing within a county or judicial district for specific case classes or types of cases. A judicial officer may mandate E-Filing and E-Service in that judicial officer's division for specific cases, for submitting documents to the court and serving documents on case parties. Where E-Filing is mandatory, the court may thereafter accept a document in paper form and the court shall scan the document and upload it to the E-Service Provider. After notice to an attorney that all future documents are to be E-Filed, the court may charge a fee of $50 per document for the service of scanning and uploading

a document filed in paper form. Where E-Filing and E-Service are mandatory, the Chief Judge or appropriate judicial officer may exclude pro se parties from mandatory E-Filing requirements.

14. Relief in the Event of Technical Difficulties:

(a) Upon satisfactory proof that E-Filing or E-Service of a document was not completed because of: (1) an error in the transmission of the document to the E-System Provider which was unknown to the sending party; (2) a failure of the E-System Provider to process the E-Filing when received, or (3) other technical problems experienced by the filer or E-System Provider, the court may enter an order permitting the document to be filed nunc pro tunc to the date it was first attempted to be sent electronically.

(b) Upon satisfactory proof that an E-Served document was not received by or unavailable to a party served, the court may enter an order extending the time for responding to that document.

15. Form of Electronic Documents

(a) **Electronic document format, size and density.** Electronic document format, size, and density shall be as specified by Chief Justice Directive # 11-01.

(b) **Multiple Documents:** Multiple documents (including proposed orders) may be filed in a single electronic filing transaction. Each document (including proposed orders) in that filing must bear a separate document title.

(c) **Proposed Orders:** Proposed orders shall be E-Filed in editable format. Proposed orders that are E-Filed in a non-editable format shall be rejected by the Court Clerk's office and must be resubmitted.

Source: Entire section and committee comment added and effective March 7, 2000; entire section and committee comment amended and effective April 17, 2003; entire section and committee comment repealed and readopted October 20, 2005, effective January 1, 2006; 6. amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); 1.(f), 4., 6. to 9., and 15.(a) amended and effective June 21, 2012.

COMMITTEE COMMENT

The Court authorized service provider for the program is Lexis Nexis File & Serve (www.lexisnexis.com/fileandserve).

"Editable Format" is one which is subject to modification by the court using standard means such as Word or WordPerfect format.

C.R.C.P. 77 provides that courts are always open for business. This Practice Standard is intended to comport with that rule.

ANNOTATION

Law reviews. For article, "Keeping up With Local Dissolution Procedures", see 12 Colo. Law. 767 (1983). For article, "Alternative Depositions: Practice and Procedure", see 19 Colo. Law. 57 (1990). For article, "Colorado's New Rules of Civil Procedure, Part I: Case Management and Disclosure", see 23 Colo. Law. 2467 (1994). For article, "Motions for Default Judgments", see 24 Colo. Law. 1295 (1995). For article, "Discrete Task Representation a/k/a Unbundled Legal Services", see 29 Colo. Law. 5 (January 2000). For article, "Electronic Filing's First Year in Colorado", see 31 Colo. Law. 41 (April 2002). For article, "Revisiting the Recovery of Attorney Fees and Costs in Colorado", see 33 Colo. Law.11 (April 2004). For article, "Bonds in Colorado Courts: A Primer for Practitioners", see 34 Colo. Law. 59 (March 2005). For article, "2006 Amendments to the Civil Rules: Modernization, New Math, and Polishing", see 35 Colo. Law. 21 (May 2006). For article, "Limited Scope Representation Under the Proposed Amendment to C.R.C.P. 121, § 1-1", see 40 Colo. Law. 89 (November 2011).

Purpose of rule. This rule is intended to provide uniformity among the various district courts as to procedural matters. People ex rel. Sullivan v. Swihart, 897 P.2d 822 (Colo. 1995).

Authority of district court rules is recognized so long as they do not conflict with the Colorado rules of civil procedure or with any directive of the supreme court. Danburg v. Realties, Inc., 677 P.2d 439 (Colo. App. 1984).

Not all standing orders are local rules. Section (a) of this rule clearly distinguishes between "standing orders having the effect of local rules" and those that do not. Therefore,

not all standing orders are required to be reviewed by the supreme court. People ex rel. Sullivan v. Swihart, 897 P.2d 822 (Colo. 1995).

This rule contemplates supreme court approval only for standing orders that affect the rights of litigants before the court. People ex rel. Sullivan v. Swihart, 897 P.2d 822 (Colo. 1995).

Standing order of chief judge of judicial district prohibiting possession of a deadly weapon or firearm in designated areas of courthouse was a valid exercise of the chief judge's authority as to administrative matters, did not affect the procedural rights of litigants, and did not require supreme court approval under this rule. People ex rel. Sullivan v. Swihart, 897 P.2d 822 (Colo. 1995).

Late filings. This rule applies only to the failure to file a brief and does not apply to late filings. Charles Milne Assoc. v. Toponce, 770 P.2d 1313 (Colo. App. 1988).

Trial court's failure to comply with procedural requirements concerning notice and time for filing responsive brief before ruling on motion to dismiss is an abuse of discretion. Lanes v. Scott, 688 P.2d 251 (Colo. App. 1984).

Court's sua sponte order of dismissal for failure to prosecute cannot stand if it is not preceded by the notice required by § 1-10 and C.R.C.P. 41. In re Custody of Nugent, 955 P.2d 584 (Colo. App. 1997); Koh v. Kumar, 207 P.3d 900 (Colo. App. 2009).

A delay reduction order does not suffice to provide notice of dismissal under § 1-10. Koh v. Kumar, 207 P.3d 900 (Colo. App. 2009).

Juvenile court did not abuse its discretion in declining to consider failure of the mother to file a responsive pleading to the father's post-trial motion as a confession of motion. M.H.W. by M.E.S. v. D.J.W., 757 P.2d 1129 (Colo. App. 1988).

Failure to give an opportunity to respond to authority cited in support of or in opposition to a motion is harmless unless prejudice is shown. Benson v. Colo. Comp. Ins. Auth., 870 P.2d 624 (Colo. App. 1994).

Where there has been an unusual delay in prosecuting an action, prejudice to the defendant will be presumed. Therefore, in the absence of mitigating circumstances, an unusual delay in prosecuting an action justifies dismissal with prejudice. Richardson v. McFee, 687 P.2d 517 (Colo. App. 1984).

Trial court held not to have abused discretion in dismissing action with prejudice for failure to prosecute. Rossi v. Mathers, 749 P.2d 964 (Colo. App. 1987).

Scope of issues raised by a trial data certificate is limited only by the breadth of notice provided by the complaint. Under our rules of civil procedure, the precise legal theory asserted by a claimant is not controlling, so long as the complaint gives sufficient notice of the transaction sued upon. Yoder v. Hooper, 695 P.2d 1182 (Colo. App. 1984), aff'd, 732 P.2d 852 (Colo. 1987).

Trial court erred when it concluded deponent received "reasonable notice" of deposition under § 1-12 (1). Deponent received deposition notice only two days before the deposition, and one of those days was a Sunday. As such, deponent did not receive at least five days notice before the deposition. However, under C.R.C.P. 32(d)(1), "all errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice". Keenan ex rel. Hickman v. Gregg, 192 P.3d 485 (Colo. App. 2008)

Provision inapplicable to summary judgment motions. Because of the drastic nature of summary judgment, provisions under § 1-15 concerning confession of motions are inapplicable to motions for summary judgment under this rule. Seal v. Hart, 755 P.2d 462 (Colo. App. 1988).

Failure to present controverting affidavit or other evidentiary materials are not grounds for summary judgment. Murphy v. Dairyland Ins. Co., 747 P.2d 691 (Colo. App. 1987).

Failure of nonmoving party to present affidavits or other evidentiary materials opposing a motion for summary judgment does not alone provide a proper basis for the entry of a judgment on the pleadings. Quiroz v. Goff, 46 P.3d 486 (Colo. App. 2002).

Only under extreme circumstances should sanction of dismissal or entry of default judgment be imposed. This rule should not be applied in a manner which unreasonably denies a party its day in court. Nagy v. District Court, 762 P.2d 158 (Colo. 1988) (decided under rule in effect prior to 1987 repeal and readoption); Pinkstaff v. Black & Decker (U.S.), Inc., 211 P.3d 698 (Colo. 2009).

It is within the district court's discretion to conduct an evidentiary hearing or rule on the submitted motions to vacate or modify an arbitration award. BFN-Greely, LLC v. Adair Group, Inc., 141 P.3d 937 (Colo. App. 2006).

Mere citation of a rule of civil procedure is not a "recitation of legal authority" as required by § 1-15 (7) of this rule. Box v. Wickham, 713 P.2d 415 (Colo. App. 1985).

Trial court improperly awarded attorney fees upon determining that a motion was frivolous due to an erroneous finding that the court had no jurisdiction. In re Smith, 757 P.2d 1159 (Colo. App. 1988).

Post-trial motion for the award of attorney fees is analogous to a request for taxing costs and should follow procedures established by C.R.C.P. 54(d) and § 1-22 of this rule. A trial court may address the issue of the award of attorney fees for services rendered in connec-

tion with the underlying litigation on a post-trial basis, whether or not counsel has previously sought to "reserve" the issue. Roa v. Miller, 784 P.2d 826 (Colo. App. 1989).

An award of attorney fees under § 13-17-102 cannot be held to be confessed by failure to respond to a motion for fees. Artes-Roy v. Lyman, 833 P.2d 62 (Colo. App. 1992).

A claim or defense is frivolous for purposes of assessing attorney fees if the proponent can present no rational argument based on the evidence or law in support of that claim or defense. McKown-Katy v. Rego Co., 776 P.2d 1130 (Colo. App. 1989), rev'd in part on other grounds, 801 P.2d 536 (Colo. 1990).

Determination of whether motion is frivolous is a matter within the discretion of the trial court. McKown-Katy v. Rego Co., 776 P.2d 1130 (Colo. App. 1989), rev'd in part on other grounds, 801 P.2d 536 (Colo. 1990).

Whether motion was frivolous under § 1-15 (7) is applied in Liebowitz v. Aimexco Inc., 701 P.2d 140 (Colo. App. 1985).

Award of attorney fees incurred in pursuing motions for sanctions improper under § 1-15 (7) where the defense to the motions, while ultimately unsuccessful, had a rational basis in fact and law and did not lack substantial justification. Boulder County Bd. of County Comm'rs v. Kraft Bldg. Contractors, 122 P.3d 1019 (Colo. App. 2005).

The provisions of § 1-15 concerning confession of a motion by failing to respond thereto are inapplicable to a motion for summary judgment. Koch v. Sadler, 759 P.2d 792 (Colo. App. 1988).

Rule is permissive, not mandatory, so that failure to file brief in opposition to motion for partial summary judgment may be considered a confession of the motion, but is not automatically considered such. Visintainer Sheep v. Centennial Gold, 748 P.2d 358 (Colo. App. 1987).

A motion to dismiss for failure to state a claim must be considered on its merits like a motion for summary judgment and cannot be deemed confessed by a failure to respond. Therefore, trial court erred in failing to consider the merits of plaintiffs' claims for relief as required by C.R.C.P. 12(b)(5) in resolving defendant's motion to dismiss. Hemmann Mgmt. Servs. v. Mediacell, Inc., 176 P.3d 856 (Colo. App. 2007).

A party has 15 days to respond to a motion and it is an abuse of discretion for a trial court to grant a motion only 12 days after it was filed. Weatherly v. Roth, 743 P. 2d 453 (Colo. App. 1987).

Trial court's ex-parte communication with defendant's counsel directing counsel to prepare the form of order was not improper and did not require the attorney fee order to be vacated, where the communication was made after the court had reached its decision based on full briefing of the issues and a telephone hearing, where plaintiff's counsel was given an opportunity to object and did in fact object, and where there was no evidence of bias on the part of the judge or prejudice to plaintiff as a result of the court's action. Aztec Minerals Corp. v. State, 987 P.2d 895 (Colo. App. 1999).

Trial judge's refusal to disqualify himself from proceeding amounted to abuse of discretion where trial judge acted as settlement judge in litigation underlying the present legal malpractice case and allegations, in light of policies expressed in § 1-17 of this rule that a settlement judge for a particular action should not thereafter have any dealings with the case and that a judge assigned for proceedings other than settlement should not be privy to discussions that occurred at court settlement conferences, were sufficient to raise a reasonable inference of the appearance of actual or apparent bias or prejudice. Tripp v. Borchard, 29 P.3d 345 (Colo. App. 2001).

For factors to use in determining appropriateness and severity of sanctions for failure to file a trial data certificate, see Nagy v. District Court, 762 P.2d 158 (Colo. 1988) (decided under rule in effect prior to 1987 repeal and readoption).

Sanction imposed for violation of § 1-18's requirement of timely filing of trial data certificate denied defendant its right to defend against plaintiff's claim. AAA Crane Serv. v. Omnibank, 723 P.2d 156 (Colo. App. 1986).

Sanctions may include dismissal, but only if court follows notice requirements of C.R.C.P. 41(b) and § 1-10 (2) of this rule. Maxwell v. W.K.A. Inc., 728 P.2d 321 (Colo. App. 1986).

In addition, it was an abuse of discretion for court to impose a sanction for both parties' failure to file trial data certificates which was detrimental only to plaintiff, and benefitted the equally noncomplying defendants. Maxwell v. W.K.A. Inc., 728 P.2d 321 (Colo. App. 1986).

Imposition of sanctions for noncompliance is not mandated; the language of § 1-18 (1) (d) is permissive in nature. Nagy v. District Court, 762 P.2d 158 (Colo. 1988) (decided under rule in effect prior to 1987 repeal and readoption).

The trial court has considerable discretion to determine whether noncompliance with mandatory pretrial procedures justifies the imposition of sanctions against the noncomplying party. People v. Milton, 732 P.2d 1199 (Colo. 1987).

Trial court's decision not to impose any sanction for noncompliance with pretrial procedures is an abuse of discretion only if, based on the particular circumstances, the decision was manifestly arbitrary, unreasonable, or unfair. People v. Milton, 732 P.2d 1199 (Colo. 1987).

Trial court did not abuse its discretion for failing to prohibit the state's witnesses from testifying in case in chief for failure to file trial

data certificate setting forth the names of the witnesses. People v. Milton, 732 P.2d 1199 (Colo. 1987).

Trial court did not apply an erroneous legal standard in determining reasonableness of plaintiff's attorney fees. Without any supporting affidavit or exhibit, defendants' opposition to award of attorney fees incurred in connection with contempt proceedings constituted mere argument and did not create a genuine issue of material fact as to the reasonableness of the fees. Moreover, the award of attorney fees was based on sufficient evidence supporting the reasonableness of the fees. Madison Capital Co., LLC v. Star Acquisition VIII, 214 P.3d 557 (Colo. App. 2009).

Notwithstanding the discretionary language in § 1-22 (2)(c), a party is entitled to an evidentiary hearing to determine a reasonable amount of attorney fees, when the party presents an expert's affidavit raising disputed issues of fact and a significant amount of fees has been requested. Roberts v. Adams, 47 P.3d 690 (Colo. App. 2001).

Discretion to grant or deny belated request. Where party did not file motion for fees until 24 days after expiration of 15-day period and did not request extension of time nor offer excuse for delay, court did not abuse its discretion by denying the motion. Major v. Chons Bros., Inc., 53 P.3d 781 (Colo. App. 2002).

Although § 1-22 requires a party seeking costs to file a request within 15 days of the judgment, it also permits the request to be filed within such greater time as the court may allow. Although plaintiff filed the request for costs outside of the deadline, the court chose to address the issue. There is no abuse of discretion in the trial court's decision to address plaintiff's request under the "within such greater time as the court may allow" standard. Phillips v. Watkins, 166 P.3d 197 (Colo. App. 2007).

A request for an award of costs and fees under § 1-22 which has been filed beyond the 15-day deadline does not preclude the trial court's consideration even though the party fails to request an extension of time. In re Wright, 841 P.2d 358 (Colo. App. 1992).

Not an abuse of discretion for trial court to award attorney fees under § 1-22 beyond the 15-day deadline and without expressly granting an extension. US Fax Law Ctr., Inc. v. Henry Schein, Inc., 205 P.3d 512 (Colo. App. 2009); Anderson v. Pursell, 244 P.3d 1188 (Colo. 2010).

The court relied on specified information indicating the reasons for the late filing of the motion for attorney fees. US Fax Law Ctr., Inc. v. Henry Schein, Inc., 205 P.3d 512 (Colo. App. 2009).

Trial court not required to deny a motion for costs and attorney fees if it is filed outside of the 15-day time limit, even if the submitting party does not request an extension of time. Anderson v. Pursell, 244 P.3d 1188 (Colo. 2010).

Issues concerning recovery of attorney fees not sought as damages are outside the purview of C.R.C.P. 59 and outside the purview of C.R.C.P. 59(j)'s requirement that a motion be denied as a matter of law if it is not decided within 60 days. Anderson v. Pursell, 244 P.3d 1188 (Colo. 2010).

Even though plaintiff filed his bill of costs and an amended bill of costs more than 15 days after the entry of judgment, the trial court considered both the bill of costs and the amended bill in awarding minimal costs. Thus, the bill of costs was filed within "such greater time as the court may allow" and the trial court was required under § 13-17-202 to award the plaintiff "reasonable costs" incurred after the offer of settlement. Borquez v. Robert C. Ozer, P.C., 923 P.2d 166 (Colo. App. 1995), aff'd in part and rev'd in part on other grounds, 940 P.2d 371 (Colo. 1997).

The rule does not require a court to determine that a filing made outside the 15-day period was attributable to excusable neglect or to make any other findings such as those required under C.R.C.P. 6(b). Parry v. Kuhlmann, 169 P.3d 188 (Colo. App. 2007).

Section 1-22 (2) does not require a party seeking attorney fees as costs to provide the disclosures mandated under C.R.C.P. 26 for experts who will testify at trial. Chartier v. Weinland Homes, Inc., 25 P.3d 1279 (Colo. App. 2001).

Failure of wife to file a motion in conformity with this rule in dissolution of marriage action does not operate as a waiver of her request for fees where wife had properly requested fees in her response to husband's petition; attorney fees were also listed as a disputed issue in the parties' joint trial management certificate; and husband acknowledged that wife raised the issue at the permanent orders hearing. In re Hill, 166 P.3d 269 (Colo. App. 2007).

The right to a jury trial, once proper demand is made and fee is paid pursuant to § 1-3 of this rule, may be lost only for reasons stated in C.R.C.P. 39(a). The trial court, in an action for payment of medical benefits, abused its discretion in denying the insured a jury trial on the basis that the insured failed to file jury instructions in accordance with § 1-19 of this rule. Neither this rule nor C.R.C.P. 39(a) includes a waiver provision on such basis. Whaley v. Keystone Life Ins. Co., 811 P.2d 404 (Colo. App. 1989).

Where defendant in prior action sought and obtained dismissal for failure to prosecute but did not specifically request dismissal with prejudice, order of dismissal did not so specify, and no good cause was shown for de-

fendant's failure to request dismissal with prejudice, subsequent "clarification" of order to specify dismissal with prejudice was ineffective. McElvaney v. Batley, 824 P.2d 73 (Colo. App. 1991).

Expert's designation and summary of testimony was available and met the requirement of this rule to provide both sides with the opportunity to prepare adequately for trial and to prevent undue surprise. Fenton v. Fibreboard Corp., 827 P.2d 564 (Colo. App. 1991).

Confession of motion due to failure to respond in accordance with subsection (3) does not automatically render a pro se litigant's claims "frivolous and groundless". Separate findings on the issue are required before court may award attorney fees against such parties under § 13-17-102. Artes-Roy v. Lyman, 833 P.2d 62 (Colo. App. 1992).

Defendants waived their rights to a hearing on costs pursuant to this section where they did not request such hearing at trial. Van Schaack v. Van Schaack Holdings, Ltd., 856 P.2d 15 (Colo. App. 1992).

It was within the trial court's discretion to award expert witness fees for designated experts who did not testify at trial where such award was supported by evidence in the record. Van Schaack v. Van Schaack Holdings, Ltd., 856 P.2d 15 (Colo. App. 1992).

Trial court had discretion to impose sanctions, including issuing an order limiting scope of expert's testimony at trial where plaintiff failed to disclose identity of experts or their opinions and failed to supplement responses to discovery when additional information became known. Locke v. Vanderark, 843 P.2d 27 (Colo. App. 1992).

Trial court properly excluded psychiatrist's testimony regarding the association between IQ and hydrocephalic condition where plaintiff failed to disclose opinion, failed to disclose psychiatrist's qualifications, and failed to update discovery responses. Locke v. Vanderark, 843 P.2d 27 (Colo. App. 1992).

Trial court properly held that tardily disclosed expert opinion went beyond fair scope of previously disclosed opinion where plaintiff failed to make timely disclosure of expert's opinion concerning damages relating to matters beyond those provided in discovery. Locke v. Vanderark, 843 P.2d 27 (Colo. App. 1992).

Generally, the trial court determines a motion on the written motion and submitted briefs, and it is within the discretion of the court whether to allow an evidentiary hearing. City & County of Denver v. Ameritrust, 832 P.2d 1054 (Colo. App. 1992).

Section 1-5 creates a presumption that all court records are to be open. Anderson v. Home Ins. Co., 924 P.2d 1123 (Colo. App. 1996).

Section 1-5 places the burden upon the party seeking to limit access to a court file to overcome this presumption in favor of public accessibility by demonstrating that the harm to the privacy of a person in interest outweighs the public interest in the openness of court files. Anderson v. Home Ins. Co., 924 P.2d 1123 (Colo. App. 1996).

The fact that the parties claim that a court file contains extremely personal, private, and confidential matters is generally insufficient to constitute a privacy interest warranting the sealing of that entire file under § 1-5. In re Purcell, 879 P.2d 468 (Colo. App. 1994); Anderson v. Home Ins. Co., 924 P.2d 1123 (Colo. App. 1996).

The expectation of privacy or confidentiality in court records has been found to exist only in those limited instances involving sexual assault claims, trade secrets, potentially defamatory material, or threats to national security. Anderson v. Home Ins. Co., 924 P.2d 1123 (Colo. App. 1996).

A broad limited access order denying access to the entire court file was not warranted where a medical malpractice charge against a licensed health care professional implicates the public interest and involves more than a private dispute between individuals. Anderson v. Home Ins. Co., 924 P.2d 1123 (Colo. App. 1996).

Court may not enter a limited access order based solely upon an agreement between the parties to the litigation. If the evidence does not support the required finding under § 1-5 (2), no such order may be entered. Anderson v. Home Ins. Co., 924 P.2d 1123 (Colo. App. 1996).

Court did not abuse its discretion in denying party's request to seal record where it was not required to seal the record under this section and the record contained nothing unusual and no material that would mandate that it be sealed. In re Purcell, 879 P.2d 468 (Colo. App. 1994).

Movant's constitutional right to due process was not violated by trial court's denial of motion for costs and damages without a separate hearing on the motion where movant did not request an evidentiary hearing on its motion and trial court, in ruling on the motion, assumed movant could prove damages but determined, based on written motion and briefs, that an award of damages would be oppressive and inequitable. City & County of Denver v. Ameritrust, 832 P.2d 1054 (Colo. App. 1992).

Trial court did not abuse its discretion in allowing defendants to file their reply to plaintiff's response more than ten days after the response was filed where, in accepting the reply, the court stated that it had been filed within a reasonable time and that, in the interest of fundamental fairness, substance would be

placed ahead of procedure. Armstead v. Memorial Hosp., 892 P.2d 450 (Colo. App. 1995).

Letter of credit was properly released by trial court, since the court was the beneficiary of the letter of credit. Vento v. Colo. Nat'l Bank, 985 P.2d 48 (Colo. App. 1999).

Section 1-1 (2) is applied in Barry v. Ashley Anderson, P.C., 718 F. Supp. 1492 (D. Colo. 1989).

Section 1-10 is applied in Powers v. Prof'l Rodeo Cowboys, 832 P.2d 1099 (Colo. App. 1992).

Section 1-10 (2) is applied in Maxwell v. W.K.A. Inc., 728 P.2d 321 (Colo. App. 1986).

Section 1-11 is applied in Herrera v. Anderson, 736 P.2d 416 (Colo. App. 1987); Todd v. Bear Valley Village Apts., 980 P.2d 973 (Colo. 1999).

Section 1-15 is applied in Herrera v. Anderson, 736 P.2d 416 (Colo. App. 1987); Ogawa v. Riley, 949 P.2d 118 (Colo. App. 1997).

Section 1-18 is applied in Baumann v. Rhode, 710 P.2d 493 (Colo. App. 1985); Conrad v. Imatani, 724 P.2d 89 (Colo. App. 1986); Coffee v. Inman, 728 P.2d 376 (Colo. App. 1986).

Section 1-19 is applied in Whaley v. Keystone Life Ins. Co., 811 P.2d 404 (Colo. App. 1989).

Civil Access Pilot Project

Applicable to Business Actions in District Court

Adopted by the

SUPREME COURT OF COLORADO

June 16, 2011,

Effective January 1, 2012

Civil Access Pilot Project

Applicable to Business Actions in District Court

The Civil Access Pilot Project currently found on pages 629-640 was amended in October 2011. For the updated version of the Civil Access Pilot Project, go to the Colorado Court Rules on-line at http://www.lexisnexis.com/hottopics/colorado/.

information related to the claims for relief and the defenses asserted and a brief description of the information each such individual is believed to possess, whether the information is supportive or harmful. The statement shall also include a certification that the party has available for inspection and copying all reasonably available documents and things related to the claims and defenses, along with a description by category and subject area of the documents and things being disclosed, whether they are supportive or harmful.

3.4. Parties shall make these disclosures in good faith and may not object to the adequacy of the disclosures until the initial case management conference pursuant to PPR 7.1, at which time they may raise those issues.

3.5. When a party withholds information by asserting that the information is privileged or subject to some other protection, the party shall make the assertion expressly and shall provide a privilege log that describes the nature of the documents, communications, or things not produced or disclosed in a manner which, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection. The privilege log shall be provided at the same time as the initial disclosures required by PPR 3 are filed.

3.6. Each party has an ongoing duty to supplement the initial disclosures promptly upon becoming aware of the supplemental information.

3.7. Unless the court makes a specific determination that failure to disclose in a timely and complete manner was justified under the circumstances or harmless, such failure shall result in one or more of the following:

(a) a denial of the right to use the information not disclosed for any purpose;

(b) a denial of the right to object to the admissibility of the evidence;

(c) a dismissal of all or part of any claim or defense;

(d) assessment of attorney fees and costs; and

(e) any other sanction the court deems appropriate.

3.8. Parties may not stipulate to extend any of the deadlines set forth in this Rule 3. The court shall address any motions for extension immediately, without waiting for a response; and shall deny them absent extraordinary circumstances.

Pilot Project Rule 4. Motion to Dismiss

4.1. The filing of a motion to dismiss shall not eliminate the need to also file an answer. Unless otherwise prohibited by statute, the filing of a motion to dismiss shall not disrupt or interfere with the pleading and disclosure requirements of PPR 3 and the scheduling of the initial case management conference under PPR 7.

Pilot Project Rule 5. Single Judge

5.1. Upon the filing of a complaint, a judge will be assigned to the case for all purposes, and, absent unavoidable or extraordinary circumstances, that judge will remain assigned to the case until final resolution, including any post-trial proceedings. It is expected that the judge to whom the case is assigned will handle all pretrial matters and will try the case.

Pilot Project Rule 6. Preservation of Relevant Documents and Things

6.1. Within 14 days after the filing of an answer, the parties shall meet and confer concerning reasonable preservation of all relevant documents and things, including any electronically stored information. In the absence of an agreement, any party may move for an order governing preservation of such documents and things. The response to such motion shall be filed within 7 days. The court promptly shall enter an order governing preservation of such documents and things.

6.2. Unless directed otherwise by an order of the court, the cost of preserving, collecting and producing electronically stored information shall be borne by the producing

party. The court may shift any or all costs associated with the preservation, collection and production of electronically stored information as the interests of justice and proportionality so require.

Pilot Project Rule 7. Case Management Conferences

7.1. Unless requested sooner by any party, the judge to whom the case has been assigned shall hold an initial case management conference no later than 49 days after the answer and responsive pleadings are filed pursuant to PPR 3.2. Each party's lead trial counsel shall attend this conference. At least seven days before the conference, the parties shall submit a joint report setting forth their agreement or their respective positions on matters set forth in the form contained in Appendix B.

7.2. As soon as possible after the initial case management conference, the judge shall issue an initial case management order with respect to each of the matters set forth in the form contained in Appendix B. In determining whether to permit or exclude discovery and pretrial motions, the court shall apply the proportionality factors set forth in PPR 1.3. Modifications to the initial case management order may be made only upon a showing of good cause.

7.3. The number and subject areas of expert testimony, and the dates for production of expert reports and files, shall be set forth in the initial case management order. There shall be no continuances of the trial date solely based on a failure to complete expert disclosures within the deadlines set forth in the case management order.

Pilot Project Rule 8. Ongoing Active Case Management

8.1. The court shall provide active case management from filing to resolution on all pending issues.

8.2. The parties may contact the court clerk by telephone, or as otherwise directed by the court, to arrange for prompt conferences for clarification, modification or supplementation of any of the court's outstanding orders, or for resolving disputes regarding any pretrial matter.

8.3. The court may hold additional status conferences on its own motion.

8.4. A conference may be held in person or by telephone or videoconference, at the court's discretion.

8.5. The trial date shall be set in the initial case management order, and shall not be changed absent extraordinary circumstances.

Pilot Project Rule 9. Discovery

9.1. Discovery shall be limited to matters that would enable a party to prove or disprove a claim or defense or to impeach a witness and shall comport with the factors of proportionality in PPR 1.3.

9.2. Discovery shall be limited in accordance with the initial case management order. No other discovery will be permitted absent further court order based on a showing of good cause and proportionality.

Pilot Project Rule 10. Expert Discovery

10.1(a) In accordance with the case management order, each retained expert and any party or representative of a party who is testifying in part as an expert, shall furnish a report (in the form of the expert report set forth in Appendix C) signed by the expert, with each paragraph initialed by the expert, setting forth his or her opinions, and the reasons for them. Each expert witness report shall, at a minimum, contain:

1. a specific statement of the opinions by the expert and the facts and other information which form the basis for each opinion;
2. a listing of all of the material relied upon by the expert;
3. references to literature which may be used during the witness' testimony;
4. any then-existing exhibit prepared by or specifically for the expert for use at trial;

5. the witness' curriculum vitae including a list of publications over the last 10 years;.
6. a list of all trial or deposition testimony given by the witness in the last four years;
7. an accounting of all time spent on the case; and
8. a fee schedule.

(b) The substance of each expert's direct testimony shall be fully addressed in the expert's report. Experts shall be limited to testifying on direct examination about matters disclosed in reasonable detail in their written reports.

(c) The parties shall obtain and voluntarily produce to all other counsel the files of their retained expert witnesses at the time the witness is disclosed. The expert has a continuing duty to make supplemental disclosures of new information and material obtained subsequent to the expert's production of his/her file. The court shall determine what, if any, portion of the supplemental information may be used at trial. See Appendix B for a complete list of what the expert's file shall include. Drafts of the expert report prepared by the expert are not required to be produced.

(d) There shall be no depositions or other discovery of experts.

10.2. Except in extraordinary cases, only one expert witness per side may be permitted to submit a report and testify in any given specialty or with respect to any given issue.

10.3. If any retained expert becomes unavailable to testify at trial, the court, upon good cause shown, should liberally grant a request for substitution by an equivalent expert. Any substituted expert remains subject to all requirements of PPR 10.

Pilot Project Rule 11. Costs and Sanctions

11.1. In addition to the sanctions set forth in PPR 3.7, the court may impose sanctions as appropriate for any failure to timely or completely comply with these PPR's.

Appendix A:
Actions Included and Excluded in the Colorado Pilot Project

I. Included actions

Business Actions. The court should handle the following types of actions under the Pilot Project Rules for business actions, whether the relief requested is legal or equitable. Pilot project business actions are not limited to "business v. business," but also include disputes between businesses and individuals.

(a) Breach of contract actions;

(b) Business torts (e.g., unfair competition, fiduciary duty, fraud, misrepresentation), or statutory and/or common law violations where the breach or violation is alleged to arise out of business dealings (e.g., sales of assets or securities; corporate restructuring; partnership, shareholder, joint venture, and other business agreements);

(c) Disputes involving transactions governed by the Uniform Commercial Code;

(d) Disputes involving commercial real property, excluding actions solely for the payment of rent, Colorado Rule of Civil Procedure 120 proceedings and uncontested receivership proceedings;

(e) Owner/investor derivative actions brought on behalf of business organizations;

(f) Disputes involving business transactions with commercial banks and other financial institutions, excluding actions solely for the collection of debt;

(g) Disputes involving the internal affairs of business organizations, excluding actions between an employee and employer;

(h) Disputes involving commercial insurance coverage, including directors and officers, errors and omissions, business interruption, environmental, and bad faith., excluding insurance disputes arising out of personal injury actions;

(i) Actions involving dissolution of corporations, partnerships, limited liability companies, limited liability partnerships and joint ventures;

(j) Disputes involving intellectual property, including state trademark laws.

As used herein, the term "business organizations" includes all forms of entities recognized by Colorado law, and applies to single owner or member entities, for profit and nonprofit entities, unincorporated associations, and sole proprietorships.

II. Excluded actions

The following types of actions are not subject to the Pilot Project Rules:

(a) Any action in which the party is pro se.

(b) Employment Actions. All employment actions and claims involving disputes arising out of existing or former employment relationships.

(c) Construction Defect Actions. All actions involving construction defect claims.

(d) Governmental Immunity. All actions subject to the Colorado Governmental Immunity Act.

(e) Medical Negligence Actions. All actions alleging a breach of the standard of care by a health care provider and which are covered under the Colorado Health Care Availability Act (C.R.S. §§13-64-101 to 503).

Appendix B:
Initial Case Management
Conference Joint Report of the Parties

District Court _____ County, Colorado Court Address:	
Plaintiff(s): _____, v. Defendant(s): _____,	**COURT USE ONLY**
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom
INITIAL CASE MANAGEMENT CONFERENCE JOINT REPORT OF THE PARTIES	

Pursuant to Colorado Pilot Project Rule (PPR) 7.1, the parties should discuss each item below. If they agree, the agreement should be stated. If they cannot agree, each party should state its position. If an item does not apply, it should be identified as not applicable. This form shall be submitted to the court in editable format.

1. **Date for joinder of additional parties:** _____

2. **Amending or supplementing pleadings:** _____

3. **Non-parties at fault:** _____

4. **The timing of mediation or other alternative dispute resolution:** _____

5. **Dispositive motions:** _____

6. **The issues to be tried:** _____

7. **An assessment of the application to the case of the proportionality factors in PPR 1.2:** _____

8. **Production, continued preservation, and restoration of electronically stored information, including the form in which electronically stored information is to be produced and other issues relating to electronic information, including the costs:**

_____

9. **Proposed discovery and limitations on discovery, consistent with the proportionality factors in PPR 1.2. Counsel will be required to represent to the Court at the conference that they have discussed the costs of the proposed discovery with their clients, or state to the court why they have not done so.**

   a. **adequacy of the initial disclosures:** _____

   b. **limitations on scope of discovery:** _____

   c. **limitations on the types of discovery:** _____

   d. **limitations on the number of written discovery requests:** _____

   e. **limitations on the number and length of depositions, and/or the total time of depositions allowed to each party:** _____

   f. **limitations on persons from whom discovery can be sought:** _____

   g. **limitations on the restoration of electronically stored information:** _____

   h. **cost shifting/co-pay rules, including the allocation of costs of the access to and production of electronically stored information:** _____

   i. **any other cost issues:** _____

10. Proposed dates for:

    a. commencement of fact discovery: _____

    b. completion of fact discovery: _____

    c. disclosure of trial witnesses: _____

    d. exchange of all trial exhibits: _____

    e. exchange of all demonstrative exhibits: _____

11. The amount of time required for the completion of all pretrial activities and the approximate length of trial: _____

12. Proposed date for trial: _____

13. Expert witnesses: _____

14. Proposed dates for:

    a. production of expert reports: _____
        i. Plaintiff: _____
        ii. Defendant: _____

    b. production of rebuttal expert reports: _____

    c. production of expert witness files: _____

15. Limitations on experts' fees to be taxed as costs: _____

16. Computation of damages and the nature and timing of discovery relating to damages: _____

17. Other appropriate matters: _____

DATED this ____ day of _____, 20____.

[signature block] [signature block]

_____ _____

[Attorney for Plaintiff] [Attorney for Defendant]

Appendix C:
Disclosure of Expert Witness(es)

District Court _____ County, Colorado Court Address:	
Plaintiff(s): _____, v. Defendant(s): _____,	**COURT USE ONLY**
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom
[NAME OF PARTY] DISCLOSURE OF EXPERT WITNESS[ES]	

[NAME OF PARTY], by counsel, pursuant to Colorado Rule of Civil Procedure ("CRCP") 26(a)(2), hereby discloses persons who may present evidence at trial pursuant to Colorado Rules of Evidence 702, 703, or 705:

I. WITNESS[ES] RETAINED OR EMPLOYEE[S] OF DISCLOSING PARTY.

The following person[s] have either (1) been retained or employed to provide expert testimony, or (2) are employees of the disclosing party whose duties regularly include giving expert testimony and for each such expert the following information is submitted:

A. NAME, PROFESSIONAL ADDRESS, AND TELEPHONE NUMBER OF EXPERT.

B. A REPORT WHICH SHALL CONTAIN THE FOLLOWING:

1. **A Specific Statement Of The Opinions By The Expert And The Facts And Other Information Specifically Relating To And Forming The Basis For Each Opinion:**

2. **A Listing Of All Of The Material Relied Upon By The Expert:**

3. **References To Literature Which May Be Used During The Witness Testimony:**

4. **Any Existing Exhibit Prepared By Or Specifically For The Expert For Use At Trial; Any Additional Exhibits To Be Used At Trial Shall Be Disclosed Consistent With The Deadlines Set Forth In The Case Management Order At 10(d) And (e):**

5. **Witness' Curriculum Vitae, Including A List Of Publications Over The Last 10 Years:**

6. **A List Of All Trial Or Deposition Testimony Given By The Witness In The Last Four Years:**

Name of Case	Court	Case Number	Retained By	Date	D/T

7. **Accounting Of All Time Spent On The Case:**

8. **A Fee Schedule:**

9. **A Certification That This Expert Has:**

[ ] prepared or reviewed the report,
[ ] signed the report and,
[ ] initialed each paragraph of the report.

[Attach report hereto as an exhibit.]

C. CERTIFICATION THAT THE FILE FOR THE EXPERT HAS BEEN PRODUCED

Except to the extent information or materials are protected under the Colorado Rule of Civil Procedure 26(b)(5), the term "File" includes exhibits which the expert may use at trial, e-mails, notes of any kind, billing documentation, time logs, correspondence, literature references which the expert reviewed or relied upon as the basis of his opinion, and all reports or memos

describing the experts opinions related to this litigation. The materials produced should also include copies of any chronologies, outlines, summaries or similar materials provided by counsel or created by the expert in either written or electronic form.

Materials common to both parties (depositions, pleadings, voluminous documents supplied by the opposing party) need not be produced if they are included in the *Listing Of All Of The Material Relied Upon By The Expert*, unless they contain written notations, highlighting or other markings made by the expert.

II. WITNESS[ES] NOT RETAINED OR EMPLOYEE[S] OF DISCLOSING PARTY.

The following person[s] may be called to provide expert testimony but have neither (1) been retained to provide expert testimony, nor (2) are employees of the disclosing party whose duties regularly involve giving expert testimony:

A. NAME, PROFESSIONAL ADDRESS, AND TELEPHONE NUMBER OF WITNESS.

1. Qualifications:

2. Substance Of All Opinions To Be Expressed And The Basis And Reasons Therefor:

DATED this ____ day of _____, 20___.

[signature block]

_____

[Attorney for Disclosing Party]

APPENDIX TO CHAPTERS 1 TO 17A

The Colorado Rules of Civil Procedure

APPENDIX TO CHAPTERS 1 TO 17A

FORMS
(See Rule 84.)

(Forms are available online at http://www.courts.state.co.us/Forms/Index.cfm.)

Forms

Introductory Statement.

1. The following forms are intended for illustration only. They are limited in number. No attempt is made to furnish a manual of forms.

2. Except where otherwise indicated, each form shown in this chapter should have a caption similar to the samples shown below. Each caption shall contain a document name and party designation that may vary according to the type of form being used. See the applicable forms to determine the appropriate title and party designation. Documents initiated by a party shall use a form of caption shown in sample caption A. Documents issued by the court under the signature of the clerk or judge should omit the attorney section as shown in sample caption B. The number of the action and the division in which the action is pending, where applicable, should be indicated in the caption of all papers subsequently filed. In the caption of the summons and in the caption of the complaint all parties must be named, but for other documents it is sufficient to state the name of the first party on both sides of the litigation, with an appropriate reference to other parties, such as et. al. See Rules 4(a), 7(b)(2), and 10(a).

3. When the action is in the County Court, the complaint in all cases should contain the jurisdictional allegation, as set forth in Form 2 below.

4. Each form is to be signed in the individual name of at least one attorney of record (Rule 11). If a party is not represented by an attorney, the signature and address of the party are required in place of those of the attorney. The plaintiff's address must be given on the complaint and the defendant's address on the answer.

5. An addendum should be used for identifying additional parties or attorneys when the space provided on a pre-printed or computer-generated form is not adequate.

6. Forms of captions are to be consistent with Rule 10, C.R.C.P.

Sample Caption A for documents initiated by a party

☐ County Court ☐ District Court _____, Colorado Court Address:	
Plaintiff(s): v. *[Substitute appropriate party designations & names]* **Defendant(s):**	
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	▲ COURT USE ONLY ▲ Case Number: Division: Courtroom:
NAME OF DOCUMENT	

Sample Caption B for documents by the court under the signature of the clerk or judge

☐ County Court ☐ District Court _____, Colorado Court Address:	
Plaintiff(s): v. *[Substitute appropriate party designations & names]* **Defendant(s):**	▲ **COURT USE ONLY** ▲ Case Number: Division: Courtroom:
NAME OF DOCUMENT	

SPECIAL FORM INDEX

Form 1.
SUMMONS

[Insert caption A from page 643 with the following designation of parties]

Plaintiff:

v.

Defendant:

THE PEOPLE OF THE STATE OF COLORADO
TO THE ABOVE NAMED DEFENDANT _____:

You are hereby summoned and required to file with the clerk of this court an answer or other response to the attached complaint. If service of the summons and complaint was made upon you within the State of Colorado, you are required to file your answer or other response within 20 days after such service upon you. If service of the summons and complaint was made upon you outside of the State of Colorado, you are required to file your answer or other response within 30 days after such service upon you.

If you fail to file your answer or other response to the complaint in writing within the applicable time period, judgment by default may be entered against you by the court for the relief demanded in the complaint without further notice.

The following documents are also served herewith:

Dated _____

_____
Attorney for Plaintiff

This summons is issued pursuant to Rule 4, C.R.C.P., as amended. A copy of the complaint must be served with this summons. This form should not be used where service by publication is desired.

TO THE CLERK: If the summons is issued by the clerk of the court, the signature block for the clerk or deputy should be provided by stamp, or typewriter, in the space to the left of the attorney's name.

Form 1.1.
SUMMONS BY PUBLICATION

[Insert caption A from page 643 with the following designation of parties]

A, B, and C,

Plaintiff(s) [Petitioner(s)]:

v.

D, E, F, and G,

Defendant(s) [Respondent(s)]:

THE PEOPLE OF THE STATE OF COLORADO
TO THE ABOVE-NAMED DEFENDANT(S):

You are hereby summoned and required to appear and defend against the claims of the complaint [petition] filed with the court in this action, by filing with the clerk of this court an answer or other response. You are required to file your answer or other response within _____ * days after the service of this summons upon you. Service of this summons shall be complete on the day of the last publication. A copy of the complaint [petition] may be obtained from the clerk of the court.

If you fail to file your answer or other response to the complaint [petition] in writing within * days after the date of the last publication, judgment by default may be rendered against you by the court for the relief demanded in the complaint [petition] without further notice.

This is an action:

Dated _____

Published in the _____.
First Publication: _____, 20___.
Last Publication: _____, 20___.

_____
Attorney for Plaintiff(s)/Petitioner(s)

[This summons is issued pursuant to Rule 4(g), Colorado Rules of Civil Procedure. This form should not be used where personal service is desired.]

[TO THE CLERK: When this summons is issued by the clerk of the court, the signature block for the clerk or deputy should be provided by stamp, or typewriter, in the space to the left of the attorney's name.]

*Rule 12(a), C.R.C.P., allows 30 days for answer or response where service of process is by publication. However, under various statutes, a different response time is set forth; e.g., § 38-6-104, C.R.S. (eminent domain); § 38-36-121, C.R.S. (Torrens registration).

Form 1.2.
DISTRICT COURT CIVIL (CV) CASE COVER SHEET FOR INITIAL PLEADING OF COMPLAINT, COUNTERCLAIM, CROSS-CLAIM OR THIRD PARTY COMPLAINT

District Court _____County, Colorado Court Address: Plaintiff(s): v. Defendant(s):	▲ COURT USE ONLY ▲
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom
DISTRICT COURT CIVIL (CV) CASE COVER SHEET FOR INITIAL PLEADING OF COMPLAINT, COUNTERCLAIM, CROSS-CLAIM OR THIRD PARTY COMPLAINT	

1. This cover sheet shall be filed with the initial pleading of a complaint, counterclaim, cross-claim or third party complaint in every district court civil (CV) case. It shall not be filed in Domestic Relations (DR), Probate (PR), Water (CW), Juvenile (JA, JR, JD, JV), or Mental Health (MH) cases.

2. Check the boxes applicable to this case.

   ❑ Simplified Procedure under C.R.C.P. 16.1 **applies** to this case because this party does not seek a monetary judgment in excess of $100,000.00 against another party, including any attorney fees, penalties or punitive damages but excluding interest and costs and because this case is not a class action or forcible entry and detainer, Rule 106, Rule 120, or other expedited proceeding.

   ❑ Simplified Procedure under C.R.C.P. 16.1, **does not apply** to this case because (check one box below identifying why 16.1 does not apply):

      ❑ This is a class action or forcible entry and detainer, Rule 106, Rule 120, or other similar expedited proceeding, **or**
      ❑ This party is seeking a monetary judgment for more than $100,000.00 against another party, including any attorney fees, penalties or punitive damages, but excluding interest and costs (see C.R.C.P. 16.1(c)), **or**
      ❑ Another party has previously stated in its cover sheet that C.R.C.P. 16.1 does not apply to this case.

3. ❑ This party makes a **Jury Demand** at this time and pays the requisite fee. See C.R.C.P. 38. (Checking this box is optional.)

Date: _____ _____
Signature of Party or Attorney for Party

NOTICE

- ✓ This cover sheet must be filed in all District Court Civil (CV) Cases. Failure to file this cover sheet is not a jurisdictional defect in the pleading but may result in a clerk's show cause order requiring its filing.
- ✓ This cover sheet must be served on all other parties along with the initial pleading of a complaint, counterclaim, cross-claim, or third party complaint.
- ✓ This cover sheet shall not be considered a pleading for purposes of C.R.C.P. 11.

JDF 601 7/04 DISTRICT COURT CIVIL (CV) CASE COVER SHEET FOR INITIAL PLEADING OF COMPLAINT, COUNTERCLAIM, CROSS-CLAIM OR THIRD PARTY COMPLAINT

Form 1.3.
NOTICE TO ELECT EXCLUSION FROM C.R.C.P. 16.1 SIMPLIFIED PROCEDURE

District Court _____ County, Colorado Court Address: Plaintiff(s): v. Defendant(s):	▲ COURT USE ONLY ▲
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom
NOTICE TO ELECT EXCLUSION FROM C.R.C.P. 16.1 SIMPLIFIED PROCEDURE	

Simplified Procedure under C.R.C.P. 16.1 is intended to be a less expensive and faster method of handling civil cases and applies where amount sought against each party is $100,000.00 or less, see C.R.C.P. 16.1(c). The Rule requires early and full disclosure of the information that each party has about the dispute and addresses what evidence will be introduced at trial.

The party and attorney, if applicable, signing this Notice hereby elect to exclude this case from the Simplified Procedure under C.R.C.P. 16.1. This election is being filed with the Court no later than the time provided by C.R.C.P. 16.1(d).

IT IS UNDERSTOOD THAT ONCE THIS NOTICE OF EXCLUSION IS FILED WITH THE COURT, THE PROCEDURES OF C.R.C.P. 16, CASE MANAGEMENT AND TRIAL MANAGEMENT WILL APPLY TO THIS CASE.

This Notice must be signed by the party and, if represented, by the attorney.

Date: _____ _____
Signature of Party

Date: _____ _____
Signature of Attorney for Party

CERTIFICATE OF SERVICE

I certify that on _____ (date) this ***NOTICE TO ELECT EXCLUSION FROM C.R.C.P. 16.1 SIMPLIFIED PROCEDURE*** was filed with the Court; and true and accurate copies of the Notice were served on all other parties by: _____ (method of service) and if by mail, postage pre-paid, and addressed to the following:

_____
_____
_____
_____ _____
Signature of Party or Attorney for Party

JDF 602 7/04 NOTICE TO ELECT EXCLUSION FROM C.R.C.P. 16.1 SIMPLIFIED PROCEDURE

Form 2.
ALLEGATION OF JURISDICTION
(for cases in the County Court)

1. That the amount (or value of the property) involved herein does not exceed _____ dollars.

Form 3.
COMPLAINT ON A PROMISSORY NOTE

1. Defendant on or about (date), executed and delivered to plaintiff a promissory note (in the following words and figures: (here set out the note verbatim)); (a copy of which is hereto annexed as Exhibit A); (whereby defendant promised to pay to plaintiff or order on (date), the sum of dollars with interest thereon at the rate of _____ percent per annum).

2. Defendant owes to plaintiff the amount of said note and interest.

Wherefore plaintiff demands judgment against defendant for the amount of the note, interest, and costs.

Signed: _____
Attorney for Plaintiff.

Address of Plaintiff: _____

Notes

1. The pleader may use the material in one of the three sets of brackets. His choice will depend upon whether he desires to plead the document verbatim, or by exhibit, or according to its legal effect.

2. Under the rules free joinder of claims is permitted. See Rules 8 (e) and 18. Consequently the claims set forth in each and all of the following forms may be joined with this complaint or with each other. Ordinarily each claim should be stated in a separate division of the complaint, and the divisions should be designated as counts successively numbered. In particular the rules permit alternative and inconsistent pleading. See Form 10.

3. On complaint and answer, address of parties must be furnished. See Rule 11, C.R.C.P. and C.A.R. 3 (d).

Form 4.
COMPLAINT ON AN ACCOUNT

Defendant owes plaintiff _____ dollars according to the account hereto annexed as Exhibit A.

Wherefore (etc. as in Form 3).

Form 5.
COMPLAINT FOR GOODS SOLD AND DELIVERED

Defendant owes plaintiff _____ dollars for goods sold and delivered by plaintiff to defendant between (date) and (date).

Wherefore (etc. as in Form 3).

Note

This form may be used either where the action is for an agreed price or where it is for the reasonable value of the goods.

Form 6.
COMPLAINT FOR MONEY LENT

Defendant owes plaintiff _____ dollars for money lent by plaintiff to defendant on (date).
Wherefore (etc. as in Form 3).

Form 7.
COMPLAINT FOR MONEY PAID BY MISTAKE

Defendant owes plaintiff _____ dollars for money paid by plaintiff to defendant by mistake on (date), under the following circumstances: (here state the circumstances with particularity - see Rule 9 (b)).
Wherefore (etc. as in Form 3).

Form 8.
COMPLAINT FOR MONEY HAD AND RECEIVED

Defendant owes plaintiff _____ dollars for money had and received from one G.H. on (date), to be paid by defendant to plaintiff.
Wherefore (etc. as in Form 3).

Form 9.
COMPLAINT FOR NEGLIGENCE

1. On (date), in a public highway called Broadway Street in Denver, Colorado, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway.
2. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of _____ dollars.

Wherefore plaintiff demands judgment against defendant in the amount established by the evidence, interest and costs.

Note

Since contributory negligence is an affirmative defense, the complaint need contain no allegation of due care of plaintiff.

Form 10.
COMPLAINT FOR NEGLIGENCE WHERE PLAINTIFF IS UNABLE TO DETERMINE DEFINITELY WHETHER THE PERSON RESPONSIBLE IS C. D. OR E. F. OR WHETHER BOTH ARE RESPONSIBLE AND WHERE HIS EVIDENCE MAY JUSTIFY A FINDING OF WILFULNESS OR OF RECKLESSNESS OR OF NEGLIGENCE

[Insert caption A from page 643 with the following designation of parties]

A.B.,
Plaintiff:

v.

C.D. and E.F.,
Defendant:

---

1. On (date), in a public highway called Broadway Street, in Denver, Colorado, defendant C. D. or defendant E. F., or both defendants C. D. and E. F. willfully or recklessly or negligently drove or caused to be driven a motor vehicle against plaintiff who was then crossing said highway.

2. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of _____ dollars.

Wherefore plaintiff demands judgment against C. D. or against E. F. or against both in the amount established by the evidence, interest and costs.

Form 11.
COMPLAINT FOR CONVERSION

1. On or about (date), defendant converted to his own use ten bonds of the _____ Company (here insert brief identification as by number and issue) of the value of _____ dollars, the property of plaintiff.

Wherefore plaintiff demands judgment against defendant in the amount established by the evidence, interest, and costs.

Form 12.
COMPLAINT FOR SPECIFIC PERFORMANCE OF CONTRACT TO CONVEY LAND

1. On or about (date), plaintiff and defendant entered into an agreement in writing a copy of which is hereto annexed as Exhibit A.

2. In accordance with the provisions of said agreement plaintiff tendered to defendant the purchase price and requested a conveyance of the land, but defendant refused to accept the tender and refused to make the conveyance.

3. Plaintiff now offers to pay the purchase price.

Wherefore plaintiff demands: (1) That defendant be required specifically to perform said agreement; (2) damages as established by the evidence; and (3) that if specific performance is not granted plaintiff have judgment against defendant for the value of the property, interest and costs.

Note

Here, as in Form 3, plaintiff may set forth the contract verbatim in the complaint or plead it, as indicated, by exhibit, or plead it according to its legal effect.

Form 13.
COMPLAINT ON CLAIM FOR DEBT AND TO SET ASIDE FRAUDULENT CONVEYANCE UNDER RULE 18(b)

[Insert caption A from page 643 with the following designation of parties]

A.B.,
Plaintiff:

v.

C.D. and E.F.
Defendants:

---

1. Defendant C. D. on or about _____ executed and delivered to plaintiff a promissory note (in the following words and figures: (here set out the note verbatim)); (a copy of which is hereto

annexed as Exhibit A); (whereby defendant C. D. promised to pay to plaintiff or order on the sum of _____ dollars with interest thereon at the rate of _____ percent per annum).

2. Defendant C. D. owes to plaintiff the amount of said note and interest.

3. Defendant C. D. on or about _____ conveyed all his property, real and personal (or specify and describe) to defendant E. F. for the purpose of defrauding plaintiff and hindering and delaying the collection of the indebtedness evidenced by the note above referred to.

Wherefore plaintiff demands: (1) That plaintiff have judgment against defendant C. D. for the amount established by the evidence; (2) that the conveyance to defendant E. F. be declared void and the judgment herein be declared a lien on said property; and (3) that plaintiff have judgment against the defendants for interest and costs.

Form 14.
COMPLAINT FOR INTERPLEADER AND DECLARATORY RELIEF

1. On or about (date), plaintiff issued to G. H. a policy of life insurance whereby plaintiff promised to pay to K. L. as beneficiary the sum of _____ dollars upon the death of G. H. The policy required the payment by G. H. of a stipulated premium on (date), and annually thereafter as a condition precedent to its continuance in force.

2. No part of the premium due (date), was ever paid and the policy ceased to have any force or effect on (date).

3. Thereafter, on (date), G. H. and K. L. died as the result of a collision between a locomotive and the automobile in which G. H. and K. L. were riding.

4. Defendant C. D. is the duly appointed and acting executor of the will of G. H.; defendant E. F. is the duly appointed and acting executor of the will of K. L.; defendant X. Y. claims to have been duly designated as beneficiary of said policy in place of K. L.

5. Each of defendants, C. D., E. F., and X. Y. is claiming that the above-mentioned policy was in full force and effect at the time of the death of G. H.; each of them is claimed to be the only person entitled to receive payment of the amount of the policy and has made demand for payment thereof.

6. By reason of these conflicting claims of the defendants, plaintiff is in great doubt as to which defendant is entitled to be paid the amount of the policy, if it was in force at the death of G. H.

Wherefore plaintiff demands that the court adjudge:

1. That none of the defendants is entitled to recover from plaintiff the amount of said policy or any part thereof.

2. That each of the defendants be restrained from instituting any action against plaintiff for the recovery of the amount of said policy or any part thereof.

3. That, if the court shall determine that said policy was in force at the death of G. H., the defendants be required to interplead and settle between themselves their rights to the money due under said policy, and that plaintiff be discharged from all liability in the premises except to the person whom the court shall adjudge entitled to the amount of said policy.

4. That plaintiff recover its costs.

Form 15.
MOTION TO DISMISS, PRESENTING DEFENSES OF FAILURE TO STATE A CLAIM, AND OF LACK OF SERVICE OF PROCESS

The defendant moves the court as follows:

1. To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.

2. To dismiss the action or in lieu thereof to quash the return of service of summons on the ground: (here state reasons, such as, (a) that the defendant is a corporation organized under the laws of Delaware and was not and is not subject to service of process within the State of Colorado; (b) that the defendant has not been properly served with process in this action, all of which more clearly appears in the affidavits of M. N. and X. Y. hereto annexed as Exhibit A and Exhibit B respectively; (c) etc.).

3. To dismiss the action on the ground: (here state the same.)

Signed: _____

Attorney for Defendant.

Notice of Motion

To: _____
Attorney for Plaintiff.

Please take notice that on the _____ day of _____, 20_____ , the undersigned will apply to the court to set the attached motion for hearing (or to hear the attached motion forthwith).

Signed: _____
Attorney for Defendant.

Received a copy of the within notice and motion at the City and County of Denver, Colorado, this _____ day of _____, 20_____ , at the hour of _____ M.

_____
Attorney for Plaintiff.

Form 15A.
CERTIFICATION OF CONFERRING
[AS REQUIRED BY C.R.C.P. 121 § 1-15 ¶ 8]

* C.R.C.P. 121 § 1-15 ¶ 8 Certification: Plaintiff's counsel has conferred in good faith with Defendant's counsel about this Motion. Defendant's counsel [opposes] [does not oppose] the relief requested in this Motion.

Form 16.
ANSWER PRESENTING DEFENSES UNDER RULE 12(b)

First Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

If defendant is indebted to plaintiffs for the goods mentioned in the complaint, he is indebted to them jointly with G. H. G. H. is alive; is a citizen and resident of this state, is subject to the jurisdiction of this court, as to both service of process and venue; can be made a party, but has not been made one.

Third Defense

Defendant admits the allegation contained in paragraphs 1 and 4 of the complaint; alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 of the complaint; and denies each and every other allegation contained in the complaint.

Fourth Defense

The right of action set forth in the complaint did not accrue within six years next before the commencement of this action.

Counterclaim

(Here set forth any claim as a counterclaim in the manner in which a claim is pleaded in a complaint.)

Cross Claim Against Defendant M. N.

(Here set forth the claim constituting a cross claim against defendant M. N. in the manner in which a claim is pleaded in a complaint.)

Signed: _____

Attorney for Defendant.

Defendant's Address: _____

Form 17.
ANSWER TO COMPLAINT SET FORTH IN FORM 8, WITH COUNTERCLAIM FOR INTERPLEADER

Defense

Defendant denies the allegations stated to the extent set forth in the counterclaim herein.

Counterclaim for Interpleader

1. Defendant received the sum of _____ dollars as a deposit from E. F.

2. Plaintiff has demanded the payment of such deposit to him by virtue of an assignment of it which he claims to have received from E. F.

3. E. F. has notified the defendant that he claims such deposit, that the purported assignment is not valid, and that he holds the defendant responsible for the deposit.

Wherefore defendant demands:

1. That the court order E. F. to be made a party defendant to respond to the complaint and to this counterclaim.

2. That the court order the plaintiff and E. F. to interplead their respective claims.

3. That the court adjudge whether the plaintiff or E. F. is entitled to the sum of money.

4. That the court discharge defendant from all liability in the premises except to the person it shall adjudge entitled to the sum of money.

5. That the court award to the defendant its costs and attorney's fees.

Cross references: For joinder of additional parties, see C.R.C.P. 13.

Form 18.
MOTION TO BRING IN THIRD-PARTY DEFENDANT

Defendant moves for leave to make E. F. a party to this action and that there be served upon him summons and third-party complaint as set forth in Exhibit A hereto attached.

Signed: _____

Attorney for Defendant C.D.

Notice of Motion

(Contents the same as in Form 15. No notice is necessary if the motion is made before the moving defendant has served his answer.)

SUMMONS

[Insert caption A from page 643 with the following designation of parties]

A.B.,
Plaintiff:

v.

C.D.
Defendant and
Third-party Plaintiff:

v.

E.F.,
Third-party Defendant:

THE PEOPLE OF THE STATE OF COLORADO:
TO the above-named third-party defendant, GREETINGS:

You are hereby summoned and required to file with the clerk an answer to the third-party complaint, a copy of which is herewith served upon you, within 20 days after service of this summons upon you. If you fail so to do, judgment by default will be taken against you for the relief demanded in the third-party complaint.

If service upon you is made outside the State of Colorado, you are required to file your answer to said third-party complaint within 30 days after service of this summons upon you.*

There is also served upon you herewith a copy of the complaint of the plaintiff which you may answer.

Dated _____, 20_____ .

_____ _____
Clerk of the _____ Court Attorney for Third-party Plaintiff

*If body execution is sought the summons must state the claim set out in said third-party complaint is "founded upon tort".

THIRD PARTY COMPLAINT

[Insert caption A from page 643 with the following designation of parties]

A.B.
Plaintiff:

v.

C.D.,
Defendant and
Third-party Plaintiff:

v.

E. F.,
Third-party Defendant:

---

1. Plaintiff A. B. has filed against defendant C. D. a complaint, a copy of which is hereto attached as Exhibit C.

2. (Here state the grounds upon which C. D. is entitled to recover from E. F., all or part of what A. B. may recover from C. D. The statement should be framed as in an original complaint.)

Wherefore C. D. demands judgment against third-party defendant E. F. for all sums that may be adjudged against defendant C. D. in favor of plaintiff A. B.

Signed: _____
Attorney for C.D., Third-party Plaintiff

Address of Third-party Plaintiff: _____

Form 19.
MOTION TO INTERVENE AS A DEFENDANT UNDER RULE 24.

[Insert caption A from page 643 with the following designation of parties]

A.B.,
Plaintiff:

v.

C.D.,
Defendant:

v.

E.F.,
Applicant for intervention:

E. F. moves for leave to intervene as a defendant in this action, in order to assert the defenses set forth in his proposed answer, of which a copy is hereto attached, on the grounds (here state them) and as such has a defense to plaintiff's claim presenting (both questions of law and of fact) which are common to the main action.

Signed: _____
Attorney for E.F., Applicant for Intervention.

Notice of Motion
(Contents the same as in Form 15)

INTERVENER'S ANSWER

[Insert caption A from page 643 with the following designation of parties]

A.B.,
Plaintiff:

v.

C.D.
Defendant:

v.

E.F.,
Intervener:

First Defense

Intervener admits the allegations stated in paragraphs _____ and _____ of the complaint; denies the allegations in paragraphs _____ and _____.

Second Defense

(Set forth any defenses.)

Signed: _____
Attorney for E.F., Intervener.

Form 20.
PATTERN INTERROGATORIES UNDER RULE 33

[Insert caption A from page 643 with the following designation of parties]

Plaintiff(s):

v.

Defendant(s):

The following Pattern Interrogatories are propounded to:

_____ pursuant to C.R.C.P. 16(a)(1)(IV), 26, and 33(e).

Section 1. Instructions to All Parties

(a) These are general instructions. For time limitations, requirements for service on other parties, and other details, see C.R.C.P. 16(b)(1)(IV), 26, 33, 121 § 1-12, and the cases construing those Rules.

(b) These interrogatories do not change existing law relating to interrogatories nor do they affect an answering party's right to assert any privilege or objection.

Section 2. Instructions to the Asking Party

(a) These interrogatories are designed for optional use in district courts only.

(b) Check the box next to each interrogatory that you want the answering party to answer. Use care in choosing those interrogatories that are applicable to the case.

(c) The interrogatories in section 16.0, Defendant's Contentions - Personal Injury, should not be used until the defendant has had a reasonable opportunity to conduct an investigation or discovery of plaintiff's injuries and damages.

(d) Subject to the limitations in C.R.C.P. 16(b)(1)(IV) and 33, additional interrogatories may be attached.

Section 3. Instructions to the Answering Party

(a) An answer or other appropriate response must be given to each interrogatory checked by the asking party.

(b) As a general rule, within 30 days after you are served with these interrogatories, you must serve your responses on the asking party and serve copies of your responses on all other parties to the action who have appeared. See C.R.C.P. 33 for details.

(c) Each answer must be as complete and straightforward as the information reasonably available to you permits. If an interrogatory cannot be answered completely, answer it to the extent possible.

(d) If you do not have enough personal knowledge to fully answer an interrogatory, say so, but make a reasonable and good faith effort to get the information by asking other persons or organizations, unless the information is equally available to the asking party.

(e) Whenever an interrogatory may be answered by referring to a document, the document may be attached as an exhibit to the response and referred to in the response. If the document has more than one page, refer to the page and section where the answer to the interrogatory can be found.

(f) Whenever an address and telephone number for the same person are requested in more than one interrogatory, you are required to furnish them in answering only the first interrogatory asking for that information.

(g) Your answers to these interrogatories must be verified, dated, and signed. You may wish to use the following form at the end of your answers: "I declare under penalty of perjury under the laws of the State of Colorado that the foregoing answers are true and correct."

(DATE)_____ (SIGNATURE)_____

Section 4. Definitions

Words in **BOLDFACE CAPITALS** in these interrogatories are defined as follows:

(a) **INCIDENT** includes the circumstances and events surrounding the alleged accident, injury, or other occurrence or breach of contract giving rise to this action or proceeding.

(b) **YOU OR ANYONE ACTING ON YOUR BEHALF** includes you, your agents, your employees, your insurance companies, their agents, their employees, your attorneys, your accountants, your investigators, and anyone else acting on your behalf.

(c) **PERSON** includes a natural person, firm, association, organization, partnership, business, trust, corporation, or public entity.

(d) **DOCUMENT** means a writing, as defined in CRE 1001 and includes the original or a copy of handwriting, typewriting, printing, photostating, photographing, and every other means of recording upon any tangible thing and form of communicating or representation, including letters, words, pictures, sounds, or symbols, or combinations of them.

(e) **HEALTH CARE PROVIDER** includes any **PERSON** or entity referred to as a "Health Care Professional" or "Health Care Institution" in C.R.S. § 13-64-202(3) and (4).

(f) **ADDRESS** means the street address, including the city, state, and zip code.

Section 5. Interrogatories

The following interrogatories have been approved by the Colorado Supreme Court under C.R.C.P. 16(b)(1)(IV), 26, and 33(e):

CONTENTS

17.0 Responses to Request for Admissions
18.0 *(Reserved)*
19.0 *(Reserved)*
20.0 How the Incident Occurred - Motor Vehicle
25.0 *(Reserved)*
30.0 *(Reserved)*
40.0 *(Reserved)*
50.0 Contract
60.0 *(Reserved)*

1.0 Identity of Persons Answering These Interrogatories

☐ 1.1 State the name, **ADDRESS**, telephone number, and relationship to you of each PERSON who prepared or assisted in the preparation of the responses to these interrogatories. (Do not identify anyone who simply typed or reproduced the responses.)

2.0 General Background Information - Individual

☐ 2.1 State:
(a) your name;
(b) every name you have used in the past;
(c) the dates you used each name.

☐ 2.2 State the date and place of your birth.

☐ 2.3 At the time of the **INCIDENT**, did you have a driver's license?
If so, state:
(a) the state or other issuing entity;
(b) the license number and type;
(c) the date of issuance;
(d) all restrictions.

☐ 2.4 At the time of the **INCIDENT**, did you have any other permit or license for the operation of a motor vehicle?
If so, state:
(a) the state or other issuing entity;
(b) the license number and type;
(c) the date of issuance;
(d) all restrictions.

☐ 2.5 State:
(a) your present residence **ADDRESS**;
(b) your residence **ADDRESSES** for the last five years;
(c) the dates you lived at each **ADDRESS**.

☐ 2.6 State:
(a) the name, **ADDRESS**, and telephone number of your present employer or place of self-employment;
(b) the name, **ADDRESS**, dates of employment, job title, and nature of work for each employer or self-employment you have had from five years before the **INCIDENT** until today.

☐ 2.7 State:
(a) the name and **ADDRESS** of each school or other academic or vocational institution you have attended beginning with high school;
(b) the dates you attended;
(c) the highest grade level you have completed;
(d) the degrees received.

☐ 2.8 Have you ever been convicted of a felony?
If so, for each conviction state:
(a) the city and state where you were convicted;
(b) the date of conviction;
(c) the offense;
(d) the court and case number.

☐ 2.9 Can you speak English with ease?
If not, what language and dialect do you normally use?

☐ 2.10 Can you read and write English with ease?
If not, what language and dialect do you normally use?

☐ 2.11 At the time of the **INCIDENT**, were you acting as an agent or employee for any **PERSON**?
If so, state:
(a) the name, **ADDRESS**, and telephone number of that **PERSON**;
(b) a description of your duties.

☐ 2.12 At the time of the **INCIDENT**, did you or any other person have any physical, emotional, or mental disability or condition that may have contributed to the occurrence of the **INCIDENT**?
If so, for each person state:
(a) the name, **ADDRESS**, and telephone number;
(b) the nature of the disability or condition;
(c) the manner in which the disability or condition contributed to the occurrence of the **INCIDENT**.

☐ 2.13 Within 24 hours before the **INCIDENT**, did you or any person involved in the **INCIDENT** use or take any of the following substances: alcoholic beverage, marijuana, or other drug or medication of any kind (prescription or not)?
If so, for each person state:
(a) the name, **ADDRESS**, and telephone number;
(b) the nature or description of each substance;
(c) the quantity of each substance used or taken;
(d) the date and time of day when each substance was used or taken;
(e) the **ADDRESS** where each substance was used or taken;
(f) the name, **ADDRESS**, and telephone number of each person who was present when each substance was used or taken;
(g) the name, **ADDRESS**, and telephone number of any **HEALTH CARE PROVIDER** that prescribed or furnished the substance and the condition for which it was prescribed or furnished.

3.0 General Background Information - Business Entity

☐ 3.1 Are you a corporation?
If so, state:
(a) the name stated in the current articles of incorporation;
(b) all other names used by the corporation during the past ten years and the dates each was used;
(c) the date and place of incorporation;
(d) the **ADDRESS** of the corporation's principal place of business;
(e) whether you are qualified to do business in Colorado.

☐ 3.2 Are you a partnership?
If so, state:
(a) the current partnership name;
(b) all other names used by the partnership during the past ten years and the dates each was used;
(c) whether you are a limited partnership and, if so, under the laws of what jurisdiction;

(d) the name and **ADDRESS** of each general partner;
(e) the **ADDRESS** of the partnership's principal place of business.

☐ 3.3 Are you a joint venture?
If so, state:
(a) the current joint venture name;
(b) all other names used by the joint venture during the past ten years and the dates each was used;
(c) the name and **ADDRESS** of each joint venturer,
(d) the **ADDRESS** of the joint venturer's principal place of business.

☐ 3.4 Are you an unincorporated association?
If so, state:
(a) the current unincorporated association's name;
(b) all other names used by the unincorporated association during the past ten years and the dates each was used;
(c) the **ADDRESS** of the association's principal place of business.

☐ 3.5 Have you done business under a fictitious name during the past ten years?
If so, for each fictitious name state:
(a) the name;
(b) the dates the name was used;
(c) the state and county of each fictitious name filing;
(d) the **ADDRESS** of your principal place of business.

☐ 3.6 Within the past five years, has any public entity registered or licensed your businesses?
If so, for each license or registration:
(a) identify the license or registration;
(b) state the name of the public entity;
(c) state the dates of issuance and expiration.

4.0 Insurance

☐ 4.1 At the time of the **INCIDENT**, was there in effect any policy of insurance through which you were or might be insured in any manner (for example, primary, pro rata, or excess liability coverage or medical expense coverage) for the damages, claims, or actions that have arisen out of the **INCIDENT**?
If so, for each policy state:
(a) the kind of coverage;
(b) the name and **ADDRESS** of the insurance company;
(c) the name, **ADDRESS**, and telephone number of each named insured;
(d) the policy number;
(e) the limits of coverage for each type of coverage contained in the policy;
(f) whether any reservation of rights or controversy or coverage dispute exists between you and the insurance company;
(g) the name, **ADDRESS**, and telephone number of the custodian of the policy.

☐ 4.2 Are you self-insured under any statute for the damages, claims, or actions that have arisen out of the **INCIDENT**?
If so, specify the statute.

5.0 (Reserved)

6.0 Physical, Mental, or Emotional Injuries

☐ 6.1 Do you attribute any physical, mental, or emotional injuries to the **INCIDENT**.
If your answer is "no," do not answer interrogatories 6.2 through 6.7.

☐ 6.2 Identify each injury you attribute to the **INCIDENT** and the area of your body affected.

☐ 6.3 Do you still have any complaints that you attribute to the **INCIDENT**?
If so, for each complaint state:
(a) a description;
(b) whether the complaint is subsiding, remaining the same, or becoming worse;
(c) the frequency and duration.

☐ 6.4 Did you receive any consultation or examination (except from expert witnesses covered by C.R.C.P. 35 or treatment from a **HEALTH CARE PROVIDER** for any injury you attribute to the **INCIDENT**?
If so, for each **HEALTH CARE PROVIDER** state:
(a) the name, **ADDRESS**, and telephone number;
(b) the type of consultation, examination, or treatment provided;
(c) the dates you received consultation, examination, or treatment;
(d) the charges to date.

☐ 6.5 Have you taken any medication, prescribed or not, as a result of injuries that you attribute to the **INCIDENT**?
If so, for each medication state:
(a) the name;
(b) the **PERSON** who prescribed or furnished it;
(c) the date prescribed or furnished;
(d) the dates you began and stopped taking it;
(e) the cost to date.

☐ 6.6 Are there any other medical services not previously listed (for example, ambulance, nursing, prosthetics)?
If so, for each service state:
(a) the nature;
(b) the date;
(c) the cost;
(d) the name, **ADDRESS**, and telephone number of each provider.

☐ 6.7 Has any **HEALTH CARE PROVIDER** advised that you may require future or additional treatment for any injuries that you attribute to the **INCIDENT**?
If so, for each injury state:
(a) the name and **ADDRESS** of each **HEALTH CARE PROVIDER**;
(b) the complaints for which the treatment was advised;
(c) the nature, duration, and estimated cost of the treatment.

7.0 Property Damage

☐ 7.1 Do you attribute any loss of or damage to a vehicle or other property to the **INCIDENT**?
If so, for each item of property:
(a) describe the property;
(b) describe the nature and location of the damage to the property;
(c) state the amount of damage you are claiming for each item of property and how the amount was calculated;
(d) if the property was sold, state the name, **ADDRESS**, and telephone number of the seller, the date of sale, and the sale price.

☐ 7.2 Has a written estimate or evaluation been made for any item of property referred to in your answer to interrogatory 7.1?
If so, for each estimate or evaluation state:
(a) the name, **ADDRESS**, and telephone number of the **PERSON** who prepared it and the date prepared;
(b) the name, **ADDRESS**, and telephone number of each **PERSON** who has a copy;
(c) the amount of damage stated.

☐ 7.3 Has any item of property referred to in your answer to interrogatory 7.1 been repaired?
If so, for each item state:
(a) the date repaired;

(b) a description of the repair;
(c) the repair cost;
(d) the name, **ADDRESS**, and telephone number of the **PERSON** who repaired it;
(e) the name, **ADDRESS**, and telephone number of the **PERSON** who paid for the repair.

8.0 Loss of Income or Earning Capacity

☐ 8.1 Do you attribute any loss of income or earning capacity to the **INCIDENT**? If your answer is "no," do not answer interrogatories 8.2 through 8.8.

☐ 8.2 State:
(a) the nature of your work;
(b) your job title at the time of the **INCIDENT**;
(c) the date your employment began.

☐ 8.3 State the last date before the **INCIDENT** that you worked for compensation.

☐ 8.4 State your monthly income at the time of the **INCIDENT** and how the amount was calculated.

☐ 8.5 State the date you returned to work at each place of employment following the **INCIDENT**.

☐ 8.6 State the dates you did not work and for which you lost income.

☐ 8.7 State the total income you have lost to date as a result of the **INCIDENT** and how the amount was calculated.

☐ 8.8 Will you lose income in the future as a result of the **INCIDENT**?
If so, state:
(a) the facts upon which you base this contention;
(b) an estimate of the amount;
(c) an estimate of how long you will be unable to work;
(d) how the claim for future income is calculated.

9.0 Other Damages

☐ 9.1 Are there any other damages that you attribute to the **INCIDENT**?
If so, for each item of damage state:
(a) the nature;
(b) the date it occurred;
(c) the amount;
(d) the name, **ADDRESS**, and telephone number of each **PERSON** to whom an obligation was incurred.

☐ 9.2 Do any **DOCUMENTS** support the existence or amount of any item of damages claimed in interrogatory 9.1?
If so, state the name, **ADDRESS**, and telephone number of the **PERSON** who has each **DOCUMENT**.

10.0 Medical History

☐ 10.1 At any time before the **INCIDENT**, did you have complaints or injuries that involved the same part of your body claimed to have been injured in the **INCIDENT**?
If so, for each state:
(a) a description;
(b) the dates it began and ended;
(c) the name, **ADDRESS**, and telephone number of each **HEALTH CARE PROVIDER** whom you consulted or who examined or treated you.

☐ 10.2 List all physical, mental, and emotional disabilities you had immediately before the **INCIDENT**. (You may omit mental or emotional disabilities unless you attribute any mental or emotional injury to the **INCIDENT**.)

☐ 10.3 At any time after the **INCIDENT**, did you sustain injuries of the kind for which you are now claiming damages.
If so, for each incident state:
(a) the date and the place it occurred;
(b) the name, **ADDRESS**, and telephone number of any other **PERSON** involved;
(c) the nature of any injuries you sustained;
(d) the name, **ADDRESS**, and telephone number of each **HEALTH CARE PROVIDER** that you consulted or who examined or treated you;
(e) the nature of the treatment and its duration.

11.0 Other Claims and Previous Claims

☐ 11.1 Except for this action, in the last ten years have you filed an action or made a written claim or demand for compensation for personal injuries?
If so, for each action, claim, or demand state:
(a) the date, time, and place and location of the **INCIDENT** (closest street **ADDRESS** or intersection);
(b) the name, **ADDRESS**, and telephone number of each **PERSON** against whom the claim was made or action filed;
(c) the court, names of the parties, and case number of any action filed;
(d) the name, **ADDRESS**, and telephone number of any attorney representing you;
(e) whether the claim or action has been resolved or is pending.

☐ 11.2 In the last ten years have you made a written claim or demand for workers' compensation benefits?
If so, for each claim or demand state:
(a) the date, time, and place of the **INCIDENT** giving rise to the claim;
(b) the name, **ADDRESS**, and telephone number of your employer at the time of the injury;
(c) the name, **ADDRESS**, and telephone number of the workers' compensation insurer and the claim number;
(d) the period of time during which you received workers' compensation benefits;
(e) a description of the injury;
(f) the name, **ADDRESS**, and telephone number of any **HEALTH CARE PROVIDER** that provided services;
(g) the case number of the workers' compensation claim.

12.0 Investigation - General

☐ 12.1 State the name, **ADDRESS**, and telephone number of each individual:
(a) who witnessed the **INCIDENT** or the events occurring immediately before or after the **INCIDENT**;
(b) who made any statement at the scene of the **INCIDENT**;
(c) who heard any statements made about the **INCIDENT** by any individual at the scene;
(d) who **YOU OR ANYONE ACTING ON YOUR BEHALF** claims to have knowledge of the **INCIDENT** (except for expert witnesses covered by C.R.C.P. 26(a)(2) and (b)(4)).

☐ 12.2 Have **YOU OR ANYONE ACTING ON YOUR BEHALF** interviewed any individual concerning the **INCIDENT**?
If so, for each individual state:
(a) the name, **ADDRESS**, and telephone number of the individual interviewed;
(b) the date of the interview;
(c) the name, **ADDRESS**, and telephone number of the **PERSON** who conducted the interview.

☐ 12.3 Have **YOU OR ANYONE ACTING ON YOUR BEHALF** obtained a written or recorded statement from any individual concerning the incident?

If so, for each statement state:
(a) the name, **ADDRESS**, and telephone number of the individual from whom the statement was obtained;
(b) the name, **ADDRESS**, and telephone number of the individual who obtained the statement;
(c) the date the statement was obtained;
(d) the name, **ADDRESS**, and telephone number of each **PERSON** who has the original statement or a copy.

☐ 12.4 Do **YOU OR ANYONE ACTING ON YOUR BEHALF** know of any photographs, films, or videotapes depicting any place, object, or individual concerning the **INCIDENT** or plaintiff's injuries?
If so, state:
(a) the number of photographs or feet of film or videotape;
(b) the places, objects, or persons photographed, filmed, or videotaped;
(c) the date the photographs, films, or videotapes were taken;
(d) the name, **ADDRESS**, and telephone number of the individual taking the photographs, films, or videotapes;
(e) the name, **ADDRESS**, and telephone number of each **PERSON** who has the original or a copy.

☐ 12.5 Do **YOU OR ANYONE ACTING ON YOUR BEHALF** know of any diagram, reproduction, or model of any place or thing (except for items developed by expert witnesses covered by C.R.C.P. 26(a)(2) and (b)(4)) concerning the **INCIDENT**?
If so, for each item state:
(a) the type (i.e., diagram, reproduction, or model);
(b) the subject matter;
(c) the name, **ADDRESS**, and telephone number of each **PERSON** who has it.

☐ 12.6 Was a report made by any **PERSON** concerning the **INCIDENT**?
If so, state:
(a) the name, title, identification number, and employer of the **PERSON** who made the report;
(b) the date and type of report made;
(c) the name, **ADDRESS**, and telephone number of the **PERSON** for whom the report was made.

☐ 12.7 Have **YOU OR ANYONE ACTING ON YOUR BEHALF** inspected the scene of the **INCIDENT**?
If so, for each inspection state:
(a) the name, **ADDRESS**, and telephone number of the individual making the inspection (except for expert witnesses covered by C.R.C.P. 26(a)(2) and (b)(4)).
(b) the date of the inspection.

13.0 Investigation - Surveillance

☐ 13.1 Have **YOU OR ANYONE ACTING ON YOUR BEHALF** conducted surveillance of any individual involved in the **INCIDENT** or any party to this action?
If so, for each surveillance state:
(a) the name, **ADDRESS**, and telephone number of the individual or party;
(b) the time, date, and place of the surveillance;
(c) the name, **ADDRESS** and telephone number of the individual who conducted the surveillance.

☐ 13.2 Has a written report been prepared on the surveillance?
If so, for each written report state:
(a) the time;
(b) the date;
(c) the name, **ADDRESS**, and telephone number of the individual who prepared the report;
(d) the name, **ADDRESS**, and telephone number of each **PERSON** who has the original or a copy.

14.0 Statutory or Regulatory Violations

☐ 14.1 Do **YOU OR ANYONE ACTING ON YOUR BEHALF** contend that any **PERSON** involved in the **INCIDENT** violated any statute, ordinance, or regulation and that the violation was a legal (proximate) cause of the **INCIDENT**?
If so, identify each **PERSON** and the statute, ordinance, or regulation.

☐ 14.2 Was any **PERSON** cited or charged with a violation of any statute, ordinance, or regulation as a result of this **INCIDENT**?
If so, for each **PERSON** state:
(a) the name, **ADDRESS**, and telephone number of the **PERSON**;
(b) the statute, ordinance, or regulation allegedly violated;
(c) whether the **PERSON** entered a plea in response to the citation or charge and, if so, the plea entered;
(d) the name and **ADDRESS** of the court or administrative agency, names of the parties, and case number.

15.0 Affirmative Defenses

☐ 15.1 Identify each denial of a material allegation and each affirmative defense in your pleadings and for each:
(a) state all facts upon which you base the denial or affirmative defense;
(b) state the names, **ADDRESSES**, and telephone numbers of all **PERSONS** who have knowledge of those facts;
(c) identify all **DOCUMENTS** and other tangible things which support your denial or affirmative defense, and state the name, **ADDRESS**, and telephone number of the **PERSON** who has each **DOCUMENT**.

16.0 Defendant's Contentions - Personal Injury
[See Instructions Section 2(c)]

☐ 16.1 Do you contend that any **PERSON**, other than you or plaintiff, contributed to the occurrence of the **INCIDENT** or the injuries or damages claimed by plaintiff?
If so, for each **PERSON**:
(a) state the name, **ADDRESS**, and telephone number of the **PERSON**;
(b) state all facts upon which you base your contention;
(c) state the names, **ADDRESSES**, and telephone numbers of all **PERSONS** who have knowledge of the facts;
(d) identify all **DOCUMENTS** and other tangible things that support your contention and state the name, **ADDRESS**, and telephone number of the **PERSON** who has each **DOCUMENT** or thing.

☐ 16.2 Do you contend that plaintiff was not injured in the **INCIDENT**?
If so:
(a) state all facts upon which you base your contention;
(b) state the names, **ADDRESSES**, and telephone numbers of all **PERSONS** who have knowledge of the facts;
(c) identify all **DOCUMENTS** and other tangible things that support your contention and state the name, **ADDRESS**, and telephone number of the **PERSON** who has each **DOCUMENT** or thing.

☐ 16.3 Do you contend that the injuries or the extent of the injuries claimed by plaintiff as disclosed in discovery proceedings thus far in this case were not caused by the **INCIDENT**?
If so, for each injury:
(a) identify it;
(b) state all facts upon which you base your contention;
(c) state the names, **ADDRESSES**, and telephone numbers of all **PERSONS** who have knowledge of the facts;
(d) identify all **DOCUMENTS** and other tangible things that support your contention and state the name, **ADDRESS**. and telephone number of the **PERSON** who has each **DOCUMENT** or thing.

☐ 16.4 Do you contend that any of the services furnished by any **HEALTH CARE PROVIDER** claimed by plaintiff in discovery proceedings thus far in this case were not due to the **INCIDENT**?

If so:

(a) identify each service;
(b) state all facts upon which you base your contention;
(c) state the names, **ADDRESSES**, and telephone numbers of all **PERSONS** who have knowledge of the facts;
(d) identify all **DOCUMENTS** and other tangible things that support your contention and state the name, **ADDRESS**. and telephone number of the **PERSON** who has each **DOCUMENT** or thing.

☐ 16.5 Do you contend that any of the costs of services furnished by any **HEALTH CARE PROVIDER** claimed as damages by plaintiff in discovery proceedings thus far in this case were unreasonable?

If so:

(a) identify each cost;
(b) state all facts upon which you base your contention;
(c) state the names, **ADDRESSES**, and telephone numbers of all **PERSONS** who have knowledge of the facts;
(d) identify all **DOCUMENTS** and other tangible things that support your contention and state the name, **ADDRESS**, and telephone number of the **PERSON** who has each **DOCUMENT** or thing.

☐ 16.6 Do you contend that any part of the loss of earnings or income claimed by plaintiff in discovery proceedings thus far in this case was unreasonable or was not caused by the **INCIDENT**?

If so:

(a) identify each part of the loss;
(b) state all facts upon which you base your contention;
(c) state the names, **ADDRESSES**, and telephone numbers of all **PERSONS** who have knowledge of the facts;
(d) identify all **DOCUMENTS** and other tangible things that support your contention and state the name, **ADDRESS**, and telephone number of the **PERSON** who has each **DOCUMENT** or thing.

☐ 16.7 Do you contend that any of the property damage claimed by plaintiff in discovery proceedings thus far in this case was not caused by the **INCIDENT**?

If so:

(a) identify each item of property damage;
(b) state all facts upon which you base your contention;
(c) state the names, **ADDRESSES**, and telephone numbers of all **PERSONS** who have knowledge of the facts;
(d) identify all **DOCUMENTS** and other tangible things that support your contention and state the name, **ADDRESS**, and telephone number of the **PERSON** who has each **DOCUMENT** or thing.

☐ 16.8 Do you contend that any of the costs of repairing the property damage claimed by plaintiff in discovery proceedings thus far in this case were unreasonable?

If so:

(a) identify each cost item;
(b) state all facts upon which you base your contention;
(c) state the names, **ADDRESSES**, and telephone numbers of all **PERSONS** who have knowledge of the facts;
(d) identify all **DOCUMENTS** and other tangible things that support your contention and state the name, **ADDRESS**, and telephone number of the **PERSON** who has each **DOCUMENT** or thing.

☐ 16.9 Do **YOU OR ANYONE ACTING ON YOUR BEHALF** have any **DOCUMENT** (for example, insurance bureau index reports) concerning claims for personal injuries made before or after the **INCIDENT** by a plaintiff in this case?

If so, for each plaintiff state:
(a) the source of each **DOCUMENT**;
(b) the date of each claim arose;
(c) the nature of each claim;
(d) the name, **ADDRESS**, and telephone number of the **PERSON** who has each **DOCUMENT**.

☐ 16.10 Do **YOU OR ANYONE ACTING ON YOUR BEHALF** have any **DOCUMENT** concerning the past or present physical, mental, or emotional condition of any plaintiff in this case from a **HEALTH CARE PROVIDER** not previously identified (except for expert witnesses covered by C.R.C.P. 26(a)(2) and (b)(4))?
If so, for each plaintiff state:
(a) the name, **ADDRESS**, and telephone number of each **HEALTH CARE PROVIDER**;
(b) a description of each **DOCUMENT**;
(c) the name, **ADDRESS**, and telephone number of the **PERSON** who has each **DOCUMENT**.

17.0 Responses to Request for Admissions

☐ 17.1 Is your response to each request for admission served with these interrogatories an unqualified admission?
If not, for each response that is not an unqualified admission:
(a) state the number of the request;
(b) state all facts upon which you base your response;
(c) state the names, **ADDRESSES**, and telephone numbers of all **PERSONS** who have knowledge of those facts;
(d) identify all **DOCUMENTS** and other tangible things that support your response and state the name, **ADDRESS**, and telephone number of the **PERSON** who has each **DOCUMENT** or thing.

18.0 (Reserved)

19.0 (Reserved)

20.0 How the Incident Occurred - Motor Vehicle

☐ 20.1 State the date, time, and place (closest street address, intersection, or highway) of the **INCIDENT**.

☐ 20.2 For each vehicle involved in the **INCIDENT**, state:
(a) the year, make, model, and license number;
(b) the name, **ADDRESS**, and telephone number of the driver;
(c) the name, **ADDRESS**, and telephone number of each occupant other than the driver;
(d) the name, **ADDRESS**, and telephone number of each registered owner;
(e) the name, **ADDRESS**, and telephone number of each lessee;
(f) the name, **ADDRESS**, and telephone number of each owner other than the registered owner or lien holder;
(g) the name of each owner who gave permission or consent to the driver to operate the vehicle.

☐ 20.3 State the **ADDRESS** and location where your trip began, and the **ADDRESS** and location of your destination.

☐ 20.4 Describe the route that you followed from the beginning of your trip to the location of the **INCIDENT**, and state the location of each stop, other than routine traffic stops, during the trip leading up to the **INCIDENT**.

☐ 20.5 State the name of the street or roadway, the lane of travel, and the direction of travel of each vehicle involved in the **INCIDENT** for the 500 feet of travel before the **INCIDENT**.

☐ 20.6 Did the **INCIDENT** occur at an intersection?
If so, describe all traffic control devices, signals, or signs at the intersection.

☐ 20.7 Was there a traffic signal facing you at the time of the **INCIDENT**?
If so, state:
(a) your location when you first saw it;
(b) the color;
(c) the number of seconds it had been that color;
(d) whether the color changed between the time you first saw it and the **INCIDENT**.

☐ 20.8 State how the **INCIDENT** occurred, giving the speed, direction, and location of each vehicle involved:
(a) just before the **INCIDENT**;
(b) at the time of the **INCIDENT**;
(c) just after the **INCIDENT**.

☐ 20.9 Do you have information that a malfunction or defect in a vehicle caused the **INCIDENT**?
If so:
(a) identify the vehicle;
(b) identify each malfunction or defect;
(c) state the name, **ADDRESS**, and telephone number of each **PERSON** who is a witness to or has information about each malfunction or defect;
(d) state the name, **ADDRESS**, and telephone number of each **PERSON** who has custody of each defective part.

☐ 20.10 Do you have information that any malfunction or defect in a vehicle contributed to the injuries sustained in the **INCIDENT**?
If so:
(a) identify the vehicle;
(b) identify each malfunction or defect;
(c) state the name, **ADDRESS**, and telephone number of each **PERSON** who is a witness to or has information about each malfunction or defect;
(d) state the name, **ADDRESS**, and telephone number of each **PERSON** who has custody of each defective part.

☐ 20.11 State the name, **ADDRESS**, and telephone number of each owner and each **PERSON** who has had possession since the **INCIDENT** of each vehicle involved in the **INCIDENT**.

25.0 (Reserved)

30.0 (Reserved)

40.0 (Reserved)

50.0 Contract

☐ 50.1 For each agreement alleged in the pleadings:
(a) identify all **DOCUMENTS** that are part of the agreement and for each state the name, **ADDRESS**, and telephone number of each **PERSON** who has the **DOCUMENT**;
(b) state each part of the agreement not in writing, the name, **ADDRESS**, and telephone number of each **PERSON** agreeing to that provision, and the date that part of the agreement was made;
(c) identify all **DOCUMENTS** that evidence each part of the agreement not in writing and for each state the name, **ADDRESS**, and telephone number of each **PERSON** who has the **DOCUMENT**;
(d) identify all **DOCUMENTS** that are part of each modification to the agreement, and for each state the name, **ADDRESS**, and telephone number of each **PERSON** who has the **DOCUMENT**;
(e) state each modification not in writing, the date, and the name, **ADDRESS**, and telephone number of each **PERSON** agreeing to the modification, and the date the modification was made;

(f) identify all **DOCUMENTS** that evidence each modification of the agreement not in writing and for each state the name, **ADDRESS**, and telephone number of each **PERSON** who has the **DOCUMENT**.

☐ 50.2 Was there a breach of any agreement alleged in the pleadings?
If so, for each breach describe and give the date of every act or omission that you claim is the breach of the agreement.

☐ 50.3 Was performance of any agreement alleged in the pleadings excused?
If so, identify each agreement excused and state why performance was excused.

☐ 50.4 Was any agreement alleged in the pleadings terminated by mutual agreement, release, accord and satisfaction, or novation?
If so, identify each agreement terminated and state why it was terminated including dates.

☐ 50.5 Is any agreement alleged in the pleadings unenforceable?
If so, identify each unenforceable agreement and state why it is unenforceable.

☐ 50.6 Is any agreement alleged in the pleadings ambiguous?
If so, identify each ambiguous agreement and state why it is ambiguous.

60.0 (Reserved)

Form 20.2.
PATTERN INTERROGATORIES (DOMESTIC RELATIONS)

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

Form 21.
REQUESTS FOR ADMISSION UNDER RULE 36

[Moved - See Form 21B]

Form 21A.
MOTION FOR PRODUCTION OF DOCUMENTS, ETC., UNDER RULE 34

Plaintiff A.B. requests pursuant to C.R.C.P. 34 that defendant C.D.:

1. Produce and permit plaintiff to inspect and to copy each of the following documents:
(Here list the documents individually or by category and describe each of them.)
(Here state the time, place, and manner of making the inspection and performance of any related acts.)

2. Produce and permit plaintiff to inspect and to copy, test, or sample each of the following objects:
(Here list the objects either individually or by category and describe each of them.)
(Here state the time, place, and manner of making the inspection and performance of any related acts.)

3. Permit plaintiff to enter (here describe property to be entered) and to inspect and to photograph, test or sample (here describe the portion of the real property and the objects to be inspected.)

Defendant C. D. has the possession, custody, or control of each of the foregoing documents and objects and of the above-mentioned real estate. Each of them constitutes or contains evidence relevant and material to a matter involved in this action, as is more fully shown in Exhibit A hereto attached.

Signed: _____
Attorney for Plaintiff.

Form 21B.
REQUEST FOR ADMISSION UNDER RULE 36

Plaintiff A.B. requests pursuant to C.R.C.P. 36 that defendant C.D. admit:

1. That each of the following documents, exhibited with this request, is genuine.
(Here list the documents and describe each document.)
2. That each of the following statements is true.
(Here list the statements.)

Signed: _____
Attorney for Plaintiff.

Form 21.2.
PATTERN REQUESTS FOR PRODUCTION OF DOCUMENTS (DOMESTIC RELATIONS)

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

Form 22.
ALLEGATION OF REASON FOR OMITTING PARTY

When it is necessary, under Rule 19 (c), for the pleader to set forth in his pleading the names of persons who ought to be made parties, but who are not so made, there should be an allegation such as the one set out below:

John Doe named in this complaint is not made a party to this action (because he is not subject to the jurisdiction of this court) or (for reasons stated).

Form 23.
AFFIDAVIT, WRIT OF GARNISHMENT AND INTERROGATORIES (RULE 103)

Repealed November 5, 1984, effective January 1, 1985.

Form 24.
WRIT OF ASSISTANCE - PETITION FOR

[Insert caption A from page 643 with the following designation of parties]

Plaintiff:

v.

Defendant:

COMES NOW the Plaintiff, above-named, by and through its attorneys of record, and moves this Honorable Court issue a Writ of Assistance to the Sheriff of the County of _____, State of Colorado, enabling the Sheriff to call to his aid the powers of his County, in accordance with Rule 104 (h), in order that the Sheriff may execute the Writ of Replevin heretofore entered in the premises, and as grounds therefor, shows unto the Court:

That the property described in the Writ of Replevin is being concealed by the Defendant, or his agents; that the Sheriff has heretofore demanded the delivery of the property, and that despite such public demand the property has not been delivered.

Respectfully submitted:

_____

Attorney for the Plaintiff

Form 25.
REQUEST FOR PRODUCTION OF DOCUMENTS, ETC., UNDER RULE 34

[Moved to become Form 21A]

Form 26.
WRIT OF CONTINUING GARNISHMENT

☐County Court ☐District Court _____ County, Colorado Court Address: Plaintiff(s)/Petitioner(s): v. Defendant(s)/Respondent(s):	▲ COURT USE ONLY ▲
Judgment Creditor's Attorney or Judgment Creditor (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom

WRIT OF CONTINUING GARNISHMENT

Judgment Debtor's name, last known address, other identifying information: _____

1. Original or Revised Amount of Judgment Entered on _____ (date) for $_____

DATE SUIT WASCOMMENCED: (Mark Appropriate Box)

a. Effective Garnishment Period
- ☐ 90 days (Judgment entered prior to August 8, 2001) ☐Prior to May 1, 1991
- ☐ 180 days (Judgment entered on or after August 8, 2001) ☐On or After May 1, 1991

2. Plus any Interest Due on Judgment (_____% per annum) $_____
3. Taxable Costs (including estimated cost of service of this Writ) $_____
4. Less any Amount Paid $_____
5. Principal Balance/Total Amount Due and Owing $_____

I affirm that I am authorized to act for the Judgment Creditor and this is a correct statement as of _____ (date).

Subscribed under oath before me on _____ (date)

_____
Notary Public or Deputy Clerk

My Commission Expires: _____

_____
Print Judgment Creditor's Name

Address: _____

By: _____
Signature (Type Name, Title, Address and Phone)

WRIT OF CONTINUING GARNISHMENT

THE PEOPLE OF THE STATE OF COLORADO to the Sheriff of any Colorado County or to any person 18 years or older and who is not a party to this action:
You are directed to serve **TWO COPIES** of this Writ of Continuing Garnishment upon _____, Garnishee, with proper return of service to be made to the Court.

TO THE GARNISHEE: YOU ARE SUMMONED AS GARNISHEE IN THIS ACTION AND ORDERED:

a. To answer the following questions under oath and mail your answers to the ☐Judgment Creditor named above ☐Judgment Creditor's Attorney or if the Judgment Creditor is not a licensed collection agency and has no attorney, to the ☐Clerk of the Court no less than 5 nor more than 10 days following the time you pay the Judgment Debtor for the first time following service of this Writ, or 40 days following service of this Writ upon you, whichever is less. **YOUR FAILURE TO ANSWER THIS WRIT OF CONTINUING GARNISHMENT MAY RESULT IN THE ENTRY OF A DEFAULT AGAINST YOU.**

b. To pay any nonexempt earnings to the party designated in "e" below no less than 5 nor more than 10 days following each time you pay the Judgment Debtor during the effective Garnishment Period of this Writ and attach a copy of the Calculation of the Amount of Exempt Earnings used (the Calculation under "Questions to be Answered by Garnishee" should be used for the first pay period, and one of the multiple Calculation forms included with this Writ should be used for all subsequent pay periods).

c. To deliver a copy of this Writ, together with the Calculation of the Amount of Exempt Earnings and a blank Objection to Calculation of the Amount of Exempt Earnings form, the first time you pay the Judgment Debtor.

d. To deliver to the Judgment Debtor a copy of each subsequent Calculation of the Amount of Exempt Earnings each time you pay the Judgment Debtor for earnings subject to this Writ.

e. **MAKE CHECKS PAYABLE AND MAIL TO:** ☐Judgment Creditor named above; ☐Judgment Creditor's Attorney or if the Judgment Creditor is not a licensed collection agency and has no attorney; to the ☐Clerk of the _____ Court
Name: _____
Address: _____
PLEASE PUT THE CASE NUMBER (shown above) ON THE FRONT OF THE CHECK.

CLERK OF THE COURT By Deputy Clerk: _____
Date: _____

NOTICE TO GARNISHEE

a. This Writ applies to all nonexempt earnings owed or owing during the Effective Garnishment Period shown on Line 1a on the front of this Writ or until you have paid to the party, designated in paragraph "e" on the front of this Writ, the amount shown on Line 5 on the front of this Writ, whichever occurs first. **However, if you have already been served with a Writ of Continuing Garnishment for Child Support, this new Writ is effective for the Effective Garnishment Period after any prior Writ terminates.**
b. **"Earnings" includes all forms of compensation for Personal Services.** Also read "Notice to Judgment Debtor" below.
c. In no case may you withhold any amount greater than the amount on Line 5 on the front of this Writ.

QUESTIONS TO BE ANSWERED BY GARNISHEE

Judgment Debtor's Name: _____ **Case Number:** _____

The following questions MUST be answered by you under oath:

a. On the date and time this Writ of Continuing Garnishment was served upon you, did you owe or do you anticipate owing any of the following to the Judgment debtor within the Effective Garnishment Period shown on Line 1a on the front of this Writ? (Mark appropriate box(es)):

1. ❑ WAGES/SALARY/COMMISSIONS/BONUS/OTHER COMPENSATION FOR PERSONAL SERVICES (Earnings)
2. ❑ Health, Accident or Disability Insurance Funds or Payments
3. ❑ Pension or Retirement Benefits (for suits commenced prior to 5/1/91 ONLY - check front of Writ for date)

If you marked any box above, indicate how the Judgment debtor is paid: ❑weekly ❑bi-weekly ❑semi-monthly ❑monthly ❑other
The Judgment Debtor will be paid on the following dates during the Effective Garnishment Period shown on Line 1a (front of this Writ):
_____

b. Are you under one or more of the following writs of garnishment? (Mark appropriate box(es)):

4. ❑ Writ of Continuing Garnishment (Expected Termination Date: _____)
5. ❑ Writ of Garnishment for Support (Expected Termination Date: _____)

c. If you marked Box 1 and you did NOT mark either Box 4 or 5, complete the Calculation below for the "First Pay Period" following receipt of this Writ. If you marked either Box 4 or 5, you must complete Calculations beginning with the first pay period following termination of the prior writ(s).
d. If you marked Box 2 or 3 and you did NOT mark either Box 4 or 5, complete the Calculation below for the "First Pay Period" following receipt of this Writ. If you marked either box 4 or 5, you must complete Calculations beginning with the first pay period following termination of the prior writ(s). However, there are a number of total exemptions, and you should seek legal advice about such exemptions. **If the earning are totally exempt, please mark box 6 below:**

6. ❑The earnings are totally exempt because: _____

CALCULATION OF THE AMOUNT OF EXEMPT EARNINGS (First Pay Period)

Gross Earnings for the First Pay Period from _____ thru _____	$ _____
Less Deductions Required by Law (For Example, Withholding Taxes, FICA)	- $ _____
Disposable Earnings (Gross Earnings less Deductions)	= $ _____
Less Statutory Exemption (Use Exemption Chart Below)	- $ _____
Net Amount Subject to Garnishment	= $ _____
Less Wage/Income Assignment(s) During Pay Period (If Any)	- $ _____
Amount to be withheld and paid	= $ _____

EXEMPTION CHART ("Minimum Hourly Wage" means state or federal minimum wage, whichever is greater.)	PAY PERIOD	AMOUNT EXEMPT IS THE GREATER OF:
	Weekly	30 x Minimum Hourly Wage or 75% of Disposable Earnings
	Bi-weekly	60 x Minimum Hourly Wage or 75% of Disposable Earnings
	Semi-monthly	65 x Minimum Hourly Wage or 75% of Disposable Earnings
	Monthly	130 x Minimum Hourly Wage or 75% of Disposable Earnings

I certify that I am authorized to act for the Garnishee; that the above answers are true and correct; and that I have delivered a copy of this Writ, together with the Calculation of the Amount of Exempt Earnings and a blank Objection to Calculation of the Amount of Exempt Earnings form to the Judgment Debtor at the time earnings were paid for the "First Pay Period" (if earnings were paid).

Name of Garnishee (Print) _____
Address _____
Phone Number _____

Subscribed under affirmation or oath
before me on _____ (date)

_____
Notary Public/Deputy Clerk

My Commission Expires: _____

_____
Name of Person Answering (Print)

_____
Signature of Person Answering

NOTICE TO JUDGMENT DEBTOR

a. The Garnishee may only withhold nonexempt earnings from the amount due you, but in no event more than the amount on Line 5 on the front of this Writ, UNLESS YOUR EARNINGS ARE TOTALLY EXEMPT, in which case NO EARNINGS CAN BE WITHHELD. You may wish to contact a lawyer who can explain your rights.

b. If you disagree with the amount withheld, you must talk with the Garnishee within 5 days after being paid.

c. If you cannot settle the disagreement with the Garnishee, you may complete and file the attached Objection with the Clerk of the Court issuing this Writ within 10 days after being paid. YOU MUST USE THE FORM ATTACHED or a copy of it.

d. You are entitled to a court hearing on your written objection.

e. Your employer cannot fire you because your earnings have been garnished. If your employer discharges you in violation of your legal rights, you may, within 90 days, bring a civil action for the recovery of wages lost because you were fired and for an order requiring that you be reinstated. Damages will not exceed 6 weeks' wages and attorney fees.

RETURN OF SERVICE

Judgment Debtor's Name: _____ **Case Number:** _____

I certify that I am 18 years or older; that I am not a party to the action; and that I have served two copies of the Writ of Continuing Garnishment, together with a blank Objection to Calculation of the Amount of Exempt Earnings on _____ (name of party) in _____ (County) _____ (State) on _____ (date) _____ (time) at the following location:

_____

By (Check one):

- ☐ By handing it to a person identified to me as _____ (name of garnishee).
- ☐ By leaving it with _____ (Type or write name legibly), who is designated to receive service because of a legal relationship with _____ (name of garnishee) as provided for in C.R.C.P. 4(e).
- ☐ I attempted to serve _____ (name of garnishee) on _____ occasions but have not been able to locate him/her/it. Return to the Judgment Creditor is made on _____ (date).
- ☐ I attempted to leave it with _____ (name of person) who refused service.

☐ Private process server
☐ Sheriff, _____County
Fee $ _____ Mileage $ _____

_____
Signature of Process Server

_____
Name (Print or type)

Subscribed under affirmation or oath before me in the County of _____, State of _____, this _____ day of _____, 20 _____. **Note: Notarization is not required for service by a sheriff or deputy.**

My Commission Expires: _____

_____
Notary Public/Clerk

Form 27.
CALCULATION OF THE AMOUNT OF EXEMPT EARNINGS

☐ County Court ☐ District Court _____ County, Colorado Court Address:	
Plaintiff(s)/Petitioner(s): v. **Defendant(s)/Respondent(s):**	
Garnishee's Attorney or Garnishee (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	▲ **COURT USE ONLY** ▲ Case Number: Division: Courtroom:

CALCULATION OF THE AMOUNT OF EXEMPT EARNINGS

Gross Pay for _____ thru_____	$_____
Less Deductions Required by Law	- $_____
Disposable Earnings	=$_____
Less Statutory Exemption	- $_____
Net Amount Subject to Garnishment	=$_____
Less Wage/Income Assignment (If Any)	- $_____
AMOUNT PAID	=$_____

I affirm that I am authorized to act for the Garnishee, the above Calculation is true and correct, and I have delivered a copy of this Calculation to the Judgment Debtor at the time earnings were paid for the above period.

Date: _____ _____
Signature

MAIL WITH EACH CHECK
TO THE PARTY DESIGNATED IN PARAGRAPH 'e' ON
FRONT OF WRIT OF CONTINUING GARNISHMENT

Form 28.
OBJECTION TO CALCULATION OF THE AMOUNT OF EXEMPT EARNINGS

❑ County Court ❑ District Court _____County, Colorado Court address: _____ Plaintiff(s): v. Defendant(s):	▲ COURT USE ONLY ▲
Judgment Debtor's Attorney or Judgment Debtor (Name and Address): Phone Number: E-mail: FAX Number: Atty.Reg. #:	Case Number: Division Courtroom
OBJECTION TO CALCULATION OF THE AMOUNT OF EXEMPT EARNINGS	

Instructions to Judgment Debtor: Use this form to object to the calculations of your exempt earnings.

Name: _____ Phone Number: _____

Street Address: _____

Mailing Address, if different: _____

City: _____ State: _____ Zip Code: _____

1. **I object to the Garnishee's Calculation of the Amount of Exempt Earnings because I believe that the correct calculation is:**

Gross Earnings for My Pay Period from _____ thru _____	$ _____
Less Deductions Required by Law (For Example, Withholding Taxes, FICA)	- $ _____
Disposable Earnings (Gross Earnings Less Deductions)	= $ _____
Less Statutory Exemption (Use Exemption Chart on Writ)	- $ _____
Net Amount Subject to Garnishment	= $ _____
Less Wage/Income Assignment(s) During Pay Period (If Any)	- $ _____
Amount which should be withheld	= $ _____

OR

2. The earnings garnished are pension or retirement benefits/deferred compensation/health, accident or disability insurance **and they are totally exempt because:**

_____

I understand that I must make a good faith effort to resolve my dispute with the Garnishee.

I ❑ **have** ❑ **have not** attempted to resolve this dispute with the Garnishee.

Name of Person I Talked to: _____

Position: _____ Phone Number: _____

Debtor's Notice to Garnishee: Even though I am filing this Objection, you are directed to send my nonexempt earnings to the Court at the address noted instead of to the party designated in paragraph "e" on the front of the Writ of Continuing Garnishment. The Court will hold my nonexempt earnings in its registry until my Objection is resolved.

I certify that the above is correct to the best of my knowledge and belief and that I sent a copy of this document by ☐certified mail (return receipt requested) to both the Garnishee and to the Judgment Creditor, or if the Judgment Creditor is represented by Counsel, ☐certified mail (return receipt requested) to the Judgment Creditor's Attorney or ☐E-Service to the Judgment Creditor's Attorney.

Garnishee

Address: _____

_____

Judgment Creditor or Attorney

Address: _____

_____

Subscribed under affirmation or oath
before me on _____(date)

_____
Signature of Judgment Debtor or
Judgment Debtor's Counsel and Reg. Number

My Commission Expires: _____

_____
Notary Public/Deputy Clerk

Form 29.
WRIT OF GARNISHMENT WITH NOTICE OF EXEMPTION AND PENDING LEVY

❑County Court ❑District Court _____ County, Colorado Court Address: Plaintiff(s)/Petitioner(s): v. Defendant(s)/Respondent(s):	▲ COURT USE ONLY ▲
Judgment Creditor's Attorney or Judgment Creditor (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom
WRIT OF GARNISHMENT WITH NOTICE OF EXEMPTION AND PENDING LEVY	

Judgment Debtor's name, last known address, other identifying information: _____

_____

1. Original Amount of Judgment Entered _____(date)	$ _____
2. Plus any Interest Due on Judgment (_____% per annum)	+ $_____
3. Taxable Costs (including estimated cost of service of this Writ)	+ $_____
4. Less any Amount Paid	- $_____
5. Principal Balance/Total Amount Due and Owing	= $_____

I affirm that I am authorized to act for the Judgment Creditor and this is a correct statement as of _____ (date).

Subscribed under oath before me on _____

_____
Notary Public or Deputy Clerk

My Commission Expires: _____

_____
Print Judgment Creditor's Name

Address: _____

_____

By: _____
Signature (Type Name, Title, Address and Phone No.)

WRIT OF GARNISHMENT WITH NOTICE OF EXEMPTION AND PENDING LEVY

THE PEOPLE OF THE STATE OF COLORADO to the Sheriff of any Colorado County, or to any person 18 years or older and who is not a party to this action:
You are directed to serve a copy of this Writ of Garnishment upon _____, Garnishee, with proper return of service to be made to the Court.

TO THE GARNISHEE:
YOU ARE HEREBY SUMMONED AS GARNISHEE IN THIS ACTION AND ORDERED:

a. To answer the following questions under oath and file your answers with the Clerk of the Court (AND to mail a completed copy with your answers to the Judgment Creditor or attorney when a stamped envelope is attached) within 10 days following service of this Writ upon you. **YOUR FAILURE TO ANSWER THIS WRIT WITH NOTICE MAY RESULT IN THE ENTRY OF A DEFAULT AGAINST YOU.**

b. To hold pending court order the personal property of any kind (other than earnings of a natural person) in your possession or control, including the debts, credits, choses in action or money owed to the Judgment Debtor whether they are due at the time of the service of the writ or are to become due thereafter.

YOU ARE NOTIFIED:

a. This Writ with Notice applies to all personal property (other than earnings) owed to or owned by the Judgment Debtor and in your possession or control as of the date and time this Writ was served upon you.

b. In no case may you withhold any personal property greater than the amount on Line 5 on the front of this Writ unless the personal property is incapable of being divided.

c. If you are ordered to pay funds to the Court, tender your check for the amount ordered PAYABLE TO THE CLERK OF THE _____, COURT AT _____, COLORADO.

CLERK OF THE COURT By Deputy Clerk: _____

DATE: _____

QUESTIONS TO BE ANSWERED BY GARNISHEE

Judgment Debtor's Name: _____ **Case Number:** _____

The following questions MUST be answered by you under oath:

a. On the date and time this Writ was served upon you, did you possess or control any personal property of the Judgment Debtor or did you owe any rents, payments, obligations, debts or moneys other than earnings to the Judgment Debtor?
❑YES ❑NO

b. If **YES**, list all items of personal property and their location(s) and/or describe the nature and amount of the debt or obligation: (Attach additional pages if necessary): _____

_____

c. Do you claim any setoff against any property, debt or obligation listed above? ❑YES ❑NO

d. If you answered **YES** to question c, describe the nature and amount of the setoff claimed: (Attach additional pages if necessary): _____

_____

I affirm that I am authorized to act for the Garnishee and the above answers are true and correct.

Name of Garnishee (Print) _____

Subscribed under oath before me on _____ (date)

Address: _____

_____

_____

Notary Public/Deputy Clerk

Phone Number _____

My Commission Expires: _____

Name of Person Answering (Print) _____

Signature of Person Answering _____

NOTICE TO JUDGMENT DEBTOR OF EXEMPTION AND PENDING LEVY

This Writ with Notice is a Court order which may cause your property or money to be held and taken to pay a judgment entered against you. You have legal rights which may prevent all or part of your money or property from being taken. That part of the money or property which may not be taken is called "exempt property". A partial list of "exempt property" is shown below, along with the law which may make all or part of your money or property exempt. The purpose of this notice is to tell you about these rights.

PARTIAL LIST OF EXEMPT PROPERTY

1. All or part of your property listed in Sections 13-54-101 and 102, C.R.S., including clothing, jewelry, books, burial sites, household goods, food and fuel, farm animals, seed, tools, equipment and implements, military allowances, stock-in-trade and certain items used in your occupation, bicycles, motor vehicles (greater for disabled persons), life insurance, income tax refunds, including a refund attributed to an earned income tax credit or child tax credit, money received because of loss of property or for personal injury, equipment that you need because of your health, or money received because you were a victim of a crime.
2. All or part of your earnings under Section 13-54-104, C.R.S.
3. Worker's compensation benefits under Section 8-42-124, C.R.S.
4. Unemployment compensation benefits under Section 8-80-103, C.R.S.
5. Group life insurance benefits under Section 10-7-205, C.R.S.
6. Health insurance benefits under Section 10-16-212, C.R.S.
7. Fraternal society benefits under Section 10-14-403, C.R.S.
8. Family allowances under Section 15-11-404, C.R.S.
9. Teachers' retirement fund benefits under Section 22-64-120, C.R.S.
10. Public employees' retirement benefits (PERA) under Sections 24-51-212 and 24-54-111, C.R.S.
11. Social security benefits (OASDI, SSI) under 42 U.S.C. §407.
12. Railroad employee retirement benefits under 45 U.S.C. §231m.
13. Public assistance benefits (OAP, AFDC, TANF, AND, AB, LEAP) under Section 26-2-131, C.R.S.
14. Police Officer's and Firefighter's pension fund payments under Sections 31-30-1117 & 31-30.5-208 and 31-31-203, C.R.S.
15. Utility and security deposits under Section 13-54-102(1)(r), C.R.S.
16. Proceeds of the sale of homestead property under Section 38-41-207, C.R.S.
17. Veteran's Administration benefits under 38 U.S.C. §5301.
18. Civil service retirement benefits under 5 U.S.C. §8346.
19. Mobile homes and trailers under Section 38-41-201.6, C.R.S.
20. Certain retirement and pension funds and benefits under Section 13-54-102(1)(s), C.R.S.
21. A Court-ordered child support or maintenance obligation or payment under Section 13-54-102(1)(u), C.R.S.

22. Public or private disability benefits under Section 13-54-102(1)(v), C.R.S.

If the money or property which is being withheld from you includes any "exempt property", you must file within 10 days of receiving this notice a written Claim of Exemption with the Clerk of the Court describing what money or property you think is "exempt property" and the reason that it is exempt. YOU MUST USE THE APPROVED FORM attached to this Writ or a copy of it. When you file the claim, you must immediately deliver, by certified mail, return receipt requested, a copy of your claim to the Garnishee (person/place that was garnished) and to the Judgment Creditor's attorney, or if none, to the Judgment Creditor at the address shown on this Writ with Notice. Notwithstanding your right to claim the property as "exempt," no exemption other than the exemptions set forth in Section 13-54-104(3), C.R.S., may be claimed for a Writ which is the result of a judgment taken for arrearages for child support or for child support debt.

Once you have properly filed you claim, the court will schedule a hearing within 10 days. The Clerk of the Court will notify you and the Judgment Creditor or attorney of the date and time of the hearing, by telephone, by mail or in person.

When you come to your hearing, you should be ready to explain why you believe your money or property is "exempt property". If you do not appear at the scheduled time, your money or property may be taken by the Court to pay the judgment entered against you.

REMEMBER THAT THIS IS ONLY A PARTIAL LIST OF "EXEMPT PROPERTY"; you may wish to consult with a lawyer who can advise you of your rights. If you cannot afford one, there are listings of legal assistance and legal aid offices in the yellow pages of the telephone book.

You must act quickly to protect your rights. Remember, you only have 10 days after receiving this notice to file your claim of exemption with the Clerk of the Court.

RETURN OF SERVICE

Judgment Debtor's Name: _____ **Case Number:** _____

I declare under oath that I am 18 years or older and not a party to the action and have served a copy of this Writ of Garnishment on _____ (name of garnishee) in _____ (County) _____ (State) on _____ (date) _____ (time) at the following location:

_____

By (Check one):

- ☐ By handing it to a person identified to me as _____ (name of garnishee).
- ☐ By leaving it with _____ (Type or write name legibly), who is designated to receive service because of a legal relationship with _____ (name of garnishee) as provided for in C.R.C.P. 4(e).
- ☐ I attempted to serve _____ (name of garnishee) on _____ occasions but have not been able to locate him/her/it. Return to the Judgment Creditor is made on _____ (date).
- ☐ I attempted to leave it with _____ (name of person) who refused service.

- ☐ Private process server
- ☐ Sheriff, _____ County
  Fee $ _____ Mileage $ _____

_____
Signature of Process Server

_____
Name (Print or type)

Subscribed and affirmed, or sworn to before me in the County of _____, State of _____, this _____ day of _____, 20 _____. **Note: Not required for service by a sheriff or deputy.**

My Commission Expires: _____

_____
Notary Public/Clerk

Form 30.
CLAIM OF EXEMPTION TO WRIT OF GARNISHMENT WITH NOTICE

☐ County Court ☐ District Court _____County, Colorado Court Address: _____ Plaintiff(s)/Petitioner(s): v. Defendant(s)/Respondent(s):	▲ COURT USE ONLY ▲
Judgment Debtor's Attorney or Judgment Debtor (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom
CLAIM OF EXEMPTION TO WRIT OF GARNISHMENT WITH NOTICE	

Instruction to Judgment Debtor: Use this form to claim your property is exempt from Garnishment.

Name: _____ Phone Number _____

Street Address: _____

Mailing Address, if different: _____

City:_____ State:_____ Zip Code:_____

I believe the following property is exempt:

Description of Property Being Held:_____

Value of Property Being Held: $ _____

Amount of Value I Claim is Exempt: $ _____

I claim the Property is Exempt because *(Please write the Exemption(s) listed in the Writ of Garnishment with Notice, if applicable):*

_____

_____

_____

I certify that the above is correct to the best of my knowledge and belief and that I sent a copy of this document by ☐ certified mail (return receipt requested) to both the Garnishee and to the Judgment Creditor, or if the Judgment Creditor is represented by Counsel, ☐ certified mail (return receipt requested) to the Judgment Creditor's Attorney or ☐ E-Service to the Judgment Creditor's Attorney.

The person/place that was garnished

Address: _____

_____

Judgment Creditor or Attorney

Address: _____

_____

Subscribed under affirmation or oath
before me on _____(date)

My commission expires: _____

_____
Notary Public/Deputy Clerk

_____
Signature of Judgment Debtor or
Judgment Debtor's Counsel and Reg. Number

FORM 30 R11/10 CLAIM OF EXEMPTION TO WRIT OF GARNISHMENT WITH NOTICE

Form 31.
WRIT OF GARNISHMENT FOR SUPPORT

❑District Court ❑Denver Juvenile Court _____County, Colorado Court Address: In re ❑The Marriage of: ❑Parental responsibilities concerning: _____ Petitioner: and Co-Petitioner/Respondent:	**COURT USE ONLY**
Judgment Creditor's Attorney or Judgment Creditor (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom
WRIT OF GARNISHMENT FOR SUPPORT	

Judgment Debtor's name, last known address, other identifying information: _____

_____

1. Original Amount of Judgment Entered _____ (date) $_____
2. Plus any Interest Due on Judgment (_____ % per annum) + $_____
3. Taxable Costs (including estimated cost of service of this Writ) + $_____
4. Less any Amount Paid - $_____
5. Principal Balance/Total Amount Due and Owing $_____

JUDGMENT FOR: (Mark Appropriate Boxes)
❑Child Support ONLY (Date of Order _____)
❑Maintenance ONLY
❑Child Support and Maintenance
❑Case commenced after 4/30/91

Mark the Appropriate Box Below to Determine the Amount of the Statutory Exemption (MARK ONLY ONE BOX)

❑The Judgment Debtor is supporting a spouse or a dependent child, and the judgment is for a period which is 12 weeks or older (Write "45" in the blank space on Line c, below).

❑The Judgment Debtor is supporting a spouse or dependent child, and the judgment is for a period which is less than 12 weeks old (Write "50" in the blank space on Line c, below).

❑The Judgment Debtor is not supporting a spouse or dependent child, and the judgment is for a period which is 12 weeks or older (Write "35" in the blank space on Line c, below).

❑The Judgment Debtor is not supporting a spouse or dependent child, and the judgment is for a period which is less than 12 weeks old (Write "40" in the blank space on Line c, below).

❑I do not know whether the Judgment Debtor is supporting a spouse or dependent child, but the judgment is for a period which is 12 weeks or older (Write "45" in the blank space on Line c, below).

❑I do not know whether the Judgment Debtor is supporting a spouse or dependent child, but the judgment is for a period which is less than 12 weeks old (Write "50" in the blank space on Line c, below).

I affirm that I am authorized to act for the Judgment Creditor and this is a correct statement as of _____ (date).

Subscribed under oath before me on _____

_____
Notary Public/ Deputy Clerk

My Commission Expires: _____

_____
Print Judgment Creditor's Name

Address: _____

_____

By: _____
Signature (Type Name, Title, Address and Phone)

WRIT OF GARNISHMENT FOR SUPPORT

THE PEOPLE OF THE STATE OF COLORADO to the Sheriff of any Colorado County, or to any person 18 years or older and who is not a party to this action:
You are directed to serve A COPY of this Writ of Garnishment for Support upon _____ Garnishee, with proper return of service to be made to the Court.
TO THE GARNISHEE:
YOU ARE HEREBY SUMMONED AS GARNISHEE IN THIS ACTION AND ORDERED:

a. To answer the following questions under oath and file your answers with the Clerk of the Court (AND to mail a completed copy with your
answers to the Judgment Creditor or attorney when a stamped envelope is attached) no less than 5 nor more than 10 days following the time you pay the Judgment Debtor for the first time following service of this Writ, or 40 days following service of this Writ upon you, whichever is less. YOUR FAILURE TO ANSWER THIS WRIT OF GARNISHMENT FOR SUPPORT MAY RESULT IN THE ENTRY OF A DEFAULT AGAINST YOU.

b. To pay any nonexempt earnings to the payee as indicated in section d below no less than 5 nor more than 10 days following each time you pay the Judgment Debtor during the effective period of this Writ and attach a copy of the Calculation of the Amount of Exempt Earnings used (the Calculation under "Questions to be Answered by Garnishee" should be used for the first pay period, and one of the multiple Calculation forms included with this Writ should be used for all subsequent pay periods).

c. The amount of the exemption is _____% of disposable earnings.

d. Payments shall be mailed to the:

❑ Family Support Registry
P. O. Box 2171
Denver, CO 80201-2171
Acct #: _____

❑ Judgment Creditor
_____
_____

CLERK OF THE COURT

By Deputy Clerk: _____
DATE: _____

NOTICE TO GARNISHEE

a. This Writ applies to all nonexempt earnings owed or owing until the Principal Balance/Total Amount Due and Owing (Line 5 on the front of this Writ) has been withheld or the garnishment is released by the court or in writing by the Judgment Creditor. If you are presently under a Writ of Continuing Garnishment or served with such Writ while this Writ of Garnishment for Support is in effect, this Writ takes priority over the other Writs, and this is the only one in force and effect.

b. "EARNINGS" INCLUDES ALL FORMS OF COMPENSATION FOR PERSONAL SERVICES.

c. The percentage of disposable earnings shown on Line c above is exempt from this Writ of Garnishment for Support.

d. In no case may you withhold any amount greater than the amount on Line 5 on the front of this Writ.

QUESTIONS TO BE ANSWERED BY GARNISHEE

Judgment Debtor's Name: _____ **Case Number:** _____
The following questions MUST be answered by you under oath:

a. On the date and time this Writ of Garnishment for Support was served upon you, did you owe or do you anticipate owing any of the following to the Judgment Debtor? (Mark appropriate box(es)).

1. ❑ WAGES/SALARY/COMMISSIONS/BONUS/OTHER COMPENSATION FOR PERSONAL SERVICES (Earnings)
2. ❑ Pension or Retirement Benefits or Health/Accident/Disability/Casualty Insurance Funds or Payments.
3. ❑ Workers' Compensation Benefits or Payments (For child support in cases filed after 4/30/91 ONLY)
4. ❑ Payments to an Independent Contractor for Labor or Services, Dividends, Severance Pay, Royalties, Monetary Gifts/Prizes, Interest, Trust Income, Annuities, Capital Gains, Rents, or Taxable Distributions from Certain Business Entities (For child support orders entered after 6/30/96 ONLY)
If you marked any box above, indicate how the Judgment Debtor is paid:
❑ WEEKLY ❑ BI-WEEKLY ❑ SEMI-MONTHLY ❑ MONTHLY ❑ OTHER

b. If you marked Box 1, complete the Calculation below for the "First Pay Period" following receipt of this Writ.

c. If you marked Box 2, 3 or 4, complete the Calculation below for the "First Pay Period" following receipt of this Writ; however, if the judgment includes maintenance (as indicated on the front of this Writ) the earnings may be totally exempt, and you should seek legal advice about such exemption. IF THE EARNINGS ARE TOTALLY EXEMPT, PLEASE MARK BOX 5 BELOW:

5. ❑ THE EARNINGS ARE TOTALLY EXEMPT BECAUSE _____.

CALCULATION OF THE AMOUNT OF EXEMPT EARNINGS (First Pay Period)

Gross Earnings for the First Pay Period from _____ through _____	$_____
Plus Tips Reported or Imputed by Federal Law (Child Support Orders after 6/30/96)	+ $_____
Less Deductions Required by Law (e.g., Withholding Taxes, FICA)	- $_____
Disposable Earnings (Gross Earnings Plus Tips (where applicable) Less Deductions)	= $_____
Less Statutory Exemption (Use percentage shown on Line c in the Wirt portion above)	- $_____
Net Amount Subject to Garnishment	= $_____
Less Wage/Income Assignment(s) During Pay Period (If Any)	- $_____
Amount to be withheld	= $_____

I affirm that I am authorized to act for the Garnishee and the above answers are true and correct.

Name of Garnishee (Print) _____

Subscribed under oath before me on _____ (date) Address: _____

Phone Number: _____

_____ Name of Person Answering (Print) _____

Notary Public

My Commission Expires: _____ Signature of Person Answering _____

RETURN OF SERVICE

Judgment Debtor's Name: _____ **Case Number:** _____

I declare under oath that I am 18 years or older and not a party to the action and have served a copy of this Writ of Garnishment for Support on _____ (name of party) in _____ (County) _____ (State) on _____ (date) _____ (time) at the following location:

_____

By (Check one):

- ☐ By handing it to a person identified to me as _____ (name of garnishee).
- ☐ By leaving it with _____ (Type or write name legibly), who is designated to receive service because of a legal relationship with _____(name of garnishee) as provided for in C.R.C.P. 4(e).

☐ I attempted to serve _____ (name of garnishee) on _____ occasions but have not been able to locate him/her/it. Return to the Judgment Creditor is made on _____ (date).

☐ I attempted to leave it with _____ (name of person) who refused service.

☐ Private process server

☐ Sheriff, _____County

Fee $ _____ Mileage $ _____

_____

Signature of Process Server

_____

Name (Print or type)

Subscribed and affirmed, or sworn to before me in the County of _____, State of _____, this _____ day of _____, 20 _____. **Note: Not required for service by a sheriff or deputy.**

My Commission Expires: _____

_____

Notary Public/Clerk

Form 32.
WRIT OF GARNISHMENT — JUDGMENT DEBTOR OTHER THAN NATURAL PERSON

☐County Court ☐District Court _____County, Colorado Court Address: _____ Plaintiff(s)/Petitioner(s): v. Defendant(s)/Respondent(s):	**COURT USE ONLY**
Judgment Creditor's Attorney or Judgment Creditor (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom
WRIT OF GARNISHMENT – JUDGMENT DEBTOR OTHER THAN NATURAL PERSON	

Judgment Debtor's name, last known address, other identifying information: _____

1. Original Amount of Judgment Entered _____(date) $ _____
2. Plus any Interest Due on Judgment (_____% per annum) + $ _____
3. Taxable Costs (including estimated cost of service of this Writ) + $ _____
4. Less any Amount Paid - $ _____
5. Principal Balance/Total Amount Due and Owing = $ _____

I affirm that I am authorized to act for the Judgment Creditor and this is a correct statement as of _____(date).

Subscribed under oath before me on _____ (date)

_____
Notary Public or Deputy Clerk

My Commission Expires: _____

_____
Print Judgment Creditor's Name

Address: _____

_____

By: _____
Signature (Type Name, Title, Address and Phone)

WRIT OF GARNISHMENT

THE PEOPLE OF THE STATE OF COLORADO to the Sheriff of any Colorado County, or to any person 18 years or older and who is not a party to this action:
You are directed to serve a copy of this Writ of Garnishment upon _____, Garnishee, with proper return of service to be made to the Court.
TO THE GARNISHEE:
YOU ARE HEREBY SUMMONED AS GARNISHEE IN THIS ACTION AND ORDERED:

a. To answer the following questions under oath and file your answers with the Clerk of the Court (AND to mail a completed copy with your answer to the Judgment Creditor or attorney when a stamped envelope is attached) within 10 days following service of this Writ upon you. **YOUR FAILURE TO ANSWER THIS WRIT WITH NOTICE MAY RESULT IN THE ENTRY OF A DEFAULT AGAINST YOU.**
b. To hold pending court order any personal property owed to or owned by the Judgment Debtor and in your possession or control on the date and time this Writ was served upon you.

YOU ARE NOTIFIED:

a. This Writ of Garnishment applies to all personal property owed to or owned by the Judgment Debtor and in your possession or control as of the date and time this Writ was served upon you.
b. In no case may you withhold any personal property greater than the amount on Line 5 on the front of this Writ unless the personal property is incapable of being divided.
c. If you are ordered to pay funds to the Court, tender your check for the amount ordered **PAYABLE TO THE CLERK OF THE** _____, **COURT AT** _____, COLORADO.

CLERK OF THE COURT

By Deputy Clerk: _____
Date: _____

QUESTIONS TO BE ANSWERED BY GARNISHEE

Judgment Debtor's Name: _____ **Case Number:** _____

The following questions MUST be answered by you under oath:

a. On the date and time this Writ was served upon you, did you possess or control any personal property of the Judgment Debtor or did you owe any rents, payments, obligations, debts or moneys to the Judgment Debtor?
❑YES ❑NO

b. If **YES,** list all items of personal property and their location(s) and/or describe the nature and amount of the debt or obligation: (Attach additional pages is necessary): _____

_____

_____

_____

c. Do you claim any setoff against any property, debt or obligation listed above?
❑YES ❑NO

d. If you answered **YES** to question c, describe the nature and amount of the setoff claimed:
(Attach additional pages if necessary): _____

_____

_____

_____

I affirm that I am authorized to act for the Garnishee and the above answers are true and correct.

Name of Garnishee (Print) _____

Subscribed under oath before me on _____ (date) Address: _____

_____

Phone Number: _____

_____

_____ Name of Person Answering (Print) _____

Notary Public

My Commission Expires: _____ Signature of Person Answering _____

Judgment Debtor's Name: _____ **Case Number:** _____

RETURN OF SERVICE

I declare under oath that I am 18 years or older and not a party to the action and have served a copy of this Writ of Garnishment on _____ (name of party) in _____ (County) _____ (State) on _____ (date) _____ (time) at the following location:

_____

By (Check one):

- ❑ By handing it to a person identified to me as _____ (name of garnishee).
- ❑ By leaving it with _____ (Type or write name legibly), who is designated to receive service because of a legal relationship with _____ (name of garnishee) as provided for in C.R.C.P. 4(e).

❑ I attempted to serve _____ (name of garnishee) on _____ occasions but have not been able to locate him/her/it. Return to the Judgment Creditor is made on _____ (date).

❑ I attempted to leave it with _____ (name of person) who refused service.

❑ Private process server
❑ Sheriff, _____County
Fee $ _____ Mileage $ _____

_____
Signature of Process Server

_____
Name (Print or type)

Subscribed and affirmed, or sworn to before me in the County of _____, State of _____, this _____ day of _____, 20 _____. **Note: Not required for service by a sheriff or deputy.**

My Commission Expires: _____

_____
Notary Public/Clerk

Form 33.
WRIT OF GARNISHMENT IN AID OF WRIT OF ATTACHMENT

☐County Court ☐District Court _____County, Colorado Court Address: Plaintiff(s)/Petitioner(s): v. Defendant(s)/Respondent(s):	**COURT USE ONLY**
Attorney or Party without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom
WRIT OF GARNISHMENT IN AID OF WRIT OF ATTACHMENT	

Defendant in Attachment's name, last known address, other identifying information: _____

1.	Original Amount of Claim	$ _____
2.	Plus any Interest Due on Claim (_____% per annum from _____(date))	+ $ _____
3.	Taxable Costs (including estimated cost of service of this Writ)	+ $ _____
4.	Less any Amount Paid	- $ _____
5.	Principal Balance/Total Amount Due and Owing	= $ _____

I affirm that I am authorized to act for the Plaintiff in Attachment and this is a true and correct statement as of _____ (date).

Subscribed under oath before me on _____ (date)

_____
Notary Public or Deputy Clerk

My Commission Expires: _____

_____
Print Plaintiff in Attachment's Name

Address: _____

_____

By: _____
Signature (Type Name, Title, Address and Phone)

WRIT OF GARNISHMENT

THE PEOPLE OF THE STATE OF COLORADO to the Sheriff of any Colorado County or to any person 18 years or older and not a party to this action:
You are directed to serve a copy of this Writ of Garnishment upon _____, Garnishee, with proper return of service to be made to the Court.

TO THE GARNISHEE:
YOU ARE HEREBY SUMMONED AS GARNISHEE IN THIS ACTION AND ORDERED:

a. To answer the following questions under oath and file your answers with the Clerk of the Court (**AND** to mail a completed copy with your answer to the Plaintiff in Attachment or attorney when a stamped envelope is attached) within 10 days following service of this Writ upon you. **YOUR FAILURE TO ANSWER THIS WRIT MAY RESULT IN THE ENTRY OF A DEFAULT AGAINST YOU.**
b. To hold pending court order any personal property (other than earnings of a natural person) owed to or owned by the Defendant in Attachment and in your possession or control on the date and time this Writ was served upon you.

YOU ARE NOTIFIED:

a. This Writ applies to all personal property (other than earnings of a natural person) owed to or owned by the Defendant in Attachment and in your possession or control as of the date and time this Writ was served upon you.
b. In no case may you withhold any personal property greater than the amount on Line 5 on the front of this Writ unless the personal property is incapable of being divided.
c. If you are ordered to pay funds to the Court, tender your check for the amount ordered **PAYABLE TO THE CLERK OF THE _____COURT AT _____, CO_____**

CLERK OF THE COURT

By Deputy Clerk: _____

Date: _____

QUESTIONS TO BE ANSWERED BY GARNISHEE

Defendant in Attachment's Name: _____ **Case Number:** _____

The following questions MUST be answered by you under oath:

a. On the date and time this Writ was served upon you, did you possess or control any personal property of the Defendant in Attachment or did you owe any rents, payments, obligations, debts or moneys other than earnings to the Defendant in Attachment? ❑YES ❑NO

b. If **YES to question a**, list all items of personal property and their location(s) and/or describe the nature and amount of the debt or obligation: (Attach additional pages if necessary): _____

_____

_____

_____

c. Do you claim any setoff against any property, debt or obligation listed above? ❑YES ❑NO

d. If you answered **YES** to question c, describe the nature and amount of the setoff claimed:

(Attach additional pages if necessary): _____

_____

_____

_____

I affirm that I am authorized to act for the Garnishee and the above answers are true and correct.

Name of Garnishee (Print) _____

Subscribed under oath before me on _____ (date)

Address: _____

_____

Phone Number: _____

_____

_____

Notary Public

Name of Person Answering (Print) _____

My Commission Expires: _____

Signature of Person Answering _____

RETURN OF SERVICE

Defendant in Attachment's Name: _____ **Case Number:** _____

I declare under oath that I am 18 years or older and not a party to the action and have served a copy of this Writ of Garnishment on _____ (name of party) in _____ (County) _____ (State) on _____ (date) _____ (time) at the following location:

_____

By (Check one):

❑ By handing it to a person identified to me as _____ (name of garnishee).

❑ By leaving it with _____ (Type or write name legibly), who is designated to receive service because of a legal relationship with _____ (name of garnishee) as provided for in C.R.C.P. 4(e).

❑ I attempted to serve _____ (name of garnishee) on _____ occasions but have not been able to locate him/her/it. Return to the Judgment Creditor is made on _____ (date).

❑ I attempted to leave it with _____ (name of person) who refused service.

❑ Private process server

❑ Sheriff, _____ County

Fee $ _____ Mileage $ _____

_____

Signature of Process Server

_____

Name (Print or type)

Subscribed and affirmed, or sworn to before me in the County of _____, State of _____, this _____ day of _____, 20 _____. **Note: Not required for service by a sheriff or deputy.**

My Commission Expires: _____

_____

Notary Public/Clerk

Form 34.
NOTICE OF LEVY

☐District Court ☐County Court _____County, Colorado Court Address: Plaintiff(s): v. Defendant(s):	**COURT USE ONLY** Case Number: Division: Courtroom:
NOTICE OF LEVY	

TO THE JUDGMENT DEBTOR(S):

You are hereby notified that pursuant to and under the authority of a WRIT OF GARNISHMENT IN AID OF WRIT OF ATTACHMENT issued by the Clerk of the Court, certain personal property, owned by you, or owed to you, is being held or taken to pay the claim of the above Plaintiff(s).

The personal property being held or taken is:

_____

_____

_____

_____

You have legal rights that may prevent all or part of your money or property from being taken. That part of the money or property that may not be taken is called "exempt property." A partial list of "exempt property" is shown below, along with the law which may make all or part of your money or property exempt. Not withstanding your right to claim the property as "exempt", no exemption other than the exemptions set forth in Section 13-54-104(3), C.R.S., may be claimed for a Writ which is the result of a judgment taken for arrearages for child support or for child support debt. The purpose of this Notice of Levy is to tell you about these rights.

If the money or property which is being withheld from you includes any "exempt property", you must file within ten days of receiving this Notice of Levy a written claim of exemption with the Clerk of the Court, describing what money or property you think is "exempt property" and the reason that it is exempt.

You must act quickly to protect your rights. Remember, you only have 10 days after receiving this Notice of Levy to file your claim of exemption with the Clerk of Court. Your failure to file a claim of exemption with 10 days is a waiver of your right to file.

Dated: _____ _____
Clerk of Court/Deputy Clerk

PARTIAL LIST OF EXEMPT PROPERTY (Numbered statutory references are subject to change)

1. All or part of your property listed in Sections 13-54-101 and 102, C.R.S., including clothing jewelry, books, burial sites, household goods, food and fuel, farm animals, seed, tools, equipment and implements, military allowances, stock-in-trade, certain items used in your occupation, bicycles, motor vehicles (greater for disabled persons), life insurance, income tax refunds, money received because of loss of property or for personal injury, equipment that you need because of your health, or money received because you were a victim of a crime.
2. All or part of your earnings under Section 13-54-104, C.R.S.

3. Workers' compensation benefits under Section 8-42-124, C.R.S.
4. Unemployment compensation benefits under Section 8-80-103, C.R.S.
5. Group life insurance benefits under Section 10-7-205, C.R.S.
6. Health insurance benefits under Section 10-16-212, C.R.S.
7. Fraternal society benefits under Section 10-14-403, C.R.S.
8. Family allowances under Section 15-11-404, C.R.S.
9. Teachers' retirement fund benefits under Section 22-64-120, C.R.S.
10. Public employees' retirement benefits (PERA) under Sections 24-51-212 and 24-54-111, C.R.S.
11. Social security benefits (OASDI, SSI) under 42 U.S.C. §407.
12. Railroad employee retirement benefits under 45 U.S.C. §23.
13. Public assistance benefits (OAP, AFDC, TANF, AND, AB, LEAP) under Section 26-2-131, C.R.S.
14. Policemen's and firemen's pension fund payments under Sections 31-30-117, 31-30.5-208 and 31-31-203, C.R.S.
15. Utility and security deposits under Section 13-54-102(1)(r), C.R.S.
16. Proceeds of the sale of homestead property under Section 38-41-207, C.R.S.
17. Veteran's Administration benefits under 38 U.S.C. §5301.
18. Civil service benefits under 5 U.S.C. §8346.
19. Mobile homes and trailers under Section 38-41-201.6, C.R.S.
20. Certain retirement and pension funds and benefits under Section 13-54-102(2)(s), C.R.S.
22. A Court-ordered child support and maintenance obligation or payment under Section 13-54-102(1)(u), C.R.S.
23. Public or private disability benefits under Section 13-54-102(1)(v), C.R.S.

REMEMBER THAT THIS IS ONLY A PARTIAL LIST OF "EXEMPT PROPERTY"; you may wish to consult with a lawyer who can advise you of your rights. If you cannot afford one, there are listings of legal assistance and legal aid offices in the yellow pages of the telephone book.

RETURN OF SERVICE

Judgment Debtor's Name _____ **Case Number:** _____

I declare under oath that I am 18 years or older and not a party to the action and have served this Notice of Levy in this case on _____ (name of party) in _____ (County) _____ (State) on _____ (date) _____ (time) at the following location:

_____

By (Check one):

- ☐ By handing it to a person identified to me as _____ (name of judgment debtor).
- ☐ By leaving it with _____ (Type or write name legibly), who is designated to receive service because of a legal relationship with _____ (name of judgment debtor) as provided for in C.R.C.P. 4(e).

☐ I attempted to serve _____ (name of judgment debtor) on _____ occasions but have not been able to locate him/her/it. Return to the Judgment Creditor is made on _____ (date).

☐ I attempted to leave it with _____ (name of person) who refused service.

☐ Private process server

☐ Sheriff, _____County

Fee $ _____ Mileage $ _____

_____

Signature of Process Server

_____

Name (Print or type)

Subscribed and affirmed, or sworn to before me in the County of _____, State of _____, this _____ day of _____, 20 _____. **Note: Not required for service by a sheriff or deputy.**

My Commission Expires: _____

_____

Notary Public/Clerk

Form 35.1.
MANDATORY DISCLOSURE

Mandatory Disclosure
FORM 35.1 - Reference to 16.2(e)(2)

These are not to be filed with the court, except as may be ordered pursuant to C.R.C.P. 16.2

Mandatory Disclosures. (Complete and accurate copies may replace originals. Children refers to minor children of both parties.)

(a) Financial Statement. Each party shall provide a complete and signed Sworn Financial Statement and (if required) Supplemental Schedule (JDF 1111 and/or JDF 1111SS) in the Supreme Court approved forms. See Appendix to Chapters 1 to 17A, Form 35.2, C.R.C.P.

(b) Income Tax Returns (Most Recent 3 Years). Provide the personal and business federal income tax returns for the three years before filing of the petition or post decree motion. The business returns shall be for any business for which a party has an interest entitling the party to a copy of such returns. Provide all schedules and attachments including W-2's, 1099's and K-1. If a return is not completed at the time of disclosure, provide the documents necessary to prepare the return including W-2's, 1099's and K-1's, copies of extension requests and estimated tax payments.

(c) Personal Financial Statements (Last 3 Years). Provide all personal financial statements, statements of assets or liabilities, and credit and loan applications prepared during the last three years.

(d) Business Financial Statements (Last 3 Years). For every business for which a party has access to financial statements, provide the last three fiscal years' financial statements, all year-to-date financial statements, and the same periodic financial statements for the prior year.

(e) Real Estate Documents. Provide the title documents and all documents stating value of all real property in which a party has a personal or business interest. This section shall not apply to post decree motions unless so ordered by the court.

(f) Personal Debt. Provide all documents creating debt, and the most recent debt statements showing the balance and payment terms.

(g) Investments. Provide most recent documents identifying each investment, and stating the current value.

(h) Employment Benefits. Provide most recent documents identifying each employment benefit, and stating the current value.

(i) Retirement Plans. Provide most recent documents identifying each retirement plan, and stating the current value, and all Plan Summary Descriptions.

(j) Bank/Financial Institution Accounts. Provide most recent documents identifying each account at banks and other financial institutions, and stating the current value.

(k) Income Documentation. For each income source in the current and prior calendar year, including income from employment, investment, government programs, gifts, trust distributions, prizes, and income from every other source, provide pay stubs, a current income statement and the final income statement for the prior year. Each self-employed party shall provide a sworn statement of gross income, business expenses necessary to produce income and net income for the three months before filing of the petition or post decree motion.

(l) Employment and Education-Related Child Care Documentation. Provide documents that show average monthly employment-related child care expense including child care expense related to parents' education and job search.

(m) Insurance Documentation. Provide life, health and property insurance policies and current documents that show beneficiaries, coverage, cost including the portion payable to provide health insurance for children, and payment schedule.

(n) Extraordinary Children's Expense Documentation. Provide documents that show average monthly expense for all recurring extraordinary children's expenses.

Form 35.2.
SWORN FINANCIAL STATEMENT

❑District Court ❑Denver Juvenile Court _____ County, Colorado Court Address: In re: ❑The Marriage of: ❑Parental Responsibilities concerning: _____ Petitioner: and Co-Petitioner/Respondent:	▲ COURT USE ONLY ▲
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom
SWORN FINANCIAL STATEMENT	

I, _____ (full name) ❑am ❑am not currently employed.

I am employed ____ hours per week. I am paid ❑weekly ❑bi-weekly ❑twice a month ❑monthly.

My pay is based on a ❑Monthly Salary ❑Hourly rate of $_____ ❑Other: _____

Date employment began _____.

My occupation is: _____ Name of employer: _____

Address of employer: _____

If unemployed, what date did you last work? _____

I am unemployed due to ❑disability ❑involuntary layoff at work ❑other: _____

This household consists of _____ adult(s), and _____ minor child(ren).

I believe the monthly gross income of the other party is $_____.

Annual gross income (last tax year) for Petitioner $ _____, ❑Co-Petitioner/Respondent $ _____

1. Monthly Income (Convert annual, bi-monthly, and weekly amounts to monthly amounts.)

Gross Monthly Income (before taxes and deductions) from salary and wages, including commissions, bonuses, overtime, self-employment, business income, other jobs, and monthly reimbursed expenses.	$	Social Security Benefits (SSA) ❑SSDI (Disability insurance – entitlement program) ❑SSI (supplemental income – need based)	$
Unemployment & Veterans' Benefits		Disability, Workers' Compensation	
Pension & Retirement Benefits		Interest & Dividends	
Public Assistance (TANF)		Other - _____	
		Total Monthly Income	$
Miscellaneous Income			
Royalties, Trusts, and Other Investments	$	Contributions from Others	$
Dependent Children's monthly gross income. Source of Income: _____		All other sources, i.e. personal injury settlement, non-reported income, etc.	
Rental Net Income		Expense Accounts	
Child Support from Others		Other - _____	
Spousal Support from Others		Other - _____	
		Total Monthly Miscellaneous Income	$
		Total Income	$

2. Monthly Deductions (Mandatory and Voluntary)

Mandatory Deductions	**Cost Per Month**		**Cost Per Month**
Federal Income Tax	$	State/Local Income Tax	$
PERA/Civil Service		Social Security Tax	
Medicare Tax		Other - _____	
		Total Mandatory Deductions	$
Voluntary Deductions	**Cost Per Month**		**Cost Per Month**
Life and Disability Insurance	$	Stocks/Bonds	$
Health, Dental, Vision Insurance Premium Total number of people covered on Plan →		Retirement & Deferred Compensation	
Child Care		Other - _____	
Flex Benefit Cafeteria Plan		Other - _____	
		Total Voluntary Deductions	$
		Total Monthly Deductions	$

3. Monthly Expenses

Note: List regular monthly expenses below that you pay on an on-going basis and that are not identified in the deductions above.

A. Housing

	Cost Per Month		**Cost Per Month**
1st Mortgage	$	2nd Mortgage	$
Insurance (Home/Rental) & Property Taxes (not included in mortgage payment)		Condo/Homeowner's/Maintenance Fees	
Rent		Other - _____	
		Total Housing	$

B. Utilities and Miscellaneous Housing Services

	Cost Per Month		**Cost Per Month**
Gas & Electricity	$	Water, Sewer, Trash Removal	$
Telephone (local, long distance, cellular & pager)		Property Care (Lawn, snow removal, cleaning, security system, etc.)	
Internet Provider, Cable & Satellite TV		Other - _____	
		Total Utilities and Miscellaneous Housing Services	$

C. Food & Supplies

	Cost Per Month		**Cost Per Month**
Groceries & Supplies	$	Dining Out	$
		Total Food & Supplies	$

D. Health Care Costs (Co-pays, Premiums, etc.)

	Cost Per Month		**Cost Per Month**
Doctor & Vision Care	$	Dentist and Orthodontist	$
Medicine & RX Drugs		Therapist	
Premiums (if not paid by employer)		Other - _____	
		Total Health Care	$

E. Transportation & Recreation Vehicles (Motorcycles, Motor Homes, Boats, ATV, Snowmobiles, etc.)

	Cost Per Month		Cost Per Month
Primary Vehicle Payment	$	Other Vehicle Payments	$
Fuel, Parking, and Maintenance		Insurance & Registration/Tax Payments (yearly amount(s)/12)	
Bus & Commuter Fees		Other - _____	
		Total Transportation	**$**

F. Children's Expenses and Activities

	Cost Per Month		Cost Per Month
Clothing & Shoes	$	Child Care	$
Extraordinary Expenses i.e. Special Needs, etc.		Misc. Expenses, i.e. Tutor, Books, Activities, Fees, Lunch, etc.	
Tuition		Other - _____	
		Total Children's Expenses and Activities	**$**

G. Education for you - Please identify status: ❑Full-time student ❑Part-time student

	Cost Per Month		Cost Per Month
Tuition, Books, Supplies, Fees, etc.		Other - _____	
		Total Education	**$**

H. Maintenance & Child Support (that you pay)

	Cost Per Month		Cost Per Month
Spousal Maintenance		Child Support	
❑This family	$	❑This family	$
❑Other family		❑Other family	
		Total Maintenance and Child Support	**$**

I. Miscellaneous (Please list on-going expenses not covered in the sections above)

	Cost Per Month		Cost Per Month
Recreation/Entertainment	$	Personal Care (Hair, Nail, Clothing, etc.)	$
Legal/Accounting Fees		Subscriptions (Newspapers, Magazines, etc.)	
Charity/Worship		Movie & Video Rentals	
Vacation/Travel/Hobbies		Investments (Not part of payroll deductions)	
Membership/Clubs		Home Furnishings	
Pets/Pet Care		Sports Events/Participation	
Other - _____		Other - _____	
Other - _____		Other - _____	
Other - _____		Other - _____	
Other - _____		Other - _____	
		Total Miscellaneous	**$**
		Total Monthly Expenses (Totals from A – I)	**$**

4. Debts (unsecured)

List unsecured debts such as credit cards, store charge accounts, loans from family members, back taxes owed to the I.R.S., etc. **Do not** list debts that are liens against your property, such as mortgages and car loans, because that payment is already listed as an expense above, and the total of the debt is shown elsewhere as a deduction from value where that asset is listed, such as under Real Estate or Motor Vehicles.

For name on account, "P" = Petitioner, "C/R" = Co-Petitioner or Respondent, "J" = Joint.

Name of Creditor	Account Number (last 4-digits only)	P	C/R	J	Date of Balance	Balance	Minimum Monthly Payment Required	Principal Purchase(s) for Which Debt Was Incurred
		❑	❑	❑		$	$	
		❑	❑	❑				
		❑	❑	❑				
		❑	❑	❑				
		❑	❑	❑				
		❑	❑	❑				
		❑	❑	❑				
		❑	❑	❑				
		❑	❑	❑				
		❑	❑	❑				
		❑	❑	❑				
		❑	❑	❑				
Unsecured Debt Balance						$	$	→Total Minimum Monthly Payment

SWORN FINANCIAL STATEMENT SUMMARY (INCOME/EXPENSES)

Total Income (from Page 1) $ _____ A

Total Monthly Deductions (from Page 2) $ _____ B

Total Monthly Net Income (A minus B) $ _____

Total Monthly Expenses (from Page 3) $ _____ C

Total Minimum Monthly Payment Required - Debts Unsecured (from Page 4) $ _____ D

Total Monthly Expenses and Payments (C plus D) $ _____

Net Excess or Shortfall (Monthly Net Income less Monthly Expenses and Payments) **(+/-)** $ _____

5. Assets

You MUST disclose all assets correctly. By indicating "None", you are stating affirmatively that you or the other party do not have assets in that category. Please attach additional copies of pages 5 & 6 to identify your assets, if necessary.

If the parties are married, check under the heading Joint (J) all assets acquired during the marriage but not by gift or inheritance. Under the headings of Petitioner (P) or Co-Petitioner/Respondent (C/R), check assets owned before this marriage and assets acquired by gift or inheritance.

If the parties were NEVER married* to each other *or are using this form to modify child support, list all of each party's assets under the headings of Petitioner (P) or Co-Petitioner/Respondent (C/R).

"P" = Petitioner, "C/R" = Co-Petitioner or Respondent, "J" = Joint.

A. Real Estate (Name of Creditor/Lender) ❑None	P	C/R	J	Amount Owed	Estimated Value as of Today. Value = what you could sell it for in its current condition.	Net Value/Equity
	❑	❑	❑	$	$	$
	❑	❑	❑			
			Total	$	$	$
B. Motor Vehicles & Recreation Vehicles Including Motorcycles, ATV's, Boats, etc.) (Year, Make, Model) (Name of Creditor/Lender) ❑None	**P**	**C/R**	**J**	**Amount Owed**	**Estimated Value as of Today. Value = what you could sell it for in its current condition.**	**Net Value/Equity**
	❑	❑	❑			
	❑	❑	❑			
	❑	❑	❑			
	❑	❑	❑			
			Total	$	$	$
C. Cash on Hand, Bank, Checking, Savings, or Health Accounts (Name of Bank or Financial Institution) ❑None	**P**	**C/R**	**J**	**Type of Account**	**Account # (last 4-digits only)**	**Balance as of Today**
	❑	❑	❑			$
	❑	❑	❑			
	❑	❑	❑			
	❑	❑	❑			
					Total	$
D. Life Insurance (Name of Company/Beneficiary) ❑None	**P**	**C/R**	**J**	**Type of Policy**	**Face Amount of Policy**	**Cash Value today**
	❑	❑	❑		$	$
	❑	❑	❑			
	❑	❑	❑			
				Total	$	$

E. Furniture, Household Goods, and Other Personal Property, i.e. Jewelry, Antiques, Collectibles, Artwork, Power Tools, etc. Identify Items and report in total. ❑None	P	C/R	J	Current Possession Held by P	C/R	J	Estimated Value as of Today. Value = what you could sell it for in its current condition.
	❑	❑	❑	❑	❑	❑	$
	❑	❑	❑	❑	❑	❑	
	❑	❑	❑	❑	❑	❑	
	❑	❑	❑	❑	❑	❑	
	❑	❑	❑	❑	❑	❑	
						Total	$

F. Stocks, Bonds, Mutual Funds, Securities & Investment Accounts ❑None ❑If owned please attach JDF 1111-SS.	Total	$
G. Pension, Profit Sharing, or Retirement Funds ❑None ❑ If owned please attach JDF 1111-SS.	Total	$

H. Miscellaneous Assets

❑None If you own any of the assets identified below, please check the appropriate box and attach JDF 1111-SS to report the value.

❑Business Interests	❑Stock Options	❑Money/Loans owed to you	❑IRS Refunds due to you
❑Country Club & Other Memberships	❑Livestock, Crops, Farm Equipment	❑Pending lawsuit or claim by you	❑Accrued Paid Leave (sick, vacation, personal)
❑Oil and Gas Rights	❑Vacation Club Points	❑Safety Deposit Box/Vault	❑Trust Beneficiary
❑Frequent Flyer Miles	❑Education Accounts	❑Health Savings Accounts	❑Mineral and Water Rights
❑Other - _____	❑Other - _____	❑Other - _____	❑Other - _____

	Total	$
I. Separate Property ❑None ❑If owned please attach JDF 1111-SS to identify the property and to report the value.	Total	$
Total Value/Balance of All Assets (A – I)		**$**

I swear or affirm under oath that this Sworn Financial Statement, attached schedules, and mandatory disclosures contain a complete disclosure of my income, expenses, assets, and debt as of the date of my signature. I understand that if the information I have provided changes or needs to be updated before a final decree or order is issued by the Court, that I have a duty to provide the correct or updated information. I understand that this oath is made under penalty of perjury. I understand that if I have omitted or misstated any material information, intentionally or not, the Court will have the power to enter orders to address those matters, including the power to punish me for any statements made with the intent to defraud or mislead the Court or the other party.

Date: _____ _____

Signature of ❑Petitioner or ❑Co-Petitioner/Respondent

Subscribed and affirmed, or sworn to before me in the County of _____, State of _____, this _____ day of _____, 20_____.

My Commission Expires: _____ _____

Notary Public/Deputy Clerk

Form 35.3.
SUPPORTING SCHEDULES
(SWORN FINANCIAL STATEMENT)

Case Name _____ and _____ Case Number: _____

Supporting Schedules for Assets in Section F, G, H, and I.

Attach this supporting schedule to JDF 1111 **ONLY** if you have assets in sections F & G, any additional assets to report in section H, and/or separate property to report in section I. In addition, report totals from this document to the appropriate sections on JDF 1111.

F. Stocks, Bonds, Mutual Funds, Securities & Investment Accounts (Name of Item or Fund)	P	C/R	J	# of Shares	Account # (last 4-digits only)	Current Value as of Today
	❑	❑	❑			
	❑	❑	❑			
	❑	❑	❑			
	❑	❑	❑			
	❑	❑	❑			
					Total	$
G. Pension, Profit Sharing, or Retirement Funds (Defined Contribution and/or Defined Benefit Plans)	**P**	**C/R**	**J**	**Type of Plan (401K, IRA, 457, PERA, Military, etc.)**	**Account # (last 4-digits only, if applicable)**	**Current Value as of Today**
	❑	❑	❑			
	❑	❑	❑			
	❑	❑	❑			
	❑	❑	❑			
					Total	$
H. Miscellaneous Assets (Identify Type of Asset)	**P**	**C/R**	**J**			**Estimated Value as of Today**
	❑	❑	❑			
	❑	❑	❑			
	❑	❑	❑			
	❑	❑	❑			
					Total	
I. Separate Property (Identify Type)	**P**	**C/R**	**J**			**Estimated Value as of Today**
	❑	❑	❑			
	❑	❑	❑			
	❑	❑	❑			
	❑	❑	❑			
					Total	$

Form 35.4.
PATTERN INTERROGATORIES
(DOMESTIC RELATIONS)

FORM 35.4
Pattern Interrogatories (Domestic Relations)

[Reference to C.R.C.P. 16.2, 26 and 33. These are not to be filed with the court, except as may be ordered.]

Section 1. Instructions to All Parties

(a) These are general instructions. For time limitations, requirements for service on other parties, and other details, see C.R.C.P. 16.2, 26, 33, 121 §1-12, and the cases construing those Rules.

(b) These interrogatories do not change existing law relating to interrogatories nor do they affect an answering party's right to assert any privilege or objection.

Section 2. Instructions to the Asking Party

(a) These interrogatories are designed for optional use in domestic relations cases only.

(b) Use care in choosing those interrogatories that are applicable to the case.

(c) Subject to the limitations in C.R.C.P. Rules 16.2 and 33, additional interrogatories may be attached.

Section 3. Instructions to the Answering Party

(a) An answer or other appropriate response must be given to each interrogatory. Parties are to answer these interrogatories with the understanding that they stand in a fiduciary relationship with each other.

(b) As a general rule, within 30 days after you are served with these interrogatories, you must serve your responses on the asking party and serve copies of your responses on all other parties to the action who have appeared. See C.R.C.P. 33 for details.

(c) Each answer must be as complete and straightforward as the information reasonably available to you permits. If an interrogatory cannot be answered completely, answer it to the extent possible.

(d) If you do not have enough personal knowledge to fully answer an interrogatory, say so, but make a reasonable and good faith effort to get the information by asking other persons or organizations, unless the information is equally available to the asking party in which case state the identity, address and telephone number of the person in possession.

(e) Whenever an interrogatory may be answered by referring to a document, the document may be attached as an exhibit to the response and referred to in the response. If the document has more than one page, refer to the page and section where the answer to the interrogatory can be found.

(f) Whenever an address and telephone number for the same person are requested in more than one interrogatory, you are required to furnish them in answering only the first interrogatory asking for that information.

(g) Your answers to these interrogatories must be verified, dated, and signed. You may wish to use the following form at the end of your answers:

I declare under penalty of perjury under the laws of the State of Colorado that the foregoing answers are true and correct.

DATE _____ SIGNATURE _____

Section 4. Definitions

(a) You or your includes you, your agents, your employees, your insurance companies, their agents, their employees, your attorneys, your accountants, your investigators, and anyone else acting on your behalf.

(b) Person includes a natural person, firm, association, organization, partnership, business, trust, corporation, or public entity.

(c) Document means a writing, as defined in CRE 1001 and includes the original or a copy of handwriting, typewriting, printing, photostating, photographing, magnetic impulses, mechanical or electronic recording or other form of data compilation and every other means of recording upon any tangible thing and form of communicating or representation, including letters, words, pictures, sounds, or symbols, or combinations of them.

(d) Address means the street address, including the city, state, and zip code.

Section 5. Pattern Interrogatories

The following interrogatories have been approved by the Colorado Supreme Court under C.R.C.P. 16.2 and 33.

1. If you are employed by any business or enterprise, for each state:
   a. Its name, address and telephone number;
   b. Your position;
   c. Your present gross monthly income;
   d. Your compensation arrangement including a complete description of draws, incentives, bonuses, perquisites and any other method of compensation;
   e. Your date of hire;
   f. The names of all documents fixing your compensation terms (contract, corporate minutes, memoranda, policy manual, etc.)
   g. If you have the use of company property, describe and explain your arrangement for use and payment;
   h. Whether you have any outstanding bonuses, commissions, or any other payment, benefit or perquisite due to you, and if so, please describe and state the amount and date due;

i. The date of your next compensation review;
j. The amount of compensation adjustment anticipated at your next compensation review.

2. Other than your present place of employment, list in detail all other places of employment during your marriage. With regard to each, state the following:
   a. The name, address and telephone number of your employer;
   b. The inclusive dates of employment;
   c. The type of work performed;
   d. The gross annual income from such employment in each of the years during the marriage.
   e. Any retirement benefits earned with that employer.

3. State, in detail, your level of education, and all professional or vocational training which you have received, dates you attended each institution or received training, and the date any degrees or certificates of completion were acquired. State with particularity any additional professional, vocational or artistic skills for which you have received compensation or public recognition.

4. If the expenses on your Affidavit with Respect to Financial Affairs include the support of any person other than yourself or your children, state the name of each person and the monthly expenses attributable to such person.

5. If you have disposed of any property with a value of $1,000.00 or more, including without limitation, stocks, bonds, debentures or other items of a similar nature in the last 12 months, for each item state:
   a. Description of the property;
   b. The date acquired and tax basis;
   c. The date you disposed of the property;
   d. The amount received by you;
   e. The fair market value of the security on the date disposed of;
   f. What you did with the sale proceeds;
   g. The amount that is still due and owing to you.

6. If during the last three years you have sold or transferred any interest in real property, for each sale and/or transfer, state:
   a. The address and description of the property;
   b. The date of sale or transfer;
   c. The method of transfer;
   d. The name and address of each purchaser or person receiving title, and the interest received by such person;
   e. The purchase price or consideration;
   f. The amount of the purchase price that remains due and owing;
   g. The amount of the proceeds of the transfer received by you;
   h. The disposition of the proceeds;
   i. The interest you presently have in such property.

7. If any person or entity holds any property for your benefit, including, but not limited to bank accounts, IRAs, Keoghs, stocks, securities or investments of any kind, for each state:
   a. The name and address of each such person, firm or legal entity;
   b. A description of the item held for your benefit;
   c. The conditions under which the item is held for your benefit;
   d. The fair market value of the property.

8. If you are currently involved in any business or investment with others, for each set forth the particular details, including the following:
   a. A description of the business or investment;
   b. The name and address of the other parties involved;
   c. The purpose;
   d. Your contribution;
   e. The tax basis of your contribution;
   f. Your percentage of ownership;
   g. The fair market value of your share;
   h. Any agreement among the partners for ownership, management and sale.

9. If you have received any gifts of money, non-taxable income or assets from any source other than through your business or employment of $1,000.00 or more in the last three years, set forth the following:
   a. The amount of money or value of the asset received and date of receipt;
   b. The name and address of the person or entity from whom the amount is received;
   c. The consideration given by you or other reason for payment to you.

10. If you are a beneficiary of the estate of any person, state:
   a. The amount of the estate;
   b. Whether the estate is being probated or administrated;
   c. Whether distribution has been made to you from such estate;
   d. The amount of money or property you have received from such estate;
   e. The date(s) distribution was made; or if distribution has not been made, the date you anticipate receiving said distribution.

11. If you are a beneficiary of any current or terminated trust, state:
   a. The date of the creation of each trust;
   b. The name and address of the trustee;
   c. The amount of principal in the trust;
   d. The amount of income and other distributions you receive each year from the trust;
   e. The name and address of the grantor;
   f. If the trust has been terminated, the date and circumstances of the termination.

12. For any business operated by you alone or with others during the last three years, state the following:
   a. The name and address of the business;
   b. The form of the business organization;
   c. The name and address of each officer and owner of the business;
   d. The date when you obtained your interest in the business;

e. Your capital contribution to the business;
f. Your ownership interest (by percentage and number of shares);
g. The date and amount of all outstanding loans to which you are a party;
h. The annual gross profits of the business since you have been engaged in the business;
i. All payments to or for you from the business, whether salary, bonus, dividend, commission, draw, advance, loan or payment of personal expenses from three years to date;
j. All expenses reimbursed to or paid for you by each business, including but not limited to, insurance, supplies, food, travel, transportation, education, entertainment, and business gifts from three years to date;
k. The fair market value of the business;
l. The current fair market value of your interest, and your explanation of how you calculated same;
m. Whether or not you intend to sell your interest;
n. The tax basis of your interest.

13. If allocation of parental responsibilities (that is, decision-making and/or parenting time) is an issue:
a. State whether joint parental decision-making or sole parental decision-making is best for the child(ren) and why;
b. State which party should be designated primary residential care and why;
c. Outline a schedule of parenting time for each party, including a holiday/school break schedule and a summer schedule;
d. Outline the manner in which parental responsibilities have been shared with the other party, i.e., daily caretaking, participation in school/extracurricular events, financial support, choosing the child(ren)'s doctors and dentists, choosing school(s), etc.;
e. Describe any history of domestic violence, child abuse, or neglect (supporting documentation should be provided);
f. Describe any physical, psychological or addictive condition of either party which if untreated has a harmful effect on the best interest of the child(ren) and why;
g. Describe any special needs of any child (physical, psychological, educational, etc.);
h. Describe any history of counseling or therapy for either party or any child; include the names, addresses and telephone numbers of the person(s) providing same;
i. State whether regular contact with grandparents, extended family, and/or other significant adults is contrary to the best interests of the child(ren) and why;
j. Describe any extraordinary travel arrangements necessary for parenting time;
k. Describe current child support arrangements and state whether payments are current;
l. Describe the child care arrangements for the child(ren) for the last three years including the name, address and telephone number of each child care provider.

Form 35.5.
PATTERN REQUESTS FOR PRODUCTION OF DOCUMENTS (DOMESTIC RELATIONS)

FORM 35.5
PATTERN REQUESTS FOR PRODUCTION OF DOCUMENTS
(Domestic Relations)

[Reference to C.R.C.P. 16.2, 26 and 34. These are not to be filed with the court, except as may be ordered.]

Section 1. Instructions to All Parties

(a) These are general instructions. For time limitations, requirements for service on other parties, and other details, see C.R.C.P. 16.2, 34, 121 §1-12, and the cases construing those Rules.

(b) These requests for production of documents do not change existing law relating to requests for production of documents nor do they affect an answering party's right to assert any privilege or objection.

Section 2. Instructions to the Asking Party

(a) These requests for production of documents are designed for optional use in domestic relations cases only.

(b) Use care in choosing only those requests for production of documents that are applicable to the case. Documents should not be requested that have been provided by disclosure or other means.

(c) Subject to the limitations in C.R.C.P. Rules 16.2 and 34, additional requests for production of documents may be attached.

(d) Complete and accurate copies may replace originals.

Section 3. Instructions to the Answering Party

(a) An answer or other appropriate response must be given to each request for production of documents. Parties are to provide documents in response to these requests for production of documents with the understanding that they stand in a fiduciary relationship with each other.

(b) As a general rule, within 30 days after you are served with these requests for production of documents, you must serve your responses on the asking party and serve copies of your responses on all other parties to the action who have appeared. See C.R.C.P. 34 for details.

(c) The response shall state with respect to each item or category that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for the objection shall be stated. If an objection is made to part of an item or category, the part shall be specified and an inspection permitted of the remaining parts.

(d) A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

Section 4. Definitions

(a) You or your includes you, your agents, your employees, your insurance companies, their agents, their employees, your attorneys, your accountants, your investigators, and anyone else acting on your behalf.

(b) Person includes a natural person, firm, association, organization, partnership, business, trust, corporation, or public entity.

(c) Document means a writing, as defined in CRE 1001 and includes the original or a copy of handwriting, typewriting, printing, photostating, photographing, magnetic impulses, mechanical or electronic recording or other form of data compilation and every other means of recording upon any tangible thing and form of communicating or representation, including letters, words, pictures, sounds, or symbols, or combinations of them.

(d) Address means the street address, including the city, state, and zip code.

Section 5. Pattern Request for Production of Documents

The following requests for production of documents have been approved by the Colorado Supreme Court under C.R.C.P. 16.2, 26 and 34.

1. All balance sheets, and/or profit and loss statements for any business entity in which you have more than a 10 percent equity interest, which have been prepared in the last three years.

2. All passbooks, certificates of deposit, credit union deposits, money market accounts, NOW accounts, mutual funds, and other evidence of savings accounts in which you or the other party has an interest or appear of record thereon, for the last three years.

3. All monthly bank statements, deposit slips, canceled checks, and check registers of every checking or other money management account in which you or the other party has an interest or appear of record thereon, for the last three years.

4. Copies of all stock certificates, stock option plans, stock option certificates, vesting schedules, or warrants owned or in which either party has an interest, and copies of all documents establishing ownership and/or defining ownership value for all investments, or any other documents evidencing your interest in such stock, stock options, or investments.

5. All brokerage account statements and documents concerning any and all securities and investments owned by you or for your benefit during the last three years.

6. All appraisals, market analyses, records of purchase and sale, deeds, bills of sale, security agreements, promissory notes, and payment records for any property, including but not limited to, real estate, business interests or any kind of personal property either owned or sold within the last three years by you or the other party.

7. All trust agreements in which you or the other party is or has been grantor, trustee or beneficiary.

8. Monthly credit card and charge account statements for the last twenty-four months, from any credit card company or charge account on which you are a signator, either in a personal capacity or as an authorized signatory for any business or person.

9. All documentation evidencing any separate interest you claim in any real or personal property, including but not limited to gift and inheritance tax returns filed concerning such property.

Form 36.
NOTICE OF WITHDRAWAL AS ATTORNEY OF RECORD

❑District Court ❑County Court ❑Denver Juvenile Court _____ County, Colorado Court Address: Petitioner/Plaintiff: v. Respondent/Co-Petitioner/Defendant:	▲ COURT USE ONLY ▲
Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom
NOTICE OF WITHDRAWAL AS ATTORNEY OF RECORD	

Undersigned attorney for the ❑Petitioner/Plaintiff **or** ❑Respondent/Co-Petitioner/Defendant provides this Notice of Withdrawal as attorney of record and affirms to the Court, the client and all other attorneys and parties of record:

1. That the attorney wishes to withdraw and has made reasonable efforts to give actual notice to the client prior to filing this Notice.
2. There are no unresolved matters currently pending before the Court. Any written orders have been submitted and entered by the Court and complied with by the withdrawing attorney.
3. The Clerk of the Court shall enter the withdrawal of counsel upon receipt of this Notice. No written Order shall be issued by the Court.
4. The client or opposing counsel may file an Objection to this Notice of Withdrawal within 15 days. If an Objection is filed the matter shall be referred to the Court.
5. Last known address and telephone number of client:

_____
Petitioner or Plaintiff or Respondent/Co-Petitioner or Defendant

_____
Address

_____
City, State, Zip Code

_____
(Area Code) Telephone Number (home and work)

Date: _____ _____
Attorney Signature

CERTIFICATE OF SERVICE

I certify that on _____ date) a true and accurate copy of the *Notice of Withdrawal as Attorney of Record* was served on the client and all other counsel or parties of record by ❑Hand Delivery, ❑E-filed, ❑Faxed to this number _____ or ❑by placing it in the United States mail, postage pre-paid, and addressed to the following:

To: _____

_____

_____

_____

_____ _____
Your signature)

FORM 36 JDF 83 R10/05 NOTICE OF WITHDRAWAL AS ATTORNEY OF RECORD

CHAPTER 17B

Appointed Judges

Adopted by the

SUPREME COURT OF COLORADO

June 23, 2005,

Effective July 1, 2005

CHAPTER 17B

APPOINTED JUDGES

Rule 122. Case Specific Appointment of Appointed Judges Pursuant to C.R.S. § 13-3-111

(a) Appointed Judges.

(1) At any time after a civil action, excluding juvenile delinquency proceedings, is filed in a trial court of record, upon agreement of all parties that a specific retired or resigned justice of the Supreme Court, or a retired or resigned judge of any other court of record within the state of Colorado be appointed to hear the action and upon agreement that one or more of the parties shall pay the agreed upon compensation of the selected justice or judge, together with all other compensation and expenses incurred, the Chief Justice may appoint such justice or judge who consents to perform judicial duties for such action.

(2) The decision as to whether such justice or judge shall be appointed to judicial duties, pursuant to subsection (1) of this section, shall be entirely within the discretion of the Chief Justice. The Chief Justice has the authority to reject or approve any deviations from these rules agreed to by the parties. The Chief Justice may require such undertakings as in his or her opinion may be necessary to ensure that proceedings held pursuant to this section shall be without expense to the state of Colorado.

(3) The compensation and expenses paid to an Appointed Judge shall be at the rate agreed upon by the parties and the Appointed Judge and rate of compensation must be approved by the Chief Justice at the time of making the appointment.

(4) The Appointed Judge shall have the same authority as a full-time sitting judge. Orders, decrees, verdicts and judgments entered by an Appointed Judge shall have the same force and effect and may be enforced or appealed in the same manner as any other order, decree, verdict, or judgment.

(b) Qualifications. To be eligible to serve as an Appointed Judge, a person must be a Senior Judge, a retired or resigned justice of the Supreme Court, or a retired or resigned judge of the court of appeals, a district court, probate court, juvenile court or county court, who has served as a judge in one or more of said courts for a total of at least six years. If a judge has served in the Colorado State Court System and as a judge in the Federal Court System, those years of service may be combined for the purpose of meeting the six year requirement. Such person must be currently licensed to practice law in Colorado.

(c) Motion for Appointment. A request for the appointment of an Appointed Judge shall be made by a joint motion filed by all parties to a case and shall be signed as approved by the Appointed Judge. The original of such motion shall be filed with the Supreme Court with a copy filed in the originating court — the court of record in which the case was originally filed. Such motion shall include:

(1) The name of the Appointed Judge;

(2) The rate of compensation agreed to be paid to the Appointed Judge;

(3) The Appointed Judge's agreement to be bound by Section II of the Colorado Code of Judicial Conduct, Applicability of Code to Senior and Retired Judges, and the Appointed Judge's agreement that the Chief Justice may ask the Office of Attorney Regulation Counsel and the Colorado Commission on Judicial Discipline for any record of his or her imposed discipline, or pending disciplinary proceeding, if any;

(4) A realistic estimate of all compensation and expenses for the Appointed Judge, any needed personnel, rental of an appropriate facility outside the courthouse, if needed, in which to hold the proceedings, payment for any requested jury, and all other anticipated compensation and expenses, including travel, lodging and meals, and provisions assuring that all such compensation and expenses will be paid by the parties; and

(5) An agreement as to who is responsible for initial payment of the compensation and expenses of the action, and who is responsible for payment of the compensation and expenses upon final judgment;

(6) The agreement of the parties and the Appointed Judge that none of the compensation and expenses shall be paid by the state of Colorado;

(7) A copy signed by the Appointed Judge of the following oath: "I, (name of Appointed Judge), do solemnly swear or affirm by the ever living God, that I will support the Constitution of the United States and of the State of Colorado, and faithfully perform the duties of the office upon which I am about to enter."

(8) Any other matters the parties desire to be considered by the Chief Justice in exercising his or her discretion.

(9) A form order approving the appointment.

(10) A statement acknowledging that the Chief Justice may approve or reject the order or, upon the agreement of all the parties and of the Appointed Judge, may change any of the provisions of the order.

The parties shall file the Chief Justice's ruling on the motion in the case file in the originating court.

(d) Duration of Appointment. The appointment shall last for so long as the parties specify in the motion and order of appointment. In the absence of such specification, the appointment shall last until entry of a final, appealable judgment, order or decree or, in dissolution actions, until the entry of Permanent Orders.

(e) Compensation and Expenses. Upon the appointment of an Appointed Judge by the Chief Justice, the parties shall forthwith deposit in an agreed escrow or trust account to be administered by the Appointed Judge or some other person acceptable to the parties and the Appointed Judge, sufficient funds to pay the estimated compensation and expenses of the case for the duration of the appointment. If, at any time, the Appointed Judge determines that the funds on deposit are insufficient to cover all further compensation and expenses, the Appointed Judge may order the parties promptly to deposit sufficient additional funds to cover such amount. An Appointed Judge may withdraw from the appointment after reasonable notice and with permission of the Chief Justice if this order is not complied with, and the case proceedings shall revert to the originating court. Within a reasonable time after the conclusion of the Appointed Judge's duties on the case, the parties shall file in the record of the case in the originating court a report of the total compensation paid for the Appointed Judge's services and the total expenses paid by the parties in the case.

(f) Rules Applicable to Proceedings. Proceedings before an Appointed Judge shall be conducted pursuant to Rules applicable to the originating court. All filings shall be open records available for public review and inspection unless sealed upon motion and order, and all proceedings shall be open to the public in the same manner and pursuant to the same law applicable to the originating court.

(g) Record.

(1) The original of each filing in all proceedings before an Appointed Judge shall be filed with the clerk of the originating court and a copy shall be provided to the Appointed Judge.

(2) The parties and the Appointed Judge shall comply with all applicable rules and Chief Justice Directives relating to reporting, filing and maintaining the record.

(3) The originals of any reporter's notes or recording medium, along with any exhibits tendered, shall be filed with the clerk of the originating court pursuant to C.R.C.P. 80(d). The parties shall pay the costs of a court reporter or for any recording equipment that is acceptable to all parties.

(h) Location of Proceedings.

(1) Unless consented to by the parties and ordered by the Appointed Judge for good cause, the location of evidentiary proceedings and trial of a matter subject to this rule shall be pursuant to C.R.C.P. 98.

(2) The parties and the Appointed Judge shall arrange for an appropriate facility in which proceedings shall be held. If available, a room in the courthouse may be used for one or more proceedings in the case. Use of available court rooms, equipment or facilities

within the courthouse shall not be considered an expense to the state that the parties are required to bear or reimburse;

(3) Whenever proceedings are scheduled in advance, the Appointed Judge shall timely file a Notice of Hearing with the clerk of the originating court giving notice of the date, time, nature and location of the proceedings.

(4) Except when proceedings are taking place in a courthouse, the parties shall arrange for or assure that there is sufficient premises liability insurance to assure that any injury to a party, other participant or spectator at the proceedings is covered without expense to the state of Colorado. Such insurance shall name the state of Colorado as an additional insured.

(i) Jury Trials.

(1) The Colorado Uniform Jury Selection and Service Act applies to jury trials conducted pursuant to this rule.

(2) When a trial by jury has been properly demanded, before setting the case for trial the Appointed Judge shall coordinate the start of the trial with the jury commissioner and the district administrator for the originating court so that jurors are selected and voir dire is held in the courthouse to which the prospective jurors are summoned.

(3) If the trial is held outside the courthouse, the parties shall be responsible for offering transportation from the courthouse to the location of the trial for the duration of the trial. Such transportation shall be at no cost to the jurors or the state of Colorado. The parties shall arrange for or assure that there is sufficient liability insurance to assure that any injury to a juror related to such transportation is covered without expense to the state of Colorado. Such insurance shall name the state of Colorado as an additional insured.

(4) Not later than 3 business days following the conclusion of their service as jurors, the parties shall pay the jurors at the statutory rate pursuant to the Colorado Uniform Jury Selection and Service Act. The parties also shall pay all related expenses such as meals for the jurors and the costs of a bailiff. Payments made pursuant to this section should not be made through the court.

(5) If the trial is held outside the courthouse, jurors shall be instructed to the effect that such fact does not affect their responsibility and the importance of their service.

(6) In the event the jury is cancelled, postponed or a jury is waived, the Appointed Judge shall notify the jury commissioner as soon as possible.

(j) Removal. An Appointed Judge shall preside over all matters throughout the duration of the appointment unless the Appointed Judge recuses, is removed pursuant to C.R.C.P. 97, dies or becomes incapacitated. In any such circumstance, the case proceedings shall immediately revert to the originating court.

(k) Immunity. An Appointed Judge shall have immunity in the same manner and to the same extent as any other judge in the state of Colorado.

This Rule is hereby enacted and adopted by the Court, En Banc, this 23rd day of June, 2005 and shall be effective with regard to all cases pending in courts as of July 1, 2005 or filed in courts on or after July 1, 2005.

Source: (c)(3) amended and effective June 16, 2011; (i)(4) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

ANNOTATION

Law reviews. For article, "Privatizing Family Law Adjudications: Issues and Procedures", see 34 Colo. Law. 95 (August 2005). For article, "Appointed Judges Under New C.R.C.P. 122: A Significant Opportunity for Litigants", see 34 Colo. Law. 37 (September 2005).

Rules 123 to 200.

[Note: There are at present no Colorado Rules of Civil Procedure 123 to 200.]

CHAPTER 18

Rules Governing Admission to the Bar

CHAPTER 18

RULES GOVERNING ADMISSION TO THE BAR

Cross references: For general provisions concerning attorneys-at-law, see article 5 of title 12, C.R.S.

NOTE: Existing Rules 201 through 220 and Rules 222 through 225 were repealed and were reenacted as Rule 201 by the Supreme Court November 10, 1982, effective December 1, 1982.

RULE 201

Rule 201.1. Supreme Court Jurisdiction

The Supreme Court exercises jurisdiction over all matters involving the licensing of persons to practice law in the State of Colorado. Accordingly, the Supreme Court has adopted the following rules governing admission to the practice of law.

ANNOTATION

District courts are without subject matter jurisdiction to entertain challenges to the application and enforcement of rules governing admission to the bar. Smith v. Mullarkey, 121 P.3d 890 (Colo. 2005).

Rule 201.2. Board of Law Examiners

(1) The "Colorado State Board of Law Examiners" (Board) shall consist of two committees, "the Law Committee" and "the Bar Committee."

(a) The Law Committee shall consist of eleven members of the Bar appointed by the Supreme Court for terms of five years. They serve at the pleasure of and may be dismissed at any time by the Supreme Court. A member of the Law Committee may resign at any time. The Supreme Court shall designate one of the members of the Law Committee to serve as its chair and also chair of the Board. The Law Committee shall conduct two written examinations each year, one in February and one in July, in the metropolitan Denver, Colorado area or at such other times and places as may be designated by the Court. The Supreme Court shall review and approve in advance the general standards of performance that must be met in order to pass the written examination.

(b) The Bar Committee shall consist of eleven members appointed by the Supreme Court for terms of five years. Nine of the members of the committee shall be registered attorneys and two shall be non-attorneys. They serve at the pleasure of and may be dismissed at any time by the Supreme Court. A member of the Bar Committee may resign at any time. The Supreme Court shall designate one of the members of the Bar Committee to serve as its chair. It shall be the duty of the Bar Committee to investigate applicants' mental stability, education, professional experience, and ethical and moral qualifications for admission to the Bar.

(2) The Board shall employ an executive director, subject to the approval of the Supreme Court, and such other staff as may be necessary to assist in performing its functions. The Board shall pay all expenses reasonably and necessarily incurred by it under an annual budget recommended by the Board and approved by the Supreme Court.

(3) The Board shall recommend to the Supreme Court proposed changes or additions to the rules of procedure governing admission to the practice of law. The Board may adopt guidelines to govern its internal operation and to provide guidance to the executive director.

(4) All fees required by Rule 201.4 (3) shall be paid by the executive director into a fund kept in a depository designated by the Supreme Court and used to pay expenses incurred incident to the admission of attorneys. A portion of the fund, while held for future expenses, may be invested as the Supreme Court shall direct. The fund shall be audited annually.

(5) The Board of Law Examiners, and its members, employees and agents are immune from all civil liability for damages for conduct and communications occurring in the performance of and within the scope of their official duties relating to the examination, character and fitness qualification, and licensing of persons seeking to be admitted to the practice of law. Records, statements of opinion and other information regarding an applicant for admission to the bar communicated by any entity, including any person, firm or institution, without malice, to the Board of Law Examiners, or to its members, employees or agents, are privileged, and civil suits for damages predicated thereon may not be instituted.

Source: (1)(b) amended and effective September 12, 1991; (1)(b) amended and effective March 13, 1996; (5) amended April 6, 2000, effective July 1, 2000.

ANNOTATION

Law reviews. For article, "The Colorado Character Investigation of Applicants to the Bar", see 28 Dicta 333 (1951).

Rule 201.3. Classification of Applicants

(1) Class A applicants are those applicants as determined by the Bar Committee:

(a) who have been admitted to the Bar of another state, territory, or district of the United States which allows admission to members of the Colorado Bar on motion without the requirement of taking that jurisdiction's bar examination,

(b) who have actively and substantially maintained a practice of law for five of the seven years immediately preceding application for admission to the Bar of Colorado in that state, territory or district of the United States which allows admission to members of the Colorado Bar on motion without the requirement of taking that jurisdiction's bar examination.

(2) For purposes of this rule, "practice of law" means:

(a) The private practice of law as a sole practitioner or as a lawyer employee of or partner or shareholder in a law firm, professional corporation, legal clinic, legal services office, or similar entity; or

(b) Employment as a lawyer for a corporation, partnership, trust, individual, or other entity with the primary duties of:

(i) Furnishing legal counsel, drafting documents and pleadings, and interpreting and giving advice with respect to the law, and/or

(ii) Preparing, trying or presenting cases before courts, executive departments, administrative bureaus or agencies; or

(c) Employment as a lawyer in the law offices of the executive, legislative, or judicial departments of the United States, including the independent agencies thereof, or of any state, political subdivision of a state, territory, special district, or municipality of the United States, with the primary duties of

(i) Furnishing legal counsel, drafting documents and pleadings, and interpreting and giving advice with respect to the law, and/or

(ii) Preparing, trying or presenting cases before courts, executive departments, administrative bureaus or agencies; or

(d) Employment as a judge, magistrate, hearing examiner, administrative law judge, law clerk, or similar official of the United States, including the independent agencies thereof, or of any state, territory or municipality of the United States with the duties of hearing and deciding cases and controversies in judicial or administrative proceedings,

provided such employment is available only to a lawyer; or

(e) Employment as a teacher of law at a law school approved by the American Bar Association throughout the applicant's employment; or

(f) Any combination of subparagraphs (a) - (e) above.

(3) A full-time commissioned officer and judge advocate of the military services of the United States stationed in this state may be temporarily admitted to the Bar of Colorado, upon request of his or her commanding officer. Such admission shall be solely for the purpose of practice and court appearance in his or her capacity as a judge advocate and shall continue only as long as he or she is serving as a judge advocate in Colorado, except that the attorney shall also be allowed to act as a pro bono/emeritus attorney as described in C.R.C.P. 223(1) below without further application or fee.

(4) A law professor who, as determined by the bar committee, has been admitted to the bar of another state, territory, or district of the United States, may be temporarily admitted to the bar of Colorado, upon application supported by the certification of employment by his or her dean. Such admission shall be solely for so long as the professor shall serve as a full-time member of the faculty of such Colorado law school. As used here, "law professor" means a law school graduate who, as determined by the bar committee, is employed full-time as a tenured or tenure track teacher at a law school approved by the American Bar Association located within the state of Colorado. Such admission shall automatically terminate when the person no longer holds the full-time status at the law school, and the person admitted pursuant to this rule shall notify the bar committee of his or her change of status in this regard, including leaves of absence, as soon as practicable.

(5) Class B applicants are those applicants who have taken the Uniform Bar Examination (UBE) in another state or territory of the United States or in the District of Columbia within two years preceding application for admission to the Bar of Colorado and earned a score that is passing based upon standards set by the Colorado Supreme Court.

(a) A UBE score that was earned more than two years, but less than three years, preceding application for admission, may be valid if the applicant has actively and substantially maintained a practice of law, as defined by Rule 201.3(2), for at least one year in a state, territory, or district of the United States which allows admission to members of the Colorado bar on motion, without the requirement of taking that jurisdiction's bar examination.

(b) A UBE score that was earned more than two years, but less than four years, preceding application for admission, may be valid if the applicant has been admitted to the Bar of another state, territory, or district of the United States and has actively and substantially maintained a practice of law, as defined by Rule 201.3(2), and for at least two years in a state, territory, or district of the United States which allows admission to members of the Colorado bar on motion, without the requirement of taking that jurisdiction's bar examination.

(c) A UBE score that was earned more than three years, but less than five years, preceding application for admission, may be valid if the applicant has been admitted to the Bar of another state, territory, or district of the United States and has actively and substantially maintained a practice of law, as defined by Rule 201.3(2), for at least three years in a state, territory, or district of the United States which allows admission to members of the Colorado bar on motion, without the requirement of taking that jurisdiction's bar examination.

(6) All other applicants are Class C applicants who shall take a written examination.

Source: (1) amended and adopted November 26, 1996, effective January 1, 1997; (4) and (5) amended and adopted March 5, 1998, effective July 1, 1998; (1) amended June 22, 2000, effective January 1, 2001; (1) amended and effective April 26, 2007; (3) amended and effective June 16, 2011; (5) amended and (6) added and effective November 1, 2011.

ANNOTATION

Law reviews. For article, "The Colorado Character Investigation of Applicants to the Bar", see 28 Dicta 333 (1951).

Annotator's note. The following annotations include cases decided under former C.R.C.P. 201 which was similar to this rule.

The ban on the unauthorized practice of law is not unconstitutionally vague or overbroad and does not violate the first amendment. People v. Shell, 148 P.3d 162 (Colo. 2006).

Applied in People ex rel. Buckley v. Beck, 199 Colo. 482, 610 P.2d 1069 (1980); Unauthorized Practice of Law Comm. v. Grimes, 654 P.2d 822 (Colo. 1982).

Rule 201.4. Applications

(1) All applications shall be made on forms furnished by the Board, requiring such information as is necessary to determine whether the applicant meets the requirements of these rules, together with such additional information as is necessary for the efficient administration of these rules. This information shall be deemed confidential and may be released only under the conditions for release of confidential information established by C.R.C.P. 201.11.

(2) All Class C applications shall be received or postmarked on or before the first day of December preceding the February Bar Examination or on or before the first day of May preceding the July Bar Examination or at such other times as may be designated by the court.

(3) Fees shall be required of all applicants in an amount fixed by the Court. Fees may be refunded in accordance with guidelines adopted by the Board. An application which is not accompanied by the applicable fee will not be accepted.

Source: (1) amended and effective June 16, 1994; (2) amended and effective November 1, 2011.

ANNOTATION

Law reviews. For article, "The Colorado Character Investigation of Applicants to the Bar", see 28 Dicta 333 (1951). For article, "Notes on Proposed Amendments to Colorado Rules of Civil Procedure", see 27 Dicta 165 (1950). For article, "The Colorado Character Investigation of Applicants to the Bar", see 28 Dicta 333 (1951).

Moral qualifications affidavit requires updating. Although the rules in effect in 1970 did not require formal updating of an applicant's moral qualifications, the affidavit is a continuing one which does require updating. People v. Mattox, 639 P.2d 397 (Colo. 1982) (decided under former C.R.C.P. 209).

Rule 201.5. Educational Qualifications

(1) Every Class A and Class B applicant shall have obtained a first professional law degree from a law school accredited by the American Bar Association.

(2) Class C applicants shall meet the following educational requirements:

(a) Every Class C applicant shall have received at the time of the examination (i) a first professional law degree from a law school approved by the American Bar Association; or (ii) a first professional law degree from a state accredited law school, provided that such applicant shall have been admitted to the bar of another state, territory, or district of the United States and shall have been actively and substantially engaged in the practice of law, as defined by Rule 201.3(2), for five of the seven years immediately preceding application for admission to the Bar of Colorado; or (iii) a first professional law degree from a law school in a common law, English-speaking nation other than the United States provided that such applicant shall have been admitted to the bar of the nation where he/she received his/her first professional law degree and shall have been actively and substantially engaged in the practice of law, as defined by Rule 201.3(2), for five of the seven years immediately preceding application for admission to the bar of Colorado.

(3) Class A, Class B, and Class C applicants shall be required to take and pass the

Multi-State Professional Responsibility Examination (MPRE). A passing score will be valid if it was achieved at an examination taken not more than two years prior to acceptance of application for admission in Colorado. The Supreme Court shall review and approve, in advance, the general standards of performance that must be met in order to pass the MPRE.

Source: (3) added January 9, 1992, effective July 1, 1992; (3) amended and adopted December 14, 1995, effective January 1, 1996; (2) amended and adopted February 13, 1997, effective March 1, 1997; (2)(a) amended and adopted April 2, 1998, effective July 1, 1998; entire rule amended and effective November 1, 2011.

ANNOTATION

Law reviews. For article, "The Colorado Character Investigation of Applicants to the Bar", see 28 Dicta 333 (1951).

Applied in People v. Roehl, 655 P.2d 1381 (Colo. 1983). (decided under former rule).

Rule 201.6. Moral and Ethical Qualifications

(1) Applicants must demonstrate that they are mentally stable and morally and ethically qualified for admission. Fingerprints may be required of all applicants.

(2) The Bar Committee may require further evidence of an applicant's mental stability and moral and ethical qualifications reasonably related to the standards for admission as it deems appropriate, including a current mental status examination. Costs for any mental status examination or for obtaining any additional information required by the Bar Committee shall be borne by the applicant.

(3) Applicants must certify that they are in compliance with any child support order as defined by § 26-13-123(a), C.R.S.

Source: (3) added and adopted June 25, 1998, effective July 1, 1998.

ANNOTATION

Reinstatement after suspension from practice may be conditioned upon undergoing a psychiatric evaluation. People v. Fagan, 745 P.2d 249 (Colo. 1987).

Applied in People ex rel. Buckley v. Beck, 199 Colo. 482, 610 P.2d 1069 (1980) (decided under former C.R.C.P. 209).

Rule 201.7. Review of Applications

The executive director, pursuant to guidelines developed by the Bar Committee, shall review all applications for information about the mental stability and ethical or moral qualifications of each applicant. The executive director shall certify to the Bar Committee the names of those applicants who, without further investigation, appear to be qualified for admission. After review and approval by the Bar Committee, the executive director shall certify to the Supreme Court the names of all qualified applicants. Those applicants not certified shall be referred for review by an inquiry panel of the Bar Committee.

Rule 201.8. Inquiry and Hearing Panels of the Bar Committee

The chair of the Bar Committee shall assign at least three members of the Bar Committee to one or more inquiry panels and at least three members of the Bar Committee to one or more hearing panels. Members of the Bar Committee may be assigned by the chair from one panel to another, but in no event shall a member who has conducted a preliminary screening or inquiry of an applicant take any part in the consideration of a formal hearing involving the same applicant. In the discharge of its duties, the Bar Committee may enlist the assistance of other persons admitted to practice law in Colorado. A quorum of either a hearing panel or an inquiry panel is three persons.

Rule 201.9. Review by Inquiry Panel

(1) If, after investigation conducted pursuant to guidelines developed by the Bar Committee, the executive director recommends that an inquiry panel be convened to determine whether there is probable cause to believe that an applicant is not mentally stable or ethically or morally qualified, the chair of the Bar Committee shall designate a member of the Bar Committee to review the director's recommendation. If the reviewing member concurs with the executive director's recommendation, the chair of the Bar Committee shall convene an inquiry panel which includes the reviewing member and designate one of the inquiry panel members as chair.

(2) The director shall notify the applicant in writing of the general matters in question and invite the applicant to appear for an interview with the inquiry panel. The applicant may be accompanied by counsel, and the notice shall so advise. The notice shall be sent by certified mail, at least 14 days before the interview is scheduled, to the address listed on the application or the address subsequently provided in writing to the Board by the applicant.

(3) If not satisfactorily explained, an applicant's failure to appear for an interview may be grounds to recommend denial of the application.

(4) Probable cause for denial exists under the following circumstances:

(a) The applicant has been convicted of a felony or a crime of moral turpitude, or any crime involving a breach of fiduciary duty, or accepted a deferred judgment which is pending as to such a charge in any jurisdiction;

(b) The applicant has been publicly disciplined in any jurisdiction for a violation of a code of professional responsibility or a comparable code of ethics;

(c) The applicant has been declared mentally ill or incompetent by a court having jurisdiction and the declaration has not been dissolved or rescinded;

(d) The applicant has been found not guilty of any crime by reason of insanity.

(e) The applicant is in arrears under a child support order as defined by § 26-13-123(a), C.R.S.

(5) In addition, probable cause for denial of an application may be established by any evidence which, in the judgment of the majority of the inquiry panel members, tends to show that the applicant is not mentally stable or morally or ethically fit to practice law. In making its probable cause determination, the inquiry panel is not bound by formal rules of evidence and may consider all documents, statements or other matters brought to its attention.

(6) If the inquiry panel determines that there is probable cause to believe that the applicant is unqualified,

(a) The panel shall set forth its findings in writing within 35 days after the panel meeting at which such determination is made;

(b) The findings shall state with particularity the specific matters indicating that the applicant is not qualified; and

(c) The executive director shall send a copy of the inquiry panel's findings to the applicant with a notice that these findings shall become the Bar Committee's recommendation to be filed with the Supreme Court, unless within 35 days after the notice is mailed, the applicant files with the Board a written request for a hearing. The request shall include the applicant's response to each of the specific matters in the inquiry panel findings.

(d) If an applicant files a written request for a hearing, but voluntarily withdraws that request before the hearing is held, the inquiry panel's findings shall become the Bar Committee's recommendation to be filed with the Supreme Court.

(7) If the reviewing member ascertains that an inquiry panel proceeding is not justified or the inquiry panel determines that there is not probable cause to believe that the applicant is unqualified, the executive director shall certify to the Supreme Court that the Bar Committee recommends the applicant's admission.

Source: (4)(e) added and adopted June 25, 1998, effective July 1, 1998; (2), (6)(a), and (6)(c) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Rule 201.10. Formal Hearings

(1) If, under Rule 201.9, an inquiry panel finds probable cause to believe that an applicant is mentally unstable or ethically or morally unfit for admission to the Bar, a formal hearing shall be conducted by a hearing panel if the applicant makes a written request as specified in Rule 201.9 (6)(c). The issues at the formal hearing shall be limited to those in the inquiry panel findings and challenged in the applicant's request for a hearing unless, prior to the hearing, the attorney regulation counsel requests the inquiry panel to reopen the probable cause determination to consider additional information. The chair of the Bar Committee shall designate one member of the hearing panel as its chair who shall rule on all motions, objections and other matters presented in connection with a formal hearing.

(2) If the applicant files a written request for a formal hearing, the hearing shall be conducted under the following rules of procedure.

(a) The applicant shall be notified in writing of:

(i) The date, time and place of the hearing;

(ii) The names and addresses of persons on whom the inquiry panel relied to establish adverse matters concerning the applicant's fitness; and

(iii) The right of the applicant to be represented by counsel at such hearing, to examine and to cross-examine witnesses, to adduce evidence bearing upon the applicant's moral character and general fitness to practice law, and to make reasonable use of the subpoena powers of the Bar Committee.

(b) (i) The chair of the Bar Committee or the chair of the hearing panel may issue subpoenas to compel the attendance of witnesses and the production of pertinent books, papers, documents, or other evidence. Witnesses shall be entitled to receive fees for mileage as provided by law for witnesses in civil actions.

(ii) A subpoena shall indicate that it is issued in connection with a confidential proceeding and that it may be deemed contempt of the the Supreme Court to breach the confidentiality of the proceeding in any way. It shall not be deemed a breach of confidentiality for a person subpoenaed to consult with a lawyer.

(iii) Any challenge to the power to subpoena as exercised under this rule shall be directed to the chair of the Bar Committee or the chair of the hearing panel.

(iv) Any person who fails or refuses to comply with a subpoena issued by the chair of the Bar Committee or the chair of the hearing panel may be cited for contempt of the Supreme Court upon recommendation of the chair of the Bar Committee.

(v) Depositions may be taken by any party to a proceeding conducted under this rule and used in the same manner and to the same extent as in any civil action except all depositions shall be sealed and filed with the Supreme Court unless otherwise ordered. Subpoenas for attendance at depositions may be issued by the chair of the Bar Committee or the chair of the hearing panel on behalf of any party.

(c) A hearing before a hearing panel shall be confidential unless the applicant shall request that the hearing be public. An applicant may not be required to testify or produce records over his objection if to do so would be in violation of his constitutional privilege against self-incrimination. The hearing panel shall not be bound by the formal rules of evidence. The hearing panel in its discretion may take evidence other than in testimonial form, having the right to rely upon records and other material furnished to it in response to its request for assistance in its inquiries or in response to its subpoena powers. The hearing panel in its discretion may determine whether evidence to be taken in testimonial form shall be taken in person or upon deposition, but in either event all testimonial evidence shall be taken under oath. A complete stenographic record of the hearing shall be kept, and a transcript thereof may be ordered by the applicant at the applicant's expense.

(d) Within 28 days after the conclusion of the hearing, the hearing panel shall prepare and file with the Supreme Court its report including findings of fact, conclusions of law and recommendations as to admission. Copies of the hearing panel's report shall be supplied to the attorney regulation counsel and the applicant. Within 14 days after service of the hearing panel's report, both the applicant and the attorney regulation counsel shall have the right to file with the Supreme Court and serve on the opposing party written

exceptions to the report.

(e) The Supreme Court, after reviewing the report of the hearing panel and any exceptions filed thereto, may admit or decline to admit the applicant to the Bar. The Supreme Court reserves the authority to review any determination made in the course of an admission proceeding and to enter any order with respect thereto, including an order that the Bar Committee conduct further proceedings.

(3) The burden of proof shall be on the applicant to show by a preponderance of the evidence that the applicant is mentally stable and ethically and morally fit for admission to the Bar.

(4) At the formal hearing, the office of the attorney regulation counsel shall represent the inquiry panel and shall present evidence in support of the inquiry panel's findings. The hearing panel shall take evidence and make findings of fact and conclusions of law. With the permission of the chair of the panel and upon sufficient notice to the applicant, the attorney regulation counsel may file amendments made by the inquiry panel to its findings. The burden of going forward initially shall be on the attorney regulation counsel. On motion of the attorney regulation counsel, and upon a showing of good cause, the hearing panel may require the applicant to submit to a mental status examination conducted by a psychiatrist or psychologist, or to submit to a substance abuse evaluation conducted by a qualified professional of the attorney regulation counsel's choosing, the cost of which shall be borne by the applicant.

(5) A prima facie case of unfitness shall be deemed established, and the burden of going forward shall shift to the applicant, upon a showing of any of the following facts:

(a) The applicant has been convicted of a felony or a crime of moral turpitude, or any crime involving a breach of fiduciary duty, or accepted a deferred judgment which is pending as to such a charge in any jurisdiction.

(b) The applicant has been publicly disciplined in any jurisdiction for a violation of a code of professional responsibility or a comparable code of ethics.

(c) The applicant has participated personally, as an attorney or a party, in manifestly excessive and frivolous litigation or has been convicted of contempt of court.

(d) The applicant has been declared mentally ill or incompetent by a court having jurisdiction, and the declaration has not been dissolved or rescinded.

(e) The applicant has been found not guilty of any crime by reason of insanity.

(6) None of the facts sufficient to establish a prima facie case of unfitness, as set forth in subsection (5), shall constitute an absolute prohibition to admission, and a prima facie showing of unfitness on any ground whether or not specified in subsection (5), may be rebutted by sufficient proof, by a preponderance of the evidence, that the applicant is mentally stable and ethically and morally fit for admission.

Source: (4) amended and effective November 10, 1993; (1) and (2)(d) amended and adopted December 14, 1995, effective January 1, 1996; (6) amended and effective March 1, 1996; (1), (2)(d), and (4) corrected and effective November 9, 1999; IP(2)(a) amended and effective March 23, 2000; (2)(d) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Rule 201.11. Request for Disclosure of Confidential Information

(1) Except as otherwise authorized by order of the Supreme Court, all proceedings conducted pursuant to these rules shall be confidential and the Bar Committee shall deny requests for confidential information unless the request is made by:

(a) An agency authorized to investigate the qualifications of persons for admission to practice law;

(b) An agency authorized to investigate the qualifications of persons for government employment;

(c) A lawyer discipline enforcement agency; or

(d) An agency authorized to investigate the qualifications of judicial candidates.

If the request is granted, information shall be released only upon certification by the requesting agency that the confidential information shall be used for authorized purposes only.

(2) If one of the above enumerated agencies requests confidential information, the Bar Committee shall give written notice to the applicant that the confidential information will be disclosed within 14 days unless the applicant obtains an order from the Supreme Court restraining such disclosure.

Source: IP(1) amended and effective June 16, 1994; (2) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Rule 201.12. Reapplication for Admission

(1) An applicant who has been rejected by the Supreme Court as mentally unstable or ethically or morally unfit may reapply for admission five years after the date of the Supreme Court's ruling unless otherwise ordered by the Supreme Court. Upon reapplication, the applicant shall have the burden of showing to the Bar Committee by a preponderance of the evidence the applicant's fitness to practice as prescribed by these rules. Upon reapplication, the applicant also shall complete successfully the written examination for admission to practice, even though the applicant has previously passed such an examination in Colorado.

(2) An applicant for readmission to the Bar after disbarment will be considered a Class C applicant under Rule 201.3(5) and shall satisfy all requirements of Rule 251.29(a).

Source: (2) amended and adopted June 25, 1998, effective July 1, 1998; (2) corrected March 21, 2005, nunc pro tunc June 25, 1998, effective July 1, 1998; (2) amended and effective November 1, 2011.

Rule 201.13. Inspection of Essay Examination Answers

Beginning 21 days after the date the results from an examination are mailed and ending on the 56th day (8th week) after such date, any unsuccessful applicant shall be entitled to a reasonable inspection of the applicant's answers to the essay portion of the examination. After that time, the decision that an applicant has passed or failed the examination shall be final. This rule does not permit applicants to inspect the Multi-State Bar Examination.

Source: Entire rule amended and effective May 23, 1996; entire rule amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Rule 201.14. Oath of Admission

(1) No applicant shall be admitted to the Bar of this State until such time as he or she has taken the oath of admission prescribed by the Supreme Court. No Class A or Class B applicant shall be permitted to take such oath later than eighteen months subsequent to the date upon which his or her application has been approved. No Class C applicant shall be permitted to take such oath later than eighteen months subsequent to the date of the announcement by the Supreme Court that he or she has passed the examination. Nothing herein shall preclude reapplication for admission.

(2) Admission of all applicants shall be by order of the Supreme Court, en banc, and certificates of admission issued to applicants shall be signed by the Clerk of the Supreme Court. Every applicant, before receiving a certificate of admission, shall pay a license fee to be set by the Supreme Court and sign an oath before the Clerk of the Supreme Court or other designated officer. The portion of the license fee necessary to cover the cost of the license shall be remitted to the Clerk of the Supreme Court.

(3) Every applicant, before taking the oath of admission, shall complete the required course on professionalism presented by the Office of Attorney Regulation Counsel in cooperation with the Colorado Bar Association. For applicants eligible for admission after

July 1, 2003, the course shall satisfy 6 units of the 45 unit general requirement during each attorney's continuing legal education first compliance period pursuant to C.R.C.P. 260.2 (1). Attorneys admitted after July 1, 2000, but prior to July 1, 2003, who have not taken the 4 unit professionalism course by July 1, 2003, shall take the 6 unit professionalism course, and shall receive 4 units of the 7 unit ethics requirement and 2 of the general requirement, in that attorney's first continuing legal education compliance period, pursuant to C.R.C.P. 260.2(2). In the event that an applicant is unsuccessful on the Colorado bar examination, the professionalism course shall be valid for one full calendar year following completion of the course. Proceeds from the fee charged for the course shall be divided equally between the Colorado Bar Association, CLE in Colorado, Inc., and the Office of Attorney Regulation Counsel to pay for administering the course and to fund the attorney regulation system.

(4) Class A, Class B and single-client applicants who are certified pursuant to Rule 222 shall have six months following admission to take the required course on professionalism required by Rule 201.14(3).

Source: (3) added and adopted March 21, 2003, effective July 1, 2003; entire rule amended and effective December 4, 2003; (1) and (4) amended and effective November 1, 2011.

ANNOTATION

Law reviews. For article, "The Colorado Character Investigation of Applicants to the Bar", see 28 Dicta 333 (1951).

Annotator's note. The following annotations include cases decided under former C.R.C.P. 220 which was similar to this rule.

Representation by one who fails to take oath of admission. Representation of a criminal defendant by one who is otherwise qualified to practice law but who fails to take the mandatory oath of admission does not constitute a per se denial of the accused's right to counsel. Wilson v. People, 652 P.2d 595 (Colo. 1982), cert. denied, 459 U.S. 1218, 103 S. Ct. 1221, 75 L. Ed. 2d 457 (1983).

Applied in People v. Schultheis, 638 P.2d 8 (Colo. 1981); People v. Harfmann, 638 P.2d 745 (Colo. 1981).

APPENDIX TO RULE 201

Approval of Law Schools

American Bar Association Standards and Rules of Procedure

301 (a) The law school shall maintain an educational program that is designed to qualify its graduates for admission to the bar.

(b) A law school may offer an educational program designed to emphasize some aspects of the law or the legal profession and give less attention to others. If a school offers such a program, that program and its objectives shall be clearly stated in its publications, where appropriate.

(c) The educational program of the school shall be designed to prepare the students to deal with recognized problems of the present and anticipated problems of the future.

302 (a) The law school shall:

(i) Offer to all students instruction in those subjects generally regarded as the core of the law school curriculum;

(ii) Offer to all students at least one rigorous writing experience;

(iii) Offer instruction in professional skills;

(iv) Require of all candidates for the first professional degree, instruction in the duties and responsibilities of the legal profession. Such required instruction need not be limited to any pedagogical method as long as the history, goals, structure and responsibilities of the legal profession and its members, including the ABA Model Code of Professional Responsibility, are all covered. Each law school is encouraged to involve members of the bench and bar in such instruction.

(b) The law school may not offer to its students, for academic credit or as a condition to graduation, instruction that is designed as a bar examination review course.

303 (a) The educational program of the law school shall provide adequate opportunity for:
(i) Study in seminars or by directed research,
(ii) Small classes for at least some portion of the total instructional program.
(b) The law school may not allow credit for study by correspondence.

304 (a) The law school shall maintain and adhere to sound standards of legal scholarship, including clearly defined standards for good standing, advancement, and graduation.
(b) The scholastic achievement of students shall be evaluated from the inception of their studies. As part of the testing of scholastic achievement, a written examination of suitable length and complexity shall be required in every course for which credit is given, except clinical work, courses involving extensive written work such as moot court, practice court, legal writing and drafting, and seminars and individual research projects.
(c) A law school shall not, either by initial admission or subsequent retention, enroll or continue a person whose inability to do satisfactory work is sufficiently manifest that the person's continuation in school would inculcate false hopes, constitute economic exploitation, or deleteriously affect the education of other students.

305 (a) Subject to the qualifications and exceptions contained in this Chapter, the law school shall require, as a condition for graduation, the completion of a course of study in residence of not less than 1200 class hours, extending over a period of not less than ninety weeks for full-time students, or not less than one hundred and twenty weeks for part-time students.
(i) "In residence" means attendance at classes in the law school.
(ii) "Class hours" means time spent in regularly scheduled class sessions in the law school, including time allotted for final examinations, not exceeding ten percent of the total number of class session hours.
(iii) "Full-time student" means a student who devotes substantially all working hours to the study of law.
(b) To receive residence credit for an academic period, a full-time student must be enrolled in a schedule requiring a minimum of ten class hours a week and must receive credit for at least nine class hours and a part-time student must be enrolled in a schedule requiring a minimum of eight class hours a week and must receive credit for at least eight class hours. If a student is not enrolled in or fails to receive credit for the minimum number of hours specified in this subsection, the student may receive residence credit only in the ratio that the hours enrolled in or in which credit was received, as the case may be, bear to the minimum specified.
(c) Regular and punctual class attendance is necessary to satisfy residence and class hours requirements.

306 If the law school has a program that permits or requires student participation in studies or activities away from the law school or in a format that does not involve attendance at regularly scheduled class sessions, the time spent in such studies or activities may be included as satisfying the residence and class hours requirements, provided the conditions of this section are satisfied.
(a) The residence and class hours credit allowed must be commensurate with the time and effort expended by and the educational benefits to the participating student.
(b) The studies or activities must be approved in advance, in accordance with the school's established procedures for curriculum approval and determination.
(c) Each such study or activity, and the participation of each student therein, must be conducted or periodically reviewed by a member of the faculty to insure that in its actual operation it is achieving its educational objectives and that the credit allowed therefor is, in fact, commensurate with the time and effort expended by, and the educational benefits to, the participating student.
(d) At least 900 hours of the total time credited towards satisfying the "in residence" and "class hours" requirements of this Chapter shall be in actual attendance in regularly scheduled class sessions in the law school conferring the degree, or, in the case of a student receiving credit for studies at another law school, at the law school at which the credit was earned.

308 The law school may admit with advanced standing and allow credit for studies at a law school outside the United States if the studies
(i) Either were "in residence" as provided in Section 305, or qualify for credit under Section 306, and

(ii) The content of the studies was such that credit therefor would have been allowed towards satisfaction of degree requirements at the admitting school, and
(iii) The admitting school is satisfied that the quality of the educational program at the prior school was at least equal to that required for an approved school.
Advanced standing and credit allowed for foreign study shall not exceed one-third of the total required by the Standards for the first professional degree unless the foreign study related chiefly to a system of law basically followed in the jurisdiction in which the admitting school is located; and in no event shall the maximum advanced standing and credit allowed exceed two-thirds of the total required by the Standards for the first professional degree.

Rule 220. Out-of-State Attorney — Conditions of Practice

(1) An attorney who meets the following conditions is an out-of-state attorney for the purpose of this rule:
(a) The attorney is licensed to practice law and is on active status in another jurisdiction in the United States;
(b) The attorney is a member in good standing of the bar of all courts and jurisdictions in which he or she is admitted to practice;
(c) The attorney has not established domicile in Colorado; and
(d) The attorney has not established a place for the regular practice of law in Colorado from which such attorney holds himself or herself out to the public as practicing Colorado law or solicits or accepts Colorado clients.
(2) An out-of-state attorney may practice law in the state of Colorado except that an out-of-state attorney who wishes to appear in any state court of record must comply with C.R.C.P. 221 concerning *pro hac vice* admission and an out-of-state attorney who wishes to appear before any administrative tribunal must comply with C.R.C.P. 221.1 concerning *pro hac vice* admission before state agencies.
(3) An out-of-state attorney practicing law under this rule is subject to the Colorado Rules of Professional Conduct and rules of procedure regarding attorney discipline and disability proceedings and those remedies set forth in C.R.C.P. 234(a).
(4) An out-of-state attorney who engages in the practice of law in Colorado pursuant to Rule 220 shall be deemed, for the purposes of Colorado Revised Statutes, Title 12, Article 5, Sections 101, 112, and 115, to have obtained a license for the limited scope of practice specified in this rule.

Source: Entire rule added and adopted December 4, 2002, effective January 1, 2003.

ANNOTATION

Law reviews. For article, "Colorado Adopts Rules Governing Out-of-State Attorneys", see 32 Colo. Law. 27 (February 2003).

Rule 221. Out-of-State Attorney — *Pro Hac Vice* Admission

An out-of-state attorney (as defined in Rule 220) may be permitted to appear on a particular matter in any state court of record under the following circumstances:
(1) Filing Requirements.
(a) In order to be permitted to appear as counsel in a state trial court, the attorney must first:
(i) File a verified motion requesting permission to appear with the trial court;
(ii) Designate an associate attorney who is admitted and licensed to practice law in this state;
(iii) File a copy of the verified motion with the Clerk of the Colorado Supreme Court at the Attorney Registration Office at the same time the verified motion is filed with the trial court;
(iv) Pay a $250 fee to the Clerk of the Colorado Supreme Court collected by the Attorney Registration Office; and

(v) Obtain permission from the trial court for such appearance.

(b) In the verified motion requesting permission to appear, the attorney must include:

(i) A statement identifying all jurisdictions in which the attorney has been licensed;

(ii) A statement identifying by date, case name, and case number all other matters in Colorado in which *pro hac vice* admission has been sought in the preceding five years, and whether such admission was granted or denied;

(iii) A statement identifying all jurisdictions in which the attorney has been publicly disciplined, or in which the attorney has any pending disciplinary proceeding, including the date of the disciplinary action, the nature of the violation, and the penalty imposed;

(iv) A statement identifying the party or parties represented, and that the attorney has notified the party or parties represented of the verified motion requesting permission to appear;

(v) A statement that the attorney acknowledges he or she is subject to all applicable provisions of the Colorado Rules of Professional Conduct and the Colorado Rules of Civil Procedure, and that such rules have been read and will be followed throughout the *pro hac vice* admission, and that the verified motion complies with those rules;

(vi) The name, address, and membership status of the licensed Colorado attorney associated for purposes of the representation;

(vii) A certificate indicating service of the verified motion upon all counsel of record and the attorney's client in the matter in which leave to appear *pro hac vice* is sought; and

(viii) The signature of the licensed Colorado associate attorney, verifying that attorney's association on the matter.

(2) Names and Appearances. The name and address of the licensed Colorado associate attorney must be shown on all papers served and filed. The Colorado associate attorney shall appear personally and, unless excused, remain in attendance with the attorney in all appearances.

(3) Frequency of Appearances. A separate petition, fee, and order granting permission are required for each action in which an attorney appears in Colorado.

(4) Permission to Provide Information to Trial Court. The Colorado Supreme Court offices may provide information to the trial court that it believes relevant for the trial court's ruling on the pending motion to appear. The trial court nevertheless retains all authority to rule on the motion as it deems appropriate.

(5) Appellate Matters and Other Forms of Review.

(a) If an attorney wants to appear in a proceeding before a Colorado appellate court, and the attorney obtained permission to appear in a proceeding involving the same action in a Colorado state trial court, the attorney only needs to file an updated affidavit with the Clerk of the Supreme Court at the Attorney Registration Office. No additional filing fee is required.

(b) If an attorney wants to appear in a proceeding before a Colorado appellate court and the attorney did not obtain permission to appear in a proceeding involving the same action in a Colorado state trial court or administrative agency, the attorney shall file motion and affidavit with the Clerk of the Colorado appellate court, with a copy sent to the Clerk of Supreme Court at the Attorney Registration Office requesting permission to appear. The motion, affidavit, and filing fee must be submitted as otherwise provided in subsection (1) of this rule.

(6) Discipline and Disability Jurisdiction. Any attorney who has received *pro hac vice* admission under this rule shall be subject to all applicable provisions of the Colorado Rules of Professional Conduct, except for the provisions of Colo. RPC 1.15 that require an attorney to have a business account and a trust account in a financial institution doing business in Colorado; and the Colorado Rules of Civil Procedure, except C.R.C.P. 227 (general registration fees) and C.R.C.P. 260 (mandatory continuing legal education).

Source: Entire rule amended and adopted December 4, 2002, effective January 1, 2003; entire rule amended and effective June 22, 2006.

ANNOTATION

Law reviews. For article, "Colorado Adopts Rules Governing Out-of-State Attorneys", see 32 Colo. Law. 27 (February 2003).

Criminal court may admit attorney pro hac vice. Although the criminal rules do not specifically authorize admission of an attorney pro hac vice, a court may apply the civil rules in a criminal case when the criminal rules do not specify a specific procedure. People v. Griffin, 224 P.3d 292 (Colo. App. 2009).

Rule 221.1. Out-of-State Attorney — *Pro Hac Vice* — Admission Before State Agencies

An out-of-state attorney (as defined in Rule 220) may, in the discretion of an administrative hearing officer in this state, be permitted to appear on a particular matter before any state agency in the hearings or arguments of any particular cause in which, for the time being, he or she is employed, under the same filing requirements as is set forth in C.R.C.P. 221(1), except for (a)(ii); (b)(vi) and (b)(viii).

Source: Entire rule amended and adopted December 4, 2002, effective January 1, 2003.

ANNOTATION

Law reviews. For article, "Colorado Adopts Rules Governing Out-of-State Attorneys", see 32 Colo. Law. 27 (February 2003).

Rule 222. Single-Client Counsel Certification

(1) Single-Client Representation. An attorney who is not licensed to practice law in the state of Colorado may be certified to act as counsel for a single-client upon application to and approval by the Colorado Supreme Court if the following conditions are met:

(a) The attorney has established domicile in Colorado;

(b) The attorney is licensed to practice law and is in active status in another state in the United States;

(c) The attorney is a member in good standing of the bar of all courts and jurisdictions in which he or she is admitted to practice; and

(d) The attorney's practice of law is limited to acting as counsel for such single-client (which may include a business entity or an organization and its organizational affiliate.)

(2) Application. The application and payment of the $725 certification fee must be made payable to the Clerk of the Colorado Supreme Court and collected by the Attorney Registration Office. The application shall contain:

(a) a certification of the limited nature of such practice;

(b) a certification that the attorney has advised such single-client that the attorney is not licensed in Colorado;

(c) a certification by the client that the client is aware the attorney is not a licensed Colorado attorney and that the attorney will be exclusively employed by that client; and

(d) a certificate of good standing from all courts and jurisdictions in which he or she is admitted to practice.

(3) Limitations. Approval under this rule shall be solely for so long as such attorney shall engage in such limited practice. The attorney may not act as counsel for the client until the application is accepted and approved. Such approval shall automatically terminate when the attorney ceases to be engaged in such limited practice. The attorney approved pursuant to this section shall notify the Clerk of the Colorado Supreme Court at the Attorney Registration Office of any change of status in this regard as soon as practicable, and shall not be authorized to represent any other client.

(4) Authority. An attorney approved under this rule has the authority to act on behalf of the single-client for all purposes as if licensed in Colorado. An attorney approved under this rule shall be deemed, for the purposes of Colorado Revised Statutes, Title 12, Article

5, Sections 101, 112, and 115, to have obtained a license for the limited scope of practice specified in this rule. Additionally, an attorney approved under this rule has the authority to provide voluntary pro bono public service to indigent persons and organizations serving indigent persons.

(5) Discipline and Disability Jurisdiction. An attorney approved under this rule is subject to the Colorado Rules of Professional Conduct and the Rules of Procedure Regarding Attorney Discipline and Disability Proceedings.

(6) Fees. An attorney approved under this rule shall also be required to pay annual registration fees and comply with all other provisions of C.R.C.P. 227, as well as comply with the mandatory legal education requirements of C.R.C.P. 260.

(7) Certification Number. An attorney approved under this rule shall be assigned a certification number which shall be used to identify that attorney's certification status in Colorado. Whenever an initial pleading is signed by an attorney authorized under this rule, it shall also include thereon the attorney's certification number. Whenever an initial appearance is made in court without a written pleading, the attorney shall advise the court of the attorney's certification number. The number need not be on any subsequent pleadings.

Source: Entire rule added and adopted December 4, 2002, effective January 1, 2003; (4) amended and effective April 27, 2006; (6) amended and effective June 22, 2006.

ANNOTATION

Law reviews. For article, "Colorado Adopts Rules Governing Out-of-State Attorneys", see 32 Colo. Law. 27 (February 2003).

Rule 223. Pro Bono/Emeritus Attorney

Statement of Purpose. To provide a licensing status to allow retired or inactive attorneys to provide pro bono legal services to the indigent through nonprofit entities as defined in part 1, below.

(1) A pro bono/emeritus attorney may, under the auspices of a Colorado nonprofit entity whose purpose is or includes the provision of pro bono legal representation to indigent or near-indigent persons, act as legal counsel on behalf of a person seeking representation through such entity.

(2) To act in such a capacity the pro bono/emeritus attorney must be either:

(a) An attorney admitted to practice law in Colorado who:

(i) is now on inactive status;

(ii) is in good standing;

(iii) has no pending disciplinary proceeding; and

(iv) will not receive or expect compensation or other direct or indirect pecuniary gain for the legal services rendered; or

(b) An attorney not admitted to practice in Colorado who meets the following conditions:

(i) is licensed to practice law and is on active, inactive, or equivalent status in another jurisdiction in the United States;

(ii) is in good standing in all courts and jurisdictions in which he or she is admitted to practice;

(iii) has no pending disciplinary proceeding;

(iv) agrees to be subject to the Colorado Rules of Professional Conduct, the rules of procedure regarding attorney discipline and disability proceedings, and the remedies set forth in C.R.C.P. 234(a);

(v) limits his or her practice to acting as pro bono counsel as set forth in this rule and will not receive or expect compensation or other direct or indirect pecuniary gain for the legal services rendered hereunder; and

(vi) completes the application described herein and pays a one-time administrative fee

of $50.00, payable to The Clerk of the Colorado Supreme Court and collected by the Attorney Registration Office. The application shall contain:

(A) A certification that the attorney agrees to the provisions of paragraphs (2)(b)(iv) & (v), above; and

(B) A certification that the attorney is in good standing in all courts and jurisdictions in which he or she is admitted to practice, and has no pending disciplinary proceeding in any jurisdiction.

(c) An attorney approved under this rule shall be assigned a certification number, which shall be used to identify the attorney's status as a pro bono/emeritus attorney.

(3) All fees collected by the Attorney Registration Office under this rule shall be used to fund the Attorney Regulation System.

(4) Pro bono/emeritus attorneys shall not be required to pay annual registration fees.

(5) All pro bono/emeritus attorneys shall annually file a registration statement on or before February 28 of each year identifying the organized nonprofit entity or entities, as described in section (1) of this rule, for which the attorney is currently volunteering at the time of filing the registration statement or volunteered in the prior calendar year. In lieu of filing such a registration statement, the attorney may pay the registration fee that was applicable in the prior calendar year for registered inactive attorneys pursuant to C.R.C.P. 227(A) and, thereby, avoid termination of her or his pro/bono emeritus status. Failure of a pro bono/emeritus attorney to file a registration statement or pay the applicable prior year's inactive attorney registration fee by February 28 of each year shall result in automatic termination of pro bono/emeritus status.

(6) This Rule shall not preclude a nonprofit entity from receiving court-awarded attorney fees for representation provided by a pro bono/emeritus attorney and shall not preclude a pro bono/emeritus attorney from receiving reimbursement for otherwise recoverable costs incurred in representing a pro bono client.

Source: Entire rule added and adopted June 28, 2007, effective July 1, 2007.

ANNOTATION

Law reviews. For article, "New Rule Allows Retired and Inactive Lawyers to Provide Pro Bono Legal Services", see 36 Colo. Law. 75 (September 2007).

Rule 224. Provision of Legal Services Following Determination of a Major Disaster

(1) Determination of Major Disaster. Solely for purposes of this rule, the Supreme Court shall determine when an emergency affecting the justice system, as a result of a natural or other major disaster, has occurred in:

(a) The state of Colorado, and whether the emergency caused by the major disaster affects the entirety or only a part of this state, or

(b) Another jurisdiction in the United States, but only after such a determination and its geographical scope have been made by the highest court of that jurisdiction.

(2) Temporary Practice in Colorado Following a Major Disaster in Colorado. Following the determination of an emergency in Colorado pursuant to paragraph (1) of this rule, an out-of-state attorney who meets the conditions of C.R.C.P. 220 (1)(a) and (b) may be allowed to establish a place for the temporary practice of law from which the attorney may provide legal services not otherwise authorized by Rule 220. The terms and conditions of such temporary practice will be set forth in the Supreme Court's emergency order, and will depend upon the nature and extent of the emergency affecting the justice system, and the needs for legal services resulting from such emergency.

(3) Temporary Practice in Colorado Following A Major Disaster in Another Jurisdiction. Following the determination of a major disaster in another jurisdiction in the United States, pursuant to paragraph (1) of this rule, an out-of-state attorney who meets the conditions of C.R.C.P. 220(1)(a) and (b) may establish a place for the temporary practice of law in Colorado not otherwise authorized by C.R.C.P. 220, from which such attorney may

provide legal services related to that attorney's practice of law in the licensing jurisdiction or the area of such licensing jurisdiction where the major disaster occurred.

(4) Duration of Authority for Temporary Practice. The authority for an out-of-state attorney to maintain a place for the practice of law in Colorado as described in paragraphs (2) and (3) shall end when the Supreme Court determines that the conditions caused by the major disaster have ended. The Supreme Court may allow a winding down period for such temporary practice offices.

(5) Court Appearances. The authority granted by this rule does not include appearances in Colorado state courts of record or administrative tribunals, except:

(a) When the out-of-state attorney files a motion for *pro hac vice* admission pursuant to C.R.C.P. 221 and 221.1, and obtains permission from the trial court for such appearance (the Supreme Court may waive *pro hac vice* admission fees at the time of the determination of the major disaster as described in paragraph (1) or at any time thereafter while the determination remains in effect); or

(b) When the Supreme Court, in any determination made under paragraph (1), grants blanket permission to attorneys providing legal services pursuant to paragraph (2) to appear in all or designated Colorado courts or administrative tribunals, thereby suspending the *pro hac vice* application and fee requirements set forth in C.R.C.P. 221 and 221.1.

(6) Disciplinary Authority and Registration Requirement. Out-of-state attorneys who establish a place for the temporary practice of law in Colorado pursuant to paragraphs (2) or (3) are subject to this Supreme Court's disciplinary authority and the Colorado Rules of Professional Conduct as provided in C.R.C.P. 220(3) and Colo. RPC 8.5. Prior to opening such place for the temporary practice of law in Colorado, these out-of-state attorneys shall file a registration statement with the Colorado Supreme Court Office of Attorney Registration. The registration statement shall be in a form prescribed by the Supreme Court. Any out-of-state attorney who provides legal services pursuant to this rule shall not be considered to be engaged in the unauthorized practice of law in Colorado, and shall be deemed, for the purposes of Colorado Revised Statutes, Title 12, Article 5, Sections 101, 112 and 115, to have obtained a license for the limited scope of practice specified in this rule.

(7) Notification to Clients. Out-of-state attorneys who establish a place for the temporary practice of law in Colorado pursuant to paragraph (2) shall inform Colorado clients in writing, at the time the relationship commences, of the jurisdiction(s) in which the attorney is licensed or otherwise authorized to practice law, any limits on that authorization, and that the attorney is not authorized to practice law in Colorado except as permitted by this rule and the Court's emergency order.

Source: Entire rule added and effective June 16, 2011.

Rule 226. Legal Aid Dispensaries; Law Students Practice

Repealed July 12, 2011, nunc pro tunc June 16, 2011, effective immediately.

Rule 226.5. Legal Aid Dispensaries and Law Student Externs

(1) Legal Aid Dispensaries.

Students of any law school that maintains a legal-aid dispensary where poor or legally underserved persons receive legal advice and services shall, when representing the dispensary and its clients, be authorized to advise clients on legal matters and appear in any court or before any administrative tribunals or arbitration panel in this state as if licensed to practice law.

(2) Law Student Externs.

A. Practice by law student extern (formerly section 12-5-116.1)

(1) An eligible law student extern, as specified in section 2B, may appear and participate in any civil proceeding in any municipal, county, or district court (including domestic relations proceedings) or before any administrative tribunal in this state, or in any county or municipal court criminal proceeding, except when the defendant has been charged with a felony, or in any juvenile proceeding in any municipal, county or district

court, or before any magistrate in any juvenile or other proceeding or any parole revocation under the following circumstances:

(a) If the person on whose behalf the extern is appearing has provided written consent to that appearance and the law student extern is under the supervision of a supervising lawyer, as specified in section 2D.

(b) When representing the office of the state public defender and its clients, if the person on whose behalf the extern is appearing has provided written consent to that appearance and the law student extern is under the supervision of the public defender or one of his deputies.

(c) On behalf of the state or any of its departments, agencies, or institutions, a county, a city, or a municipality, with the written approval and under the supervision of the attorney general, attorney for the state, county attorney, district attorney, city attorney, or municipal attorney. A general approval for the law student extern to appear, executed by the appropriate supervising attorney pursuant to this paragraph (c), shall be filed with the clerk of the applicable court/administrative tribunal and brought to the attention of the judge/presiding officer thereof.

(d) On behalf of a nonprofit legal services organization where poor or legally underserved persons receive legal advice and services if the person on whose behalf the student is appearing has provided written consent to that appearance and the law student extern is under the supervision of a supervising lawyer, as specified in Section 2D.

(2) The consent or approval referred to in subsection (1) of this section, except a general approval, shall be made in the record of the case and shall be brought to the attention of the judge of the court or the presiding officer of the administrative tribunal.

(3) In addition to the activities authorized in subsection (1) of this section, an eligible law student extern may engage in other activities under the general supervision of a supervising lawyer, including but not limited to the preparation of pleadings, briefs, and other legal documents which must be approved and signed by the supervising lawyer and assistance to indigent inmates of correctional institutions who have no attorney of record and who request such assistance in preparing applications and supporting documents for post conviction relief.

B. Eligibility requirements for law student extern practice (formerly section 12-5-116.2)

(1) In order to be eligible to make an appearance and participate pursuant to section 2A, a law student must:

(a) Be duly enrolled in an ABA accredited law school, or a recent graduate of such a law school who has applied for admission to the Colorado Bar. For purposes of this rule, the "law student's" eligibility continues after graduation from law school and until the announcement of the results of the first bar examination following the student's graduation, provided for anyone who passes that examination, eligibility shall continue in effect through the date of the first swearing in ceremony following the examination.

(b) Have completed a minimum of two years of legal studies;

(c) Have the certification of the dean of such law school that the dean has no personal knowledge of or knows of nothing of record that indicates that the student is not of good moral character and, in addition, that the law student has completed the requirements specified in paragraph (b) of this subsection (1) and is a student in good standing, or recently graduated. The dean of such law school has no continuing duty to certify the student's good moral character after the student has graduated from law school [at that point, the law student/applicant to the Colorado Bar has obligations to maintain the integrity of the profession pursuant to Colo. RPC 8.1].

(d) Be introduced to the court or administrative tribunal in which the extern is appearing as a law student extern by a lawyer authorized to practice law in this state;

(e) Neither ask nor receive any compensation or remuneration of any kind for the extern's services from the person on whose behalf the extern renders services; but such limitation shall not prevent the law student extern from receiving credit for participation in the law school externship program upon prior approval of the law school, nor shall it prevent the law school, the state, a county, a city, a municipality, or the office of the district attorney or the public defender from paying compensation to the law school extern, nor

shall it prevent any agency from making such charges for its services as it may otherwise properly require; and

(f) State that the extern has read, is familiar with, and will be governed in the conduct of the extern's activities under section 2A by the Colorado Rules of Professional Conduct.

C. Certification of law student extern by laws school dean-filing-effective period-withdrawal by dean or termination (formerly section 12-5-116.3)

(1) The certification by the law school dean, pursuant to section 2B(1)(c), required in order for a law student extern to appear and participate in proceedings:

(a) Shall be filed with the clerk of the Colorado Supreme Court Office of Attorney Registration, and unless it is sooner withdrawn, shall remain in effect until the student's graduation.

(b) May be withdrawn by the dean at any time by mailing a notice to that effect to the clerk of the Colorado Supreme Court Office of Attorney Registration, and such withdrawal may be without notice or hearing and without any showing of cause; and

(c) May be terminated by the supreme court at any time without notice or hearing and without any showing of cause.

D. Qualifications and requirements of supervising lawyer (formerly section 12-5-116.4)

(1) A supervising lawyer, under whose supervision an eligible law student extern appears and participates pursuant to section 2A, shall be authorized to practice law in this state and:

(a) Shall be a lawyer working for or on behalf of an organization identified in sections 2A(1)(b)-(d);

(b) Shall assume personal professional responsibility for the conduct of the law student extern; and

(c) Shall assist the law student extern in the extern's preparation to the extent the supervising lawyer considers it necessary.

Source: Entire rule added and effective June 16, 2011.

Rule 227. Registration Fee

A. Registration Fee of Attorneys and Attorney Judges

(1) General Provisions.

(a) Fees. On or before February 28 of each year, every attorney admitted to practice in Colorado (including judges, those admitted on a provisional or temporary basis and those admitted as judge advocate) shall annually file a registration statement and pay a fee as set by the Colorado Supreme Court. As of 2008, the fees set by the court are as follows: the fee for active attorneys is $225.00; the fee of any attorney whose first admission to practice is within the preceding three years is $180.00; the fee for attorneys on inactive status is $95.00. All persons first becoming subject to this rule shall file a statement required by this rule at the time of admission, but no annual fee shall be payable until the first day of January following such admission. As necessary to defray the costs of disciplinary administration and enforcement, the costs incurred with respect to unauthorized practice of law matters, and expenses incurred in the administration of this rule, the Supreme Court will authorize periodic increases to the annual fee for every Colorado attorney.

(b) Collection of Fee. The annual fee shall be collected by the Clerk of the Supreme Court of Colorado, who shall send and receive the notices and statements provided for hereafter.

(c) Application of Fees. The fee shall be divided. Nine dollars shall be used to pay the costs of establishing and administering the mandatory continuing legal education requirement. A portion of the fee, to be determined and adjusted periodically by the Supreme Court, shall be used to support designated providers that have been selected by the Advisory Committee to provide assistance to attorneys needing help in dealing with physical, emotional, or psychological problems which may be detrimental to their ability to practice law. Forty dollars shall be used to maintain an Attorneys' Fund for Client

Protection. The remaining portion of the fee, and the entire fee of those on inactive status, shall be used only to defray the costs of disciplinary administration and enforcement, the costs incurred with respect to unauthorized practice matters, and the expenses incurred in the administration of this rule.

(d) Initial Registration of Non-Registered Attorneys. Every attorney admitted to practice in Colorado before January 1, 1974 who has not previously complied with the provisions of C.R.C.P. 227 may apply for registration with the Clerk of the Supreme Court of Colorado by filing a registration statement and paying a fee of $100.00.

(2) Statement.

(a) Contents. The annual registration statement shall be on a form prescribed by the Clerk, setting forth:

(1) date of admission to the Bar of the Colorado Supreme Court;

(2) registration number;

(3) current residence and office addresses and, if applicable, a preferred mailing address for the Colorado Courts;

(4) certification as to (a) whether the attorney has been ordered to pay child support and, if so, whether the attorney is in compliance with any child support order, (b) whether the attorney or the attorney's law firm has established one or more interest-bearing accounts for client funds as provided in Colo. RPC 1.15, and if so, the name of the financial institution, account number and location of the financial institution, or, if not, the reason for the exemption, and (c) with respect to attorneys engaged in the private practice of law, whether the attorney is currently covered by professional liability insurance and, if so, whether the attorney intends to maintain insurance during the time the attorney is engaged in the private practice of law; and

(5) such other information as the Clerk may from time to time direct.

(b) Notification of Change. Every attorney shall file a supplemental statement of change in the information previously submitted, including home and business addresses, within 28 days of such change. Such change shall include, without limitation, the lapse or termination of professional liability insurance without continuous coverage.

(c) Availability of Information. The information provided by the lawyer regarding professional liability insurance shall be available to the public through the Supreme Court Office of Attorney Registration and on the Supreme Court Office of Attorney Registration website.

(3) Compliance.

(a) Late Fee. Any attorney who pays the annual fee or files the annual registration statement after February 28 but on or before March 31 shall pay a late fee of $50.00 in addition to the registration fee. Any attorney who pays the annual fee or files the annual registration statement after March 31 shall pay a late fee of $150.00 for each such year, in addition to the registration fee.

(b) Receipt - Demonstration of Compliance. Within 28 days of the receipt of each fee and of each statement filed by an attorney in accordance with the provisions of this rule, receipt thereof shall be acknowledged on a form prescribed by the Clerk in order to enable the attorney on request to demonstrate compliance with the requirement of registration pursuant to this rule.

(c) Initial Pleading Must Contain Registration Number. Whenever an initial pleading is signed by an attorney, it shall also include thereon the attorney's registration number. Whenever an initial appearance is made in court without a written pleading, the attorney shall advise the court of the registration number. The number need not be on any subsequent pleadings.

(4) Suspension.

(a) Failure to Pay Fee or File Statement - Notice of Delinquency. An attorney shall be summarily suspended if the attorney either fails to pay the fee or fails to file a complete statement or supplement thereto as required by this rule prior to May 1, provided a notice of delinquency has been issued by the Clerk and mailed to the attorney addressed to the attorney's last known mailing address at least 28 days prior to such suspension, unless an excuse has been granted on grounds of financial hardship.

(b) Failure of Judge to Pay Fee or File Statement. Any judge subject to the

jurisdiction of the Commission on Judicial Qualifications or the Denver County Court Judicial Qualifications Commission who fails to timely pay the fee or file a complete statement or supplement thereto as required by this rule shall be reported to the appropriate commission, provided a notice of delinquency has been issued by the Clerk and mailed to the judge addressed to the judge's last known business address at least 28 days prior to such reporting, unless an excuse has been granted on grounds of financial hardship.

(5) Reinstatement.

(a) Application - Reinstatement Fee. Any attorney suspended under the provisions of section (4)(a) above shall not be reinstated until application for reinstatement is made in writing and the Clerk acts favorably on the application. Each application for reinstatement shall be accompanied by a reinstatement fee of $100.00 and payment of all arrearages and late fees to the date of the request for reinstatement.

(b) Report Judge's Payment. If any judge who is reported to a commission under the provisions of section (4)(b) above subsequently makes payment of all arrearages, such payment shall be reported to the commission by the Clerk.

(6) Inactive Status.

(a) Notice. An attorney who has retired or is not engaged in practice shall file a notice in writing with the Clerk that he or she desires to transfer to inactive status and discontinue the practice of law.

(b) Payment of Fee - Filing of Statement. Upon the filing of the notice to transfer to inactive status, the attorney shall no longer be eligible to practice law but shall continue to pay the fee required under section (1)(a) above and file the statements and supplements thereto required by this rule on an annual basis.

(c) Exemption - Age 65. Any registered inactive attorney over the age of 65 is exempt from payment of the annual fee.

(7) Transfer to Active Status.

Upon the filing of a notice to transfer to inactive status and payment of the fee required under section (1)(a) above and any arrearages, if owed, an attorney shall be removed from the roll of those classified as active until and unless a request for transfer to active status is made and granted. Transfer to active status shall be granted, unless the attorney is subject to an outstanding order of suspension or disbarment, upon the payment of any assessment in effect for the year the request is made and any accumulated arrearages for non-payment of inactive fees.

(8) Resignation.

An attorney may resign from the practice of law in Colorado upon order of the Supreme Court and thereby be excused from paying the annual registration fee provided that no disciplinary or disability matter or order is pending against the attorney. Any attorney who wishes to resign must petition the Supreme Court pursuant to this Rule and tender the attorney's certificate of admission with the petition. Any attorney who so resigns is not eligible for reinstatement or transfer to active or inactive status and may be admitted to the practice of law in Colorado only by complying with Rule 201 regarding admission to the practice of law. Any attorney who so resigns remains subject to the jurisdiction of the Supreme Court as set forth in Rule 241.1(b) with respect to the attorney's practice of law in Colorado.

B. Registration Fee of Nonattorney Judges

(1) Every nonattorney judge who is subject to the jurisdiction of the Commission on Judicial Qualifications shall pay an annual fee of $10.00. The annual fee shall be collected by the Clerk of the Supreme Court of Colorado, who shall send and receive. or cause to be sent and received, the notices and fees provided for hereafter. The ten-dollar fee shall be used to pay the costs of establishing and administering the mandatory continuing legal education requirement. On or before March 1 of each year, the Chief Justice shall prepare, certify and file with the Clerk a written report of the receipts and disbursements under this rule during the preceding calendar year. These reports shall be public documents.

(2) Any nonattorney judge who fails to timely pay the fee required under subparagraph

(1) above shall be reported to the Commission on Judicial Qualifications, provided a notice of delinquency has been issued by the Clerk and mailed to the nonattorney judge by certified mail addressed to the county court in the respective county seat at least 28 days prior to such reporting, unless an excuse has been granted on grounds of financial hardship.

(3) If any nonattorney judge who is reported to the Commission on Judicial Qualifications under the provisions of subparagraph (2) above subsequently makes payment of arrearages, such payment shall be reported to the Commission by the Clerk.

(4) On or before January 31 of each year, all nonattorney judges shall file any affidavit required by Rule 260.5 and shall pay the annual fee required by this rule.

(5) Within 21 days after the receipt of each fee in accordance with the provisions of subparagraph (4) above, receipt thereof shall be acknowledged on a form prescribed by the Clerk.

Source: A.(1)(a) amended October 17, 1991, effective January 1, 1992; A.(8) added and effective October 15, 1992; A.(1)(c) amended June 25, 1998, effective June 30, 1998; A.(2)(a) and A.(3)(a) amended June 25, 1998, effective July 1, 1998; A.(1)(a) amended June 25, 1998, effective January 1, 1999; entire rule amended November 22, 2000, effective January 1, 2001; A.(1)(c) amended June 7, 2001, effective July 1, 2001; A.(1)(a) amended April 14, 2005, effective January 1, 2006; A.(1) amended and effective March 16, 2006; A.(4)(a) amended and effective April 27, 2006; A.(1)(c) amended and effective June 22, 2006; A.(1), A.(2), A.(3), A.(4), and A.(5) amended and Comment added September 10, 2008, effective January 1, 2009; A.(2)(b), A.(3)(b), A.(4), B.(2), and B.(5) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

COMMENT

The Supreme Court sets the annual attorney registration fee. The annual attorney registration fee includes both attorneys on active status and attorneys on inactive status. Attorneys admitted under C.R.C.P. 222 (Single-Client Certification) annually pay the active attorney fee. The Supreme Court apportions the active attorney fee to the various attorney regulation and registration offices; the continuing legal education office; the Attorneys' Fund for Client Protection; and the Colorado Attorney Assistance Program.

To cover the operating costs of the various programs the court increased the annual attorney registration fee every six to eight years. In 2006, the court increased the active attorney registration fee fifteen percent. In 1998, to fund major changes to the attorney regulation system the court increased the fee seventy percent. The infrequent increases resulted in a surplus in the attorney registration/regulation fund for a period of years. In an effort to reduce the impact of a substantial fee increase every six to eight years the court adopted a more modest and consistent way of determining attorney registration fees. The court will authorize smaller but more frequent fee increases as necessary to cover operating expenses related to the costs of the Attorneys' Fund for Client Protection, attorney regulation, unauthorized practice of law matters, and administration of this rule.

ANNOTATION

Law reviews. For a discussion of federal jurisdiction arising under this rule, see survey of Tenth Circuit decisions on federal practice and procedure, 53 Den. L.J. 153 (1976). For article, "Colorado's New Rule on Mandatory Professional Liability Insurance Disclosure", see 38 Colo. Law. 69 (February 2009). For article, "Attorney-Client Communications in Colorado", see 38 Colo. Law. 59 (April 2009).

Constitutionality. The difference in treatment accorded lawyers who pay the fee under this rule and those who do not pay the fee does not constitute invidious discrimination against those who do not pay the fee as it is not in violation of due process or equal protection of the law. May v. Supreme Court of Colo., 508 F.2d 136 (10th Cir. 1974), cert. denied, 422 U.S. 1008, 95 S. Ct. 2631, 45 L. Ed. 2d 671 (1975).

Attorney currently under suspension for failure to comply with registration requirements is still subject to jurisdiction of the court for additional violations of Colorado rules of civil procedure and failure to comply with the code of professional responsibility. People v. Richards, 748 P.2d 341 (Colo. 1987).

Conduct violating this rule sufficient to justify public censure. People v. Smith, 757 P.2d 628 (Colo. 1988); People v. Newman, 925 P.2d 783 (Colo. 1996).

Disbarment is warranted for driving while

impaired, marihuana possession, improperly executing agreement without permission, and failing to perform certain professional duties, despite the lack of a prior record. People v. Gerdes, 891 P.2d 995 (Colo. 1995).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Woodrum, 911 P.2d 640 (Colo. 1996).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Garrett, 802 P.2d 1082 (Colo. 1990); People v. Dash, 811 P.2d 36 (Colo. 1991); People v. Regan, 831 P.2d 893 (Colo. 1992); People v. Denton, 839 P.2d 6 (Colo. 1992); People v. Cassidy, 884 P.2d 309 (Colo. 1994).

Conduct violating this rule sufficient to justify suspension. People v. Craig, 653 P.2d 1115 (Colo. 1982).

Conduct violating this rule sufficient to justify disbarment. People v. Greene, 773 P.2d 528 (Colo. 1989).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Fager, 938 P.2d 138 (Colo. 1997); People v. Clyne, 945 P.2d 1386 (Colo. 1997).

Facts supported finding of direct contempt when defendant admittedly made offensive statement during the course of proceedings even though obscenity was directed toward counsel for the People and merely overheard by the court. There was no abuse of discretion by the trial court given the fact that the defendant admitted it was inappropriate and an affront to the dignity of the court and its proceedings, and given the fact that defendant was an attorney admitted to the Bar. People v. Holmes, 967 P.2d 192 (Colo. App. 1998).

Applied in People v. Whiting, 189 Colo. 253, 539 P.2d 128 (1975).

NOTE: Rules 201 to 227 are a part of the Colorado Rules of Civil Procedure. Rule 110(b), Use of Terms, provides that the "masculine shall include the feminine."

(The above footnote was added to Rules 201 to 227 by the Supreme Court, April 3, 1978.)

CHAPTER 19

Unauthorized Practice of Law Rules

CHAPTER 19

UNAUTHORIZED PRACTICE OF LAW RULES

Rule 228. Jurisdiction

The Supreme Court of Colorado, in the exercise of its exclusive jurisdiction to define the practice of law and to prohibit the unauthorized practice of law within the State of Colorado, adopts the following rules, which shall govern proceedings concerning the unauthorized practice of law.

ANNOTATION

Law reviews. For article, "Proposed Amendments to C.R.C.P. 228 and the Cross-Border Practice of Law", see 31 Colo. 21 (January 2002).

Granting person permission to practice law is sole prerogative of supreme court of Colorado. People v. Belfor, 200 Colo. 44, 611 P.2d 979 (1980).

Purpose of the bar and the admission requirements is to protect the public from unqualified individuals who charge fees for providing incompetent legal advice. Unauthorized Practice of Law Comm. v. Grimes, 654 P.2d 822 (Colo. 1982); Unauthorized Practice of Law Comm. v. Prog, 761 P.2d 1111 (Colo. 1988).

The court cannot permit an unlicensed person to commit acts which it would condemn if done by a lawyer. Unauthorized Practice of Law Comm. v. Grimes, 654 P.2d 822 (Colo. 1982).

The counseling and sale of living trusts by nonlawyers constitutes the unauthorized practice of law. People v. Cassidy, 884 P.2d 309 (Colo. 1994).

Assignee's action in filing adversary proceedings contesting discharge of debts assigned to him by various subcontractors constitutes the unauthorized practice of law. As long as the subcontractors are not selling their claims for present consideration but instead are retaining an interest in the proceeds of the claims, assignee is acting partially on their behalf in a representative capacity. By pursuing litigation to recover on the claims, assignee is arguably taking actions amounting to the practice of law. In re Thomas, 387 B.R. 808 (D. Colo. 2008).

Suspended attorney must demonstrate rehabilitation for readmittance to bar. Actions of a suspended attorney who took part in a complex real estate transaction and engaged in the practice of law by representing, counseling, advising, and assisting a former client warranted suspension until he demonstrates by clear and convincing evidence that: (1) He has been rehabilitated; (2) he has complied with and will continue to comply with all applicable disciplinary orders and rules; and (3) he is competent and fit to practice law. People v. Belfor, 200 Colo. 44, 611 P.2d 979 (1980).

Rule 229. Appointment and Organization of Unauthorized Practice of Law Committee

(a) There is hereby established a committee to be known as the Unauthorized Practice of Law Committee of the Supreme Court of the State of Colorado (Committee) and which shall be an adjunct to the Supreme Court. The Committee shall be composed of nine members, six of whom shall be members of the Bar of Colorado. The members of the Committee shall be appointed by the Supreme Court for terms of three years, beginning on the 1st day of January, and the terms of three members shall commence each year; provided, that terms may be for shorter periods to accommodate changes in the size of the Committee by amendments to this rule. Membership on the Committee may be terminated by the Supreme Court at its pleasure, and members may resign at any time. Any vacancies shall be filled by appointment by the Supreme Court for the unexpired term. The Committee and members thereof shall be entitled to reimbursement for reasonable travel, lodging, and other expenses incurred in the performance of their official duties.

(b) The Supreme Court shall designate a member of the Committee as Chair.

(c) The Committee may adopt rules providing for the time and place of its meetings, the selection of a Vice-Chair and other officers, and such other rules not in conflict with the rules of the Supreme Court as may be deemed necessary or expedient for the conduct of the Committee's business. The Clerk of the Supreme Court shall have copies of the rules for interested persons.

(d) The Committee may enlist the assistance of other duly licensed members of the Bar of Colorado in the performance of the activities of the Committee.

Source: (d) amended and adopted December 14, 1995, effective January 1, 1996; (b) and (c) amended and adopted October 29, 1998, effective January 1, 1999.

Rule 230. Committee Jurisdiction

(a) The Committee shall have jurisdiction over and inquire into and consider complaints or reports made by any person, including Regulation Counsel, or other entities alleging the unauthorized practice of law. Moreover, the Committee, on its own motion, may inquire into any matter pertaining to the unauthorized practice of law.

(b) Nothing contained in these rules shall be construed as a limitation upon the authority or jurisdiction of any court or judge thereof to punish for contempt any person or legal entity not having a license from this court who practices law or attempts or purports to practice law in any matter which comes within the jurisdiction of that court nor shall these rules be construed as a limitation upon any civil remedy or criminal proceeding which may otherwise exist with respect to the unauthorized practice of law.

Source: (a) amended and adopted October 29, 1998, effective January 1, 1999.

ANNOTATION

Trial court has jurisdiction under subsection (b) of this rule to conduct punitive contempt proceedings in which the sole allegation is that an individual is engaged in the unauthorized practice of law in violation of rules adopted by the Colorado Supreme Court. Watt, Tieder, Killian & Hoffar v. U.S. Fidelity & Guaranty Co., 847 P.2d 170 (Colo. App. 1992).

Because a partnership is not a separate legal entity, but is only treated as such under partnership statutes for certain limited purposes, trial court should reconsider its finding of contempt based on theory that a Virginia partnership and individuals representing it in Colorado courts were engaged in the unauthorized practice of law. Watt, Tieder, Killian & Hoffar v. U.S. Fidelity & Guaranty Co., 847 P.2d 170 (Colo. App. 1992).

Rule 231. Regulation Counsel; Duties and Powers

Regulation Counsel, appointed by the Supreme Court pursuant to C.R.C.P. 251.3, shall have the following duties and powers, in addition to those set forth in C.R.C.P. 251.3:

(a) (1) To investigate and to assist with the investigation of all matters within the jurisdiction of the Committee, upon the request and at the direction of members of the Committee; to dismiss allegations as provided in C.R.C.P. 232.5(c); and to report to the Committee as provided in C.R.C.P. 232.5(d).

(2) To prepare and prosecute, or assist in the preparation and prosecution of, civil-injunction proceedings as provided in C.R.C.P. 234 to 237.

(3) To prepare and prosecute, or assist in the preparation and prosecution of, contempt proceedings as provided in C.R.C.P. 238 and 239.

(b) To maintain records in the office of the Committee, in an appropriately cataloged manner, of all matters coming within the jurisdiction of the Committee.

(c) To provide facilities for the administration of proceedings under these rules and for receiving and filing all requests of investigation and all complaints concerning matters within the jurisdiction of the Committee.

(d) To employ such staff, including investigative and clerical personnel, subject to approval of the Committee, as may be necessary to carry out the duties under these rules.

(e) To perform such other duties as the Chair or the Supreme Court may require.

Source: IP amended and effective May 14, 1992; (a) amended and adopted December 14, 1995, effective January 1, 1996; IP and (e) amended and adopted October 29, 1998, effective January 1, 1999; IP, (a), and (d) amended and effective October 29, 2001.

Rule 232. Investigations; General, Subpoenas

Repealed, effective October 29, 2001.

Rule 232.5. Investigation; Procedure; Subpoenas

(a) All matters within the jurisdiction of the Committee shall be referred to the Regulation Counsel who shall either conduct an investigation or, if the Chair concurs, refer the matter to a member of the Committee pursuant to this rule or to an enlisted member of the Bar pursuant to C.R.C.P. 229(d) for investigation. Unless excused by the Regulation Counsel, the complainant shall be required to submit the complaint in writing and subscribe the same.

(b) (1) Promptly after receiving a written request for investigation or complaint, the Regulation Counsel shall determine whether to proceed with an investigation. In making such determination, the Regulation Counsel may make such inquiry regarding the underlying facts as the Regulation Counsel deems appropriate.

(2) If the Regulation Counsel determines to proceed with an investigation or refers the matter to a member of the Committee or an enlistee for investigation pursuant to C.R.C.P. 232.5(a), the respondent shall be: notified that the investigation is underway; provided with a copy of the complaint and of the rules governing the investigation; and asked to file with the Regulation Counsel or the person conducting the investigation a written answer to the complaint within 21 days after notice of the investigation is given.

(c) When the investigation is concluded, the Regulation Counsel shall either dismiss the allegations or report to the Committee for a determination as provided in paragraph (d) of this rule. If the Regulation Counsel dismisses the allegations, the person making the allegations may request review of the Regulation Counsel's decision by the Committee. If such review is requested, the Committee shall review the matter and make a determination as provided in paragraph (d). The Committee shall sustain the dismissal unless it finds that the Regulation Counsel's action constituted an abuse of discretion. If the Committee sustains a dismissal, it shall furnish the person making the allegations with a written explanation of its decision.

(d) If, after conducting an investigation, the Regulation Counsel believes that the Committee should authorize an informal disposition, civil-injunction proceedings, or contempt proceedings, the Regulation Counsel shall submit a report of the investigation and a recommendation to the Committee. The Committee shall then decide whether to:

(1) dismiss the matter; provided that the dismissal may be either with or without a finding of the unauthorized practice of law, and the letter of dismissal may contain cautionary language if appropriate; and provided that the person making the allegation shall be furnished a written explanation of the Committee's decision;

(2) conduct further investigation;

(3) enter into an informal disposition with the respondent consisting of a written agreement by the respondent to refrain from the conduct in question, to refund any fees collected, to make restitution and/or to pay a fine that may range from $100 to $250 per incident; such informal dispositions are to be encouraged;

(4) commence civil-injunction proceedings as provided in C.R.C.P. 234 to 237; or

(5) commence contempt proceedings as provided in C.R.C.P. 238 and 239.

(e) At least three Committee members must be present for the Committee to act upon said reports, findings, and recommendations.

(f) In connection with an investigation of the unauthorized practice of law, the Chair or the Regulation Counsel may issue subpoenas to compel the attendance of respondents and other witnesses or to compel the production of books, papers, documents, or other evidence. All such subpoenas are subject to the provisions of C.R.C.P. 45.

(g) Any person subpoenaed to appear and give testimony, or to produce books or records, who refuses to appear and give testimony, or to produce the books or records; and

any person having been sworn to testify and who refuses to answer any proper questions, may be cited for contempt of the Supreme Court, as provided in C.R.C.P. 107.

(h) Any person investigating a matter pursuant to these rules shall have the power to administer oaths and affirmations, and to take and have transcribed the testimony and evidence of witnesses.

(i) Any person who knowingly obstructs the Regulation Counsel or the Committee, or any part thereof, in the performance of their duties may be cited for contempt of the Supreme Court, as provided in C.R.C.P. 107.

Source: Entire rule added and effective October 29, 2001; (d)(3) amended and adopted December 14, 2006, effective January 1, 2007; (b)(2) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Rule 233. Investigation; Procedure

Repealed, effective October 29, 2001.

Rule 234. Civil Injunction Proceedings; General

(a) If the Committee determines that civil injunction proceedings shall be instituted against a respondent, such proceedings may be commenced in the name of the People of the State of Colorado by a petition filed in the Supreme Court by the Regulation Counsel or by a member of the Bar appointed by the Supreme Court for the purpose of conducting such proceedings.

(b) The petition shall be in writing and shall set forth the facts and charges in plain language and with sufficient particularity to inform the respondent of the acts complained of. The petition shall specify requested relief which may include, without limitation, injunction, refund, restitution, a fine, and assessment of costs of the proceeding.

(c) The Supreme Court, upon consideration of the petition so filed, may issue its order directed to the respondent commanding the respondent to show cause why the respondent should not be enjoined from the alleged unauthorized practice of law, and further requiring the respondent to file with the Supreme Court within 21 days after service of the petition and show cause order, a written answer admitting or denying the matter stated in the petition. The show cause order, together with a copy of the petition, shall be served upon the respondent. Service of process shall be sufficient when made either personally upon the respondent or by certified mail sent to the respondent's last known address.

(d) If no response or defense is filed within the time permitted, the Supreme Court, upon its motion or upon motion of any party, shall decide the case, granting such relief and issuing such other orders as may be appropriate.

(e) If a response or defense raises no genuine issue of material fact, any party by motion may request a judgment on the pleadings and the Supreme Court may decide the case as a matter of law, granting such relief and issuing such orders as may be appropriate.

(f) Upon the Supreme Court's motion or upon motion of any party, questions of fact raised in proceedings under this rule shall be referred to a hearing master for determination.

Source: (a) to (c) amended and adopted December 14, 1995, effective January 1, 1996; (a) amended and adopted October 29, 1998, effective January 1, 1999; (b) amended and adopted December 14, 2006, effective January 1, 2007; (c) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

ANNOTATION

Representation by non-attorneys allowed. Persons entitled to a hearing regarding the appeal of a deputy's decision may be represented by a non-lawyer, even though such representation constitutes practicing law. Unauthorized Prac. of Law v. Employers Unity, 716 P.2d 460

(Colo. 1986).

It is within the authority of the Supreme Court to promulgate rules governing the admission and regulation of lawyers. An attorney licensed to practice in another state may not engage in the practice of law in Colorado without obtaining a license or authorization from the Colorado supreme court. Unauthorized Pract. of Law v. Bodhaine, 738 P.2d 376 (Colo. 1987).

Applied in People v. Love, 775 P.2d 26 (Colo. 1989).

Rule 235. Civil Injunction Proceedings; Hearing Master, Powers, Procedure

(a) Civil injunction proceedings before a hearing master shall be held in any county designated by the hearing master that is convenient to the participants.

(b) The People of the State of Colorado may be represented in proceedings before the hearing master by the Regulation Counsel, or by a member of the Bar appointed pursuant to Rule 234. Upon receipt of the order of reference, the hearing master shall set a date, time, and place for a first meeting of the parties which shall be within 28 days after the date notice thereof is given and notify the parties accordingly. At such meeting, a date, time, and place for hearing shall be set, and any matters which may expedite the proceedings shall be considered. A complete record of this meeting shall be made unless jointly waived by the parties. After the first meeting, the hearing master shall issue a notice of hearing to the parties. The notice shall be in writing and shall designate the date, time, and place of the hearing. The notice shall also advise the respondent that the respondent is entitled to be represented by counsel at the hearing, to cross-examine witnesses, and to present evidence in the respondent's own behalf. The giving of notice shall be sufficient when made by certified mail sent to the respondent at the respondent's last known address.

(c) The parties may procure the attendance of witnesses before the hearing master by the issuance of subpoenas which shall run in the name of the Supreme Court and may be issued by the hearing master or Clerk of the Supreme Court upon the request of a party. All such subpoenas shall be subject to the provisions of C.R.C.P. 45. Failure or refusal, without adequate excuse, to comply with any such subpoena shall be a contempt of the Supreme Court and may be punished accordingly.

(d) The Colorado Rules of Civil Procedure shall be applicable when not inconsistent with these rules. Subject to any limitations in the order of reference, the hearing master shall have the powers generally reposed in a "Court" under the Colorado Rules of Civil Procedure. At all hearings before a hearing master witnesses shall be sworn and a complete record made of all proceedings had and testimony taken.

Source: (a) and (b) amended and adopted December 14, 1995, effective January 1, 1996; (b) amended and adopted October 29, 1998, effective January 1, 1999; (b) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Rule 236. Civil Injunction Proceedings; Report of Hearing Master; Objections

(a) After the hearing, the hearing master shall report in writing to the Supreme Court in accordance with the order of reference, setting forth findings of fact, conclusions of law, and recommendations for final disposition of the case. If the hearing master makes a finding of unauthorized practice of law in the report, then the hearing master shall also recommend that a fine be imposed for each incident of unauthorized practice of law; the minimum fine for each incident shall be not less than $250 and not more than $1000. A report from the Presiding Disciplinary Judge approving the parties' stipulation to injunction, may be exempt from a fine. Promptly after the report is filed with the Supreme Court, the Clerk shall mail copies thereof to all parties.

(b) Objections to the report of the hearing master may be filed with the Supreme Court by any party, within 28 days after copies of the report have been mailed to the parties.

(c) If no objections are filed, the case shall stand submitted upon the hearing master's report.

(d) If objections are filed, the objecting party shall within 14 days thereafter request the reporter to prepare a transcript of the proceedings before the hearing master, or any portion of such transcript thereof as is deemed necessary for the consideration of the case. The objecting party shall file with the Supreme Court and serve on the opposing party a designation of those portions of the transcript and of the record before the hearing master which the party wishes added to the record before the Supreme Court.

The opposing party may within 14 days after service of the designation file and serve a cross-designation of any additional portions of the transcript and additional parts of the record before the hearing master as is deemed necessary for a proper consideration of the case. The objecting party is responsible for the expense of preparing the record, including the transcript or portions thereof.

The reporter shall prepare the transcript and file it, properly certified, with the Supreme Court within 63 days (9 weeks) after the filing of the objections.

(e) An objecting party shall have 28 days after the filing with the Supreme Court of the transcript and other additions to the record within which to file an opening brief. The opposing party shall have 28 days after the filing of the objecting party's opening brief within which to file an answer brief. The objecting party shall have 14 days after the filing of the answer brief within which to file a reply brief.

(f) A brief of an amicus curiae may be filed only by leave of the Supreme Court granted on motion or by the request of the Court. The brief may be conditionally filed with the motion for leave. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable. Any amicus curiae shall file its brief within the time allowed the party whose position the amicus brief will support unless the Court for cause shown shall grant leave for later filing, in which event it shall specify within what period an opposing party may answer.

Source: Entire rule amended and adopted December 14, 1995, effective January 1, 1996; (e) amended and adopted October 29, 1998, effective January 1, 1999; (a) amended and adopted December 14, 2006, effective January 1, 2007; (b), (d), and (e) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Rule 237. Civil Injunction Proceedings; Determination by Court

(a) After review of the report of the hearing master, together with any objections and briefs, the Supreme Court may adopt the report or modify or reject it in whole or in part and shall determine as a matter of law whether the respondent has been engaged in the unauthorized practice of law. If the Supreme Court finds that the respondent was engaged in the unauthorized practice of law, the Supreme Court may enter an order enjoining the respondent from further conduct found to constitute the unauthorized practice of law, and make such further orders as it may deem appropriate, including restitution and the assessment of costs.

(b) Nothing in this rule shall be construed to limit the power of the Supreme Court, upon proper application, to issue an injunction at any stage of the proceeding in order to prevent public harm.

ANNOTATION

The court cannot permit an unlicensed person to commit acts which it would condemn if done by a lawyer. Unauthorized Practice of Law Comm. v. Grimes, 654 P.2d 822 (Colo. 1982).

Applied in Unauthorized Practice of Law Comm. v. Prog, 761 P.2d 1111 (Colo. 1988); People v. Adams, 243 P.3d 256 (Colo. 2010).

Rule 238. Contempt Proceedings; General

(a) If the Committee determines that contempt proceedings shall be instituted against a respondent, such proceedings shall be commenced in the name of the People of the State of Colorado by a petition filed in the Supreme Court by the Regulation Counsel or by a member of the Bar appointed by the Supreme Court for the purpose of conducting such proceedings.

(b) The petition shall allege facts indicating that the respondent is engaged in the unauthorized practice of law and shall contain a prayer for the issuance of a contempt citation.

(c) Upon the filing of a petition, the Supreme Court may issue a citation directing the respondent to show cause why he should not be held in contempt of the Supreme Court for the unauthorized practice of law, or the Supreme Court may, in the alternative, issue a show cause order in civil injunctive proceedings which shall be governed by Rules 234 to 237. If a citation is issued, the citation shall state that a fine of not less than $2000 per incident or imprisonment may be imposed to vindicate the dignity of the Supreme Court.

(d) If a contempt citation is issued, it shall be served upon the respondent, together with a copy of the petition, as provided in Rule 4, C.R.C.P., and the citation shall specify the time for response. If a response is filed, the Supreme Court shall appoint a hearing master who shall set a date, time, and place for the appearance of the respondent, and shall give notice thereof. The notice shall be in writing. The notice shall designate the date, time, and place of the appearance. The notice shall also advise the respondent that the respondent is entitled to be represented by counsel at the appearance, to cross-examine witnesses, and to present evidence in the respondent's own behalf. The giving of notice shall be sufficient when made by certified mail sent to the respondent at the respondent's last known address.

(e) Proceedings for the hearing of a contempt citation before a hearing master shall be held in any county designated by the hearing master that is convenient to the participants.

(f) If the respondent has been served with a citation and fails to respond to the citation or appear before the hearing master at the time and place designated in the notice issued by the hearing master, a warrant for the arrest of the respondent may be issued by the hearing master without prior approval of the Supreme Court. The warrant shall fix the time and place for the production of the respondent before the hearing master. The hearing master shall direct by endorsement on the warrant the amount of bail required, and the respondent shall be discharged upon the delivery to and approval by the sheriff or the Clerk of the Supreme Court of a written undertaking executed by a sufficient surety, to the effect that the respondent will appear at the time and place designated in the warrant and at any time thereafter to which the hearing on the citation may be continued, or pay the sum specified. Any funds surrendered as bail shall be deposited with the Clerk of the Supreme Court or with the Clerk of the District court in the county where the proceedings are to be held. If the respondent fails to appear at the time designated in the warrant, or at any time to which the hearing may be continued, the undertaking may be forfeited upon order of the hearing master. If the respondent fails to make bond, the sheriff shall keep the respondent in custody and produce the respondent before the hearing master at the time and place fixed by the warrant.

(g) At all hearings before the hearing master, witnesses shall be sworn and a complete record made of all proceedings had and testimony taken. The citation shall be prosecuted by the Regulation Counsel of the State of Colorado or by such duly licensed and registered members of the Bar as may be designated by this Court.

(h) The Colorado Rules of Civil Procedure shall be applicable when not inconsistent with these rules. Subject to any limitations in the order of reference, the hearing master shall have the powers generally reposed in a "court" under the Colorado Rules of Civil Procedure.

(i) The parties may procure the attendance of witnesses before the hearing master by the issuance of subpoenas in the name of the Supreme Court, which may be issued by the hearing master or Clerk of the Supreme Court upon the request of a party. All such subpoenas shall be subject to the provisions of C.R.C.P. 45. Failure or refusal, without

adequate excuse, to comply with any such subpoena shall be a contempt of the Supreme Court and may be punished accordingly. The parties shall have the right to be present at all times during the hearings before the hearing master and to examine and cross-examine witnesses.

Source: (a) and (d) to (i) amended and adopted December 14, 1995, effective January 1, 1996; (a) and (g) amended and adopted October 29, 1998, effective January 1, 1999; (c) amended and adopted December 14, 2006, effective January 1, 2007.

ANNOTATION

The court cannot permit an unlicensed person to commit acts which it would condemn if done by a lawyer. Unauthorized Practice of Law Comm. v. Grimes, 654 P.2d 822 (Colo. 1982).

Rule 239. Contempt Determination by Court Proceedings; Report of Hearing Master; Objections

(a) After the conclusion of the hearing, the hearing master shall report in writing to the Supreme Court, setting forth the hearing master's findings of fact, conclusions of law, and, upon a finding of contempt, recommendations for punishment. If the matter proceeds to trial and the hearing master makes a finding of contempt but does not recommend imprisonment, then the hearing master shall recommend that a fine be imposed for each incident of contempt; the minimum fine for each incident shall be not less than $2000 and not more than $5000. Promptly after the report is filed with the Supreme Court, the Clerk of the Supreme Court shall mail copies thereof to the parties.

(b) Objections to the report of the hearing master may be filed with the Supreme Court by either party within 28 days after the filing of the report.

(c) If no objections are filed, the case shall stand submitted upon the hearing master's report.

(d) If objections are filed, the objecting party shall within 14 days thereafter request the reporter to prepare a transcript of the proceedings before the hearing master, or any portion of such transcript thereof as is deemed necessary for the consideration of the case. The objecting party shall file with the Supreme Court and serve on the opposing party a designation of those portions of the transcript and of the record before the hearing master which the party wishes added to the record before the Supreme Court.

The opposing party may within 14 days after service of the designation file and serve a cross-designation of any additional portions of the transcript and additional parts of the record before the hearing master as is deemed necessary for a proper consideration of the case. The objecting party is responsible for the expense of preparing the record, including the transcript or portions thereof.

The reporter shall prepare the transcript and file it, properly certified, with the Supreme Court within 63 days (9 weeks) after the filing of the objections.

(e) An objecting party shall have 28 days after the filing with the Supreme Court of the transcript and other additions to the record within which to file an opening brief. The opposing party shall have 28 days after the filing of the objecting party's opening brief within which to file an answer brief. The objecting party shall have 14 days after the filing of the answer brief within which to file a reply brief.

(f) A brief of an amicus curiae may be filed only by leave of the Supreme Court granted on motion or by the request of the Court. The brief may be conditionally filed with the motion for leave. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable. Any amicus curiae shall file its brief within the time allowed the party whose position the amicus brief will support unless the Court for cause shown shall grant leave for later filing, in which event it shall specify within what period an opposing party may answer.

(g) After review of the report of the hearing master any objections thereto and briefs, the Supreme Court may adopt the report or modify or reject it in whole or in part and shall

determine whether the respondent is guilty of contempt of the Supreme Court and shall, by order, prescribe the punishment therefor, including the assessment of costs, expenses and reasonable attorney's fees.

(h) Nothing in this rule shall be construed to limit the power of the Supreme Court, upon proper application, to issue an injunction at any stage of contempt proceedings in order to prevent public harm, or to limit the power of the Supreme Court to issue an injunction in lieu of or in addition to the imposition of a fine or any other remedy under these rules.

Source: Entire rule amended and adopted December 14, 1995, effective January 1, 1996; (a) amended and adopted December 14, 2006, effective January 1, 2007; (b), (d), and (e) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Rule 240. General Provisions; Qualifications of Hearing Master; Access to Information Concerning Proceedings Under these Rules

(a) A hearing master to whom matters are referred pursuant to these rules shall be a person who is duly licensed to practice law in Colorado.

(b) All civil injunction proceedings and contempt proceedings filed in the Supreme Court pursuant to Rules 234 and 238, including proceedings before a hearing master, shall be public proceedings.

(c) Except as otherwise provided by these rules or by order of the Supreme Court, all proceedings conducted pursuant to these rules shall be confidential, and the files and records of the Committee shall be confidential and shall not be made public.

Except as otherwise provided by these rules, any person who wishes to disclose or to make public the pendency, subject matter, or status of proceedings which are otherwise confidential or to disclose or to make public the files and records of the Committee which are otherwise confidential or to gain access to the files and records of the Committee which are otherwise confidential shall file a petition with the Supreme Court setting forth the specific reasons why the existence of the particular proceedings should not remain confidential or the specific reasons why the disclosure of particular files and records or access to them should be permitted.

Upon final determination of any proceedings conducted pursuant to these rules, notice of the disposition of the matter shall be given by Regulation Counsel or the Clerk of the Supreme Court to the respondent, the complainant, and their counsel of record. Any person having received notice that a written agreement has been entered pursuant to C.R.C.P. 232.5(d)(3) shall treat such information as confidential and shall not disclose such information to anyone, except by order of the Supreme Court. Any person who makes a disclosure other than as permitted by these rules or by order of the Supreme Court may be subject to punishment for contempt of the Supreme Court.

(d) Exceptions to Confidentiality. The pendency, subject matter, and status of the proceedings conducted pursuant to these rules may be disclosed by the Committee or Regulation Counsel to:

(1) An entity authorized to investigate the qualifications of persons for admission to practice law;

(2) An entity authorized to investigate the qualifications of judicial candidates;

(3) A lawyer discipline enforcement agency;

(4) Any person or agency requesting such information, provided that the respondent has waived confidentiality and the request is within the scope of the waiver;

(5) An enlistee who, pursuant to Rule 229(d), was enlisted to assist the Committee;

(6) An agency authorized to investigate violations of the criminal laws or the consumer protection laws of this state or any other state, or of the United States; or

(7) Any person or agency, provided the proceeding is predicated either upon allegations that have become generally known to the public through printed or broadcast news accounts or upon acts of the respondent which are public or generally known.

(d.5) Access to the files and records of the Committee may be granted by the

Committee or the Regulation Counsel, provided a request for disclosure or access is made in writing by:

(1) An entity authorized to investigate the qualifications of persons for admission to practice law;

(2) An entity authorized to investigate the qualifications of persons for government employment;

(3) An agency authorized to investigate allegations of unauthorized practice of law;

(4) An entity authorized to investigate the qualifications of judicial candidates;

(5) A lawyer discipline enforcement agency;

(6) An agency authorized to investigate violations of the criminal laws or the consumer protection laws of this state or any other state, or of the United States; or

(7) A state or federal judicial or administrative court or agency with which the respondent has had previous contact.

If the Regulation Counsel discloses confidential information to a judicial nominating commission of the State of Colorado or grants a judicial nominating commission access thereto, the Regulation Counsel shall give written notice to the respondent that specified confidential information has been so disclosed or that access has been granted.

(e) Repealed.

Source: (c) to (e) amended and adopted December 14, 1995, effective January 1, 1996; (c) and (d) amended and adopted and (e) repealed October 29, 1998, effective January 1, 1999; (c) and (d.5) amended and effective October 29, 2001.

Rule 240.1. Immunity

Persons performing official duties under the provisions of this chapter, including but not limited to members of the Committee and its staff; the Regulation Counsel and the Regulation Counsel's staff; the members of the Bar and enlistees working under the direction of the Committee; and the hearing masters, shall be immune from suit for all conduct in the course and scope of their official duties.

Source: Entire rule amended and adopted December 14, 1995, effective January 1, 1996; entire rule amended and adopted October 29, 1998, effective January 1, 1999.

Rule 240.2. Expunction of Records

(a) Expunction — Self-Executing. Except for records relating to proceedings that have 1) become public pursuant to C.R.C.P 234, et seq., 2) resulted in a finding of unauthorized practice of law, or 3) resulted in agreements, all records relating to proceedings that were dismissed without a finding of unauthorized practice of law shall be expunged from the files of the committee, the Presiding Disciplinary Judge, and Regulation Counsel three years after the end of the year in which the dismissal occurred.

(b) Definition. The terms "expunge" and "expunction" shall mean the destruction of all records or other evidence of any type, including but not limited to, the request for investigation, the response, the investigator's notes, and the report of investigation.

(c) Notice to Respondent. If proceedings conducted pursuant to these Rules (or their predecessor) were commenced, the attorney in question shall be given prompt notice of the expunction.

(d) Effect of Expunction. After expunction, the proceedings shall be deemed never to have occurred. Upon either general or specific inquiry concerning the existence of proceedings which have been expunged, the committee or the Regulation Counsel shall respond by stating that no record of the proceedings exists. The respondent in question may properly respond to any general inquiry about proceedings which have been expunged by stating that no record of the proceedings exists. The respondent in question may properly respond to any inquiry requiring reference to a specific proceeding which has been expunged by stating only that the proceeding was dismissed with no finding of unauthorized practice of law and that the record of the proceeding was expunged pursuant to this Rule. After a response is provided and is given to an inquirer, no further response to

an inquiry into the nature or scope of the proceedings which have been expunged needs be made.

(e) Retention of Records. Upon written application to the committee, for good cause and with written notice to the respondent in question and opportunity to such respondent to be heard, the Regulation Counsel may request that records which would otherwise be expunged under this Rule be retained for such additional period of time, not to exceed three years, as the committee deems appropriate. The Regulation Counsel may seek further extensions of the period for which retention of the records is authorized whenever a previous application has been granted.

Source: Entire rule added and adopted December 14, 2006, effective January 1, 2007.

CHAPTER 20

Colorado Rules of Procedure Regarding Attorney Discipline and Disability Proceedings, Colorado Attorneys' Fund for Client Protection, and Mandatory Continuing Legal Education and Judicial Education

CHAPTER 20

COLORADO RULES OF PROCEDURE REGARDING ATTORNEY DISCIPLINE AND DISABILITY PROCEEDINGS, COLORADO ATTORNEYS' FUND FOR CLIENT PROTECTION, AND MANDATORY CONTINUING LEGAL EDUCATION AND JUDICIAL EDUCATION

Editor's note: Rules 241.1 through 241.26, C.R.C.P., were repealed and reenacted by the Supreme Court. Rules 251.1 through 252.16 replace Rules 241.1 through 241.26 on July 1, 1998 or January 1, 1999, as indicated in the source note following the rule. For an explanation of the implementation of these rules see the order from the Office of the Chief Justice following this editor's note.

Law reviews: For article, "How the New Attorney Regulation System Will Work", see 28 Colo. Law. 57 (February 1999); for article, "Colorado's Attorney Regulation System: An Update", see 35 Colo. Law. 25 (April 2006); for article, "Attorney Discipline and Disability Process and Procedure—Part I", see 36 Colo. Law. 23 (February 2007); for article, "Attorney Discipline and Disability Process and Procedure—Part II", see 36 Colo. Law. 41 (March 2007).

ORDER

The Supreme Court of the State of Colorado has adopted a series of changes to the attorney grievance system. Most of the reforms are incorporated into Rules that have been adopted effective January 1, 1999. However, a number of the reforms will come into effect over the course of the next six months. Hence, the Court enters this Order to permit immediate implementation of some programs and to insure an orderly transition to the new system.

IT IS ORDERED:

1. The following reorganization of the attorney regulation system has been adopted and will be implemented as set forth in this order;

a. We hereby adopt an alternatives to discipline program to permit the diversion of certain cases of minor misconduct to various agencies that will provide concrete assistance to attorneys and better protect the public. Therefore, C.R.C.P. 251.9, 251.10, 251.11, 251.12, and 251.13, shall become effective July 1, 1998, and shall be applicable to all cases pending in the Office of Disciplinary Counsel or before an Inquiry Panel, a Hearing Board, or a Hearing Panel of the Grievance Committee as of June 30, 1998, and to all cases initiated July 1, 1998 and thereafter;

b. Probation may be considered for all cases after a hearing pursuant to C.R.C.P. 251.7, which Rule shall become effective July 1, 1998, and which shall be applicable to all cases pending before the Hearing Board or Hearing Panel of the Grievance Committee on July 1, 1998, and to all cases considered after that date;

c. An attorneys' peer assistance program will be established and funded as part of the attorney regulation process pursuant to C.R.C.P. 227, which shall become effective June 30, 1998, and C.R.C.P. 251.34, which shall become effective July 1, 1998;

d. Immunity shall be granted to those individuals and entities providing assistance through the alternatives to discipline and peer assistance programs, as provided in C.R.C.P. 251.32, which shall become effective July 1, 1998;

e. The Office of the Presiding Disciplinary Judge is established by C.R.C.P. 251.16, which shall become effective January 1, 1999. The court will attempt to appoint the Presiding Disciplinary Judge on or before December 1, 1998, following an application and review process to be established by the court. After December 31, 1998, the Presiding Disciplinary Judge shall be substituted for the

Presiding Officer of all Hearing Boards in which a hearing has not been held. The Presiding Officer so replaced shall then act as one of the other members of that Hearing Board in the event that case goes to trial. In those cases in which the Presiding Disciplinary Judge cannot sit, the Grievance Committee member who was appointed Presiding Officer will continue to act as Presiding Officer of the Hearing Board;

f. All conditional admissions of misconduct and deferral agreements entered into prior to January 1, 1999, shall be reviewed by the Inquiry Panel at a final meeting or meetings in 1999. Conditional admissions of misconduct and alternatives to discipline agreements entered into on or after January 1, 1999, shall be considered by the Presiding Disciplinary Judge or the Attorney Regulation Committee as provided by C.R.C.P. 251.1 et seq.

g. All attorney discipline cases in which trial has occurred prior to January 1, 1999 before a Hearing Board of the Grievance Committee prior to the appointment of the Presiding Disciplinary Judge, shall be reviewed by the applicable, existing Hearing Panel at a final meeting to be held in 1999;

h. All reinstatement and readmission cases in which hearing has been held by a Hearing Board of the Grievance Committee prior to the establishment of the officer of the Presiding Disciplinary Judge shall be reviewed by the applicable, existing Hearing Panel at a final meeting to be held in 1999.

i. An Advisory Committee shall be appointed to assist the court with administrative oversight of the attorney regulation system pursuant to C.R.C.P. 251.34, which shall become effective July 1, 1998. Therefore, the following individuals are hereby appointed to the Advisory Committee: John Lebsack, Bethiah Crane, Erika Schafer, David Stark, Justice Rebecca Love Kourlis, Justice Michael L. Bender and William C. McClearn, who shall serve as chair.

2. Rules implementing federal and state statutorily mandated procedures regarding licensing of attorneys who are in arrears in child support, C.R.C.P. 201.6, C.R.C.P. 201.9, C.R.C.P. 251.8, and C.R.C.P. 227 are hereby adopted and shall be effective July 1, 1998. Between July 1 and December 30, 1998, any hearings requested shall be held before a member of the Grievance Committee designated by the chairman.

3. C.R.C.P. 227 is hereby amended to raise late fees and reinstatement fees effective July 1, 1998.

4. The readmission process after disbarment shall be amended to provide for one hearing by amendment of C.R.C.P. 201.12 and 259.29, adopted and effective on July 1, 1998.

5. Any references in those rules adopted herein and made effective June 30, 1998, and July 1, 1998, to Regulation Counsel, the Attorney Regulation Committee, the Presiding Disciplinary Judge, the Appellate Discipline Commission, and Appellate Discipline Commission Counsel shall, in fact, refer to the Disciplinary Counsel, Committee Counsel, and the Grievance Committee between now and January 1, 1999.

6. C.R.C.P. 251.1 through 251.34 shall become effective January 1, 1999. In order to avoid confusion, Rules 241.1, et seq., have been repealed and re-enacted as C.R.C.P. 251.1, et seq., as set forth in this order.

7. Amendments to Colo. RPC 1.15 establishing an attorney trust account overdraft notification rule shall become effective July 1, 1999.

8. Rules establishing a Client Protection Fund, C.R.C.P. 252.1 through 252.16, shall become effective on January 1, 1999.

DONE at Denver, Colorado, this 30th day of June, 1998.

ANTHONY F. VOLLACK, Chief Justice

Rule 251.1. Discipline and Disability; Policy — Jurisdiction

(a) Statement of Policy. All members of the Bar of Colorado, having taken an oath to support the Constitution and laws of this state and of the United States, are charged with obedience to those laws at all times. As officers of the Supreme Court of Colorado, attorneys must observe the highest standards of professional conduct. A license to practice law is a proclamation by this Court that its holder is a person to whom members of the public may entrust their legal affairs with confidence; that the attorney will be true to that

trust; that the attorney will hold inviolate the confidences of clients; and that the attorney will competently fulfill the responsibilities owed to clients and to the courts.

In order to maintain the highest standards of professional conduct, attorneys who have demonstrated that they are unable, or are likely to be unable, to discharge their professional responsibilities shall be subject to appropriate disciplinary or disability proceedings.

(b) Jurisdiction. Every attorney licensed to practice law in the State of Colorado is subject to the disciplinary and disability jurisdiction of the Supreme Court in all matters relating to the practice of law. Every attorney practicing law in this state pursuant to C.R.C.P. 220, or admitted *pro hac vice* pursuant to C.R.C.P. 221 or 221.1, or certified to represent a single-client pursuant to C.R.C.P. 222 is subject to the disciplinary and disability jurisdiction of the Supreme Court when practicing law pursuant to such rules. Every attorney serving as a magistrate pursuant to Colorado Rules for Magistrates, Chapter 35, vol. 12, C.R.S., is subject to the disciplinary and disability jurisdiction of the Supreme Court for conduct performed as a magistrate as provided by C.R.M. 5(h).

(c) Standards of Conduct. Any reference contained in these Rules to the Code of Professional Responsibility pertains to conduct occurring prior to January 1, 1993. On January 1, 1993, and thereafter, the conduct of attorneys licensed to practice law in the State of Colorado shall be governed by the Colorado Rules of Professional Conduct and the other Rules or Standards of Professional Conduct adopted from time to time by this Court.

(d) Plenary Power of the Supreme Court. The Supreme Court reserves the authority to review any determination made in the course of a disciplinary proceeding and to enter any order with respect thereto, including an order directing that further proceedings be conducted as provided by these Rules.

Source: Amended and adopted June 25, 1998, effective January 1, 1999; (b) amended June 1, 2000, effective July 1, 2000; (b) corrected and effective June 27, 2000; (b) amended and adopted December 4, 2002, effective January 1, 2003.

Editor's note: This rule was previously numbered as 241.1.

ANNOTATION

Law reviews. For note, "Standards of Discipline for Attorneys in Colorado and the Significance of the Code of Professional Responsibility", see 50 Den. L.J. 207 (1973). For article, "Avoiding Family Law Malpractice: Recognition and Prevention — Parts I and II", see 14 Colo. Law. 787 and 991 (1985).

Annotator's note. The following annotations include cases decided under former provisions similar to this rule.

Rule held constitutional. Rule provides sufficient guidelines to impose attorney discipline and is not, therefore, unconstitutionally vague in violation of due process of law. People v. Morley, 725 P.2d 510 (Colo. 1986); People v. Varallo, 913 P.2d 1 (Colo. 1996).

Bill of rights freedoms should not be prevented. The supreme court should never make an order which would prevent any lawyer, or association of lawyers, from enjoying to the fullest the fundamental freedoms contained in the bill of rights. In re Petition of Colo. Bar Ass'n, 137 Colo. 357, 325 P.2d 932 (1958).

There is lodged in the supreme court exclusive power to admit applicants to the bar of this state, to prescribe the rules to be followed in the discipline of lawyers, and to revoke a license to practice law or otherwise assess penalties in disciplinary proceedings where the conduct of the lawyer accused either amounts to a violation of law or involves moral turpitude or dishonorable conduct; in all these matters full responsibility rests with the court. In re Petition of Colo. Bar Ass'n, 137 Colo. 357, 325 P.2d 932 (1958); People v. Varallo, 913 P.2d 1 (Colo. 1996).

Granting person permission to practice law is sole prerogative of supreme court of Colorado. People v. Belfor, 200 Colo. 44, 611 P.2d 979 (1980) (decided under prior rule).

And statute disqualifying a convicted felon of practicing as an attorney in no wise interferes with the exclusive right of the supreme court to determine the rules and regulations which shall govern those seeking admission to the bar nor does the statute impinge in any real sense the judicial right to discipline those licensed to practice law. Rather, such a statute is an effort by the general assembly under its police power to bar convicted felons from practicing law in the courts, which the general assembly has the power to do so, since it does not violate the separation of powers doctrine. People v. Buckles, 167 Colo. 64, 453 P.2d 404

(1968).

The supreme court has the inherent power, apart from rule or statute, as well as the duty, to suspend an attorney whose conduct tends to obstruct or impede the administration of justice. People v. Radinsky, 176 Colo. 357, 490 P.2d 951 (1971).

Supreme court authority in disciplinary proceedings is limited to lawyers. In re Petition of Colo. Bar Ass'n, 137 Colo. 357, 325 P.2d 932 (1958).

Purpose of the bar and the admission requirements is to protect the public from unqualified individuals who charge fees for providing incompetent legal advice. Unauthorized Practice of Law Comm. v. Grimes, 654 P.2d 822 (Colo. 1982).

The procedures in force which must be followed in actions for the discipline of lawyers are defined in these rules on the discipline of attorneys. In re Petition of Colo. Bar Ass'n, 137 Colo. 357, 325 P.2d 932 (1958).

These rules require that the pendency of investigations be strictly confidential. In re Petition of Colo. Bar Ass'n, 137 Colo. 357, 325 P.2d 932 (1958).

No person acting as a representative of the supreme court has any power or authority to express an opinion concerning the propriety or the ethics of the conduct of any lawyer. In re Petition of Colo. Bar Ass'n, 137 Colo. 357, 325 P.2d 932 (1958).

In disciplinary proceedings the supreme court acts under well-established rules which protect the attorney from possible unjust public criticism until guilt is established under due process of law. In re Petition of Colo. Bar Ass'n, 137 Colo. 357, 325 P.2d 932 (1958).

Previously, disciplinary action could not be taken merely for violating standards of ethics. In re Petition of Colo. Bar Ass'n, 137 Colo. 357, 325 P.2d 932 (1958).

To be actionable, it must have amounted to a violation of law, or involve moral turpitude or dishonorable conduct. See In re Petition of Colo. Bar Ass'n, 137 Colo. 357, 325 P.2d 932 (1958).

License to practice law assures public that the lawyer who holds the license will perform basic legal tasks honestly and without undue delay, in accordance with the highest standards of professional conduct. People ex rel. Silverman v. Anderson, 200 Colo. 76, 612 P.2d 94 (1980); People v. Meldahl, 200 Colo. 332, 615 P.2d 29 (1980); People v. Witt, 200 Colo. 522, 616 P.2d 139 (1980); People v. Dixon, 621 P.2d 322 (Colo. 1981); People v. Kendrick, 646 P.2d 337 (Colo. 1982).

An attorney must adhere with dedication to the highest standards of honesty and integrity in order that members of the public are assured that they may deal with attorneys with the knowledge that their matters will be handled with absolute propriety. People v. Golden, 654 P.2d 853 (Colo. 1982).

As officers of the court, lawyers are charged with obedience to the laws of this state and to the laws of the United States, and intentional violation by them of these laws subjects them to the severest discipline. People v. Wilson, 176 Colo. 389, 490 P.2d 954 (1971).

Attorney never to obstruct justice or judicial process. An attorney has a high duty as an officer of the court to never participate in any scheme to obstruct the administration of justice or the judicial process. People v. Kenelly, 648 P.2d 1065 (Colo. 1982); People v. Richards, 748 P.2d 341 (Colo. 1987).

Since a lawyer is an officer of the court, the court cannot tolerate or allow fraud by a lawyer to go unpunished, for to declare such acts to be unprofessional conduct would be to use the mildest of language. People v. Radinsky, 176 Colo. 357, 490 P.2d 951 (1971).

Disciplining those who perpetrate fraud on courts is a sacred duty. A most sacred duty is to maintain the integrity of the law profession by disciplining lawyers who indulge in practices which are designed to perpetrate a fraud on the courts. People v. Radinsky, 176 Colo. 357, 490 P.2d 951 (1971).

A lawyer who holds the position of district attorney, with the substantial powers of that office, assumes responsibilities beyond those of other lawyers and must be held to the highest standard of conduct. People v. Brown, 726 P.2d 638 (Colo. 1986).

Public expects appropriate discipline for misconduct. The public has a right to expect that one who engages in professional misconduct shall be disciplined appropriately. People ex rel. Silverman v. Anderson, 200 Colo. 76, 612 P.2d 94 (1980); People v. Meldahl, 200 Colo. 332, 615 P.2d 29 (1980); People v. Witt, 616 P.2d 139 (Colo. 1980); People v. Dixon, 621 P.2d 322 (Colo. 1981); People v. Kendrick, 646 P.2d 337 (Colo. 1982).

Supreme court has, as part of inherent powers, ultimate and exclusive responsibility for the structure and administration of disciplinary proceedings against lawyers. People v. Susman, 196 Colo. 458, 587 P.2d 782 (1978); Mulei v. Jet Courier Serv., Inc., 860 P.2d 569 (Colo. App. 1993).

In a disciplinary proceeding, the court's primary duty is to protect the public and the legal profession from unscrupulous lawyers. People v. Harfmann, 638 P.2d 745 (Colo. 1981); People v. Morley, 725 P.2d 510 (Colo. 1986); People v. Grenemyer, 745 P.2d 1027 (Colo. 1987).

Disciplinary proceedings are sui generis in nature, and conviction of a criminal offense is not a condition precedent to the institution of such proceedings nor does acquittal constitute a bar to such proceedings. People v. Harfmann,

638 P.2d 745 (Colo. 1981); People v. Morley, 725 P.2d 510 (Colo. 1986).

Where the crime with which an attorney is charged is one of serious consequences denoting moral turpitude, which he is found guilty of, he cannot, in good conscience, be permitted to practice law in this state. People v. Wilson, 176 Colo. 389, 490 P.2d 954 (1971).

Acts and conduct on the part of an attorney which establish that he is incapable of being trusted, when coupled with acts of dishonesty and deceit, render that person unworthy of public confidence and recognition by the courts. People v. Radinsky, 176 Colo. 357, 490 P.2d 951 (1971).

Such acts should be promptly and severely punished. In that the foundation of the legal profession is honor, if acts which a respondent has committed are not promptly and severely punished, the public will not have reason to trust those lawyers who maintain the high standards of the profession. People v. Radinsky, 176 Colo. 357, 490 P.2d 951 (1971).

Conduct of counsel found contrary to standard of honesty, justice, and integrity. People v. Van Nocker, 176 Colo. 354, 490 P.2d 697 (1971).

Attorney is subject to jurisdiction of court even though disbarred for failure to comply with the Code of Professional Responsibility while practicing law as an officer of this court. People v. Richards, 748 P.2d 341 (Colo. 1987); People v. Koransky, 830 P.2d 490 (Colo. 1992); People v. Vigil, 945 P.2d 1385 (Colo. 1997).

Attorney who is licensed to practice law in Colorado is subject to the jurisdiction of the supreme court for violations of ethical obligations under the rules of professional conduct that are committed while the license to practice is suspended. In re C de Baca, 11 P.3d 426 (Colo. 2000).

Attorney who is a member of the Colorado bar is subject to the jurisdiction of the supreme court and its grievance committee for professional misconduct committed in another jurisdiction where attorney is licensed to practice law despite fact that attorney does not maintain a law office in this state and has not paid the required registration fee or satisfied the continuing legal education requirements of this state. People v. Schindelar, 845 P.2d 1146 (Colo. 1993).

Applied in People v. Hebeler, 638 P.2d 254 (Colo. 1981); People v. Archuleta, 638 P.2d 255 (Colo. 1981); People v. Gellenthien, 638 P.2d 295 (Colo. 1981); People v. Proffitt, 731 P.2d 1257 (Colo. 1987); People v. Turner, 758 P.2d 1335 (Colo. 1988).

Rule 251.2. Attorney Regulation Committee

(a) Attorney Regulation Committee. The Attorney Regulation Committee of the Supreme Court of Colorado (hereinafter committee) is hereby established. The Committee shall serve as a permanent committee of the Supreme Court.

(1) Committee. The Committee shall be composed of seven members, a Chair and Vice-Chair.

(2) Members. The members shall be composed of four members of the Bar of Colorado and three public members. Diversity shall be a consideration in making the appointment. The Supreme Court, with the assistance of the Advisory Committee, shall appoint the members. The members shall serve one term of seven years but may be dismissed from the Committee at any time by order of the Supreme Court. The terms of the members of the Committee shall be staggered to provide, so far as possible, for the expiration each year of the term of one member. Members of the Committee may resign at any time. In the event of a vacancy on the Committee, the Supreme Court shall appoint a successor to serve the remainder of the unexpired term.

(3) Chair and Vice-Chair. The Chair and Vice-Chair shall be members of the Bar of Colorado. The Supreme Court, with the assistance of the Advisory Committee, shall appoint the Chair and Vice-Chair. The Chair and Vice-Chair shall serve an unspecified term at the pleasure of the Supreme Court. The Chair and Vice-Chair of the Committee may resign at any time. The Chair shall exercise overall supervisory control of the Committee. The Vice-Chair shall assist the Chair and shall serve as Chair in the Chair's absence.

(4) Reimbursement of Committee Members. The members of the Committee shall be entitled to reimbursement for reasonable travel, lodging, and other expenses incurred in the performance of their official duties.

(b) Powers and Duties of the Committee. The committee shall be authorized and empowered to act in accordance with these Rules and to:

(1) Enlist the assistance of members of the Bar to conduct investigations, or assist with investigations;

(2) Periodically report to the Advisory Committee and the management committee on

the operation of the committee;

(3) Recommend to the Advisory Committee proposed changes or additions to the rules of procedure for attorney discipline and disability proceedings; and

(4) Adopt such practices as may from time to time become necessary to govern the internal operation of the committee, as approved by the Supreme Court.

(c) Abstention of Committee Members. Committee members shall refrain from taking part in any proceedings in which a judge, similarly situated, would be required to abstain. No partner or associate in the law firm of a member of the committee, or any attorney in any way affiliated with a committee member or the member's law firm, may accept or continue in employment connected with any matter pending before the committee, the Presiding Disciplinary Judge, a Hearing Board, or the Supreme Court as long as the member is serving on the committee.

(d) Disqualification. Members of the committee shall not represent an attorney in any matter as provided in these Rules during their terms of service. Former members of the committee shall not represent an attorney in any matter that was being investigated or prosecuted as provided in these rules during their terms of service.

Source: Amended and adopted June 25, 1998, effective January 1, 1999; (d) amended and adopted October 29, 1998, effective January 1, 1999; entire rule amended and effective September 1, 2000; (a)(1), (a)(2), and (a)(3) amended and adopted November 24, 2004, effective January 1, 2005.

Editor's note: This rule was previously numbered as 241.2.

ANNOTATION

Law reviews. For note, "Standards of Discipline for Attorneys in Colorado and the Significance of the Code of Professional Responsibility", see 50 Den. L.J. 207 (1973).

Annotator's note. The following annotations include cases decided under former provisions similar to this rule.

Rule held constitutional. Rule provides sufficient guidelines to impose attorney discipline and is not, therefore, unconstitutionally vague in violation of due process of law. People v. Morley, 725 P.2d 510 (Colo. 1986).

Grievance committee is committee of supreme court, not bar association. The grievance committee, functioning in disciplinary proceedings under the rules on the discipline of attorneys, ceases to be a representative of the bar association and becomes a committee of the supreme court, and as such is responsible solely to the court. In re Petition of Colo. Bar Ass'n, 137 Colo. 357, 325 P.2d 932 (1958).

It has no greater power than the court. The grievance committee acting as the investigating agent for the supreme court has no greater power or authority than the court. In re Petition of Colo. Bar Ass'n, 137 Colo. 357, 325 P.2d 932 (1958).

Confidential matters cannot be used for any other purpose than that of disciplinary action. No committee serving in the confidential capacity called for under the rules for discipline of attorneys can conduct hearing as the representative of the supreme court and thereafter make use of any confidential matters coming to its attention for any purpose other than that of disciplinary action if such action is warranted; and if such action is not warranted, it cannot use the data obtained as the basis for the publication of an opinion on ethics in which the identity of the original subject is divulged. In re Petition of Colo. Bar Ass'n, 137 Colo. 357, 325 P.2d 932 (1958).

The data gathered by the grievance committee are not public records and are not to be released unless by vote of the committee with the approval of the supreme court. In re Petition of Colo. Bar Ass'n, 137 Colo. 357, 325 P.2d 932 (1958).

Committee cannot escape responsibility for releasing information of intended investigations. Where a grievance committee functioning in the capacity of an agent and representative of the supreme court, or persons identified with it, releases information that it intends to investigate certain persons in connection with particular conduct in violation of the applicable rules, such committee cannot escape responsibility for the advance press publication of its intentions. In re Petition of Colo. Bar Ass'n, 137 Colo. 357, 325 P.2d 932 (1958).

The committee occupies a position of trust and confidence. When the supreme court calls upon a committee of the bar to conduct investigations in disciplinary proceedings, the members of that committee occupy a position of trust and confidence, and they must function under applicable rules. In re Petition of Colo. Bar Ass'n, 137 Colo. 357, 325 P.2d 932 (1958).

Any such committee acting for the court should not be charged with duties as members of another committee of the bar association, a private organization, which might require the individual members to disregard the confidential nature of the duties they have assumed as an agent of the court. In re Petition of Colo. Bar Ass'n, 137 Colo. 357, 325 P.2d 932 (1958).

Rule 251.3. Attorney Regulation Counsel

(a) Attorney Regulation Counsel. The Supreme Court shall appoint a Regulation Counsel. The Regulation Counsel shall serve at the pleasure of the Supreme Court.

(b) Qualifications. The Regulation Counsel shall be an attorney, duly admitted to the Bar of Colorado, with no less than five years experience in the practice of law. The Regulation Counsel, while serving in that capacity, shall not hold any other public office or engage in the private practice of law.

(c) Powers and Duties. The Regulation Counsel shall act in accordance with these Rules and:

(1) Maintain and supervise a permanent office to serve as a central office for the filing of requests for investigation and for the coordination of such investigations; the filing of claims with the Colorado Attorneys' Fund for Client Protection as provided in C.R.C.P. 252 and the consideration of such claims; the administration of all disciplinary and disability enforcement proceedings carried on pursuant to these Rules; and, the administration of all proceedings conducted pursuant to C.R.C.P. 252, et seq., under a budget approved by the Supreme Court;

(2) Appoint and supervise a staff as necessary to carry out the duties of the Regulation Counsel;

(3) Conduct investigations as provided by C.R.C.P. 251.9 and C.R.C.P. 251.10, dismiss the allegations as provided in C.R.C.P. 251.11, and report to the committee as provided in C.R.C.P. 251.12;

(4) Prepare and prosecute disciplinary and disability actions against attorneys as provided by these Rules;

(5) In appropriate cases, negotiate dispositions of pending matters as authorized in C.R.C.P. 251.10(b)(4) and C.R.C.P. 251.22;

(6) Prepare and prosecute petitions for immediate suspension in conformity with C.R.C.P. 251.8;

(7) Prosecute contempt proceedings for violations of these Rules;

(8) Prosecute contempt proceedings for violations of orders of the Supreme Court relating to suspended and disbarred attorneys and attorneys placed on disability inactive status;

(9) Participate in and present recommendations reflecting the public interest in all proceedings for reinstatement held pursuant to C.R.C.P. 251.29 and C.R.C.P. 251.30;

(10) Maintain permanent records of matters processed by the committee, and the disposition thereof;

(11) Participate in the management and supervision of the bar mediation process established by the Supreme Court, implemented by the Colorado Bar Association, and administered by the mediation committee of the association in conjunction with the committee; and,

(12) Perform such other duties as the Supreme Court may direct.

Mediators shall be appointed by the Supreme Court. The mediation committee and the Regulation Counsel shall jointly recommend attorneys to the Court for appointment as mediators. The Regulation Counsel shall forward the names of those recommended to the Court together with a proposed order making the appointment of the mediators.

(d) Disqualification. A former member of the Regulation Counsel's staff shall not represent an attorney in any proceeding that was being investigated and/or prosecuted during the member's association with the Regulation Counsel's staff.

Source: Amended and adopted June 25, 1998, effective January 1, 1999.

Editor's note: This rule was previously numbered as 241.4.

ANNOTATION

Annotator's note. The following annotations include cases decided under former C.R.C.P. 241.4, which was similar to this rule.

Rule held constitutional. Rule provides sufficient guidelines to impose attorney discipline and is not, therefore, unconstitutionally vague in violation of due process of law. People v. Morley, 725 P.2d 510 (Colo. 1986).

Colorado Supreme Court disciplinary counsel is an "arm of the state" and not a "person" for the purposes of a suit for damages pursuant to 42 U.S.C. sec. 1983. Bannister v. Colo. Supreme Court Disciplinary Counsel, 856 P.2d 79 (Colo. App. 1993).

Disciplinary prosecutor, acting in an official capacity, is an "arm of the state" and not a "person" for the purposes of a suit for damages pursuant to 42 U.S.C. sec. 1983. Bannister v. Colo. Supreme Court Disciplinary Counsel, 856 P.2d 79 (Colo. App. 1993).

Disciplinary prosecutors, in their individual capacity, are absolutely immune from liability for damages under 42 U.S.C. sec. 1983 when acting within the scope of their prosecutorial duties. Bannister v. Colo. Supreme Court Disciplinary Counsel, 856 P.2d 79 (Colo. App. 1993).

Rule 251.4. Duty of Judge to Report Misconduct or Disability

A judge has a duty to report unprofessional conduct by an attorney to Regulation Counsel pursuant to Rule 2.15 of the Colorado Code of Judicial Conduct. No action taken by any judge pursuant to Rule 2.15 shall in any way limit the power of the reporting judge to exercise the power of contempt against an attorney, nor should the reporting of such matters to the Regulation Counsel be used in lieu of contempt proceedings.

Source: Amended and adopted June 25, 1998, effective January 1, 1999; entire rule amended and effective April 12, 2012.

Editor's note: This rule was previously numbered as 241.5.

ANNOTATION

Annotator's note. The following annotations include cases decided under former provisions similar to this rule.

Rule held constitutional. Rule provides sufficient guidelines to impose attorney discipline and is not, therefore, unconstitutionally vague in violation of due process of law. People v. Morley, 725 P.2d 510 (Colo. 1986).

A most sacred duty is to maintain the integrity of the law profession by disciplining lawyers who indulge in practices which are designed to perpetrate a fraud on the courts. People v. Radinsky, 176 Colo. 357, 490 P.2d 951 (1971).

Where the court specifically noted that the issue of contempt was not properly before the court, the trial court lacked authority to impose disciplinary sanctions against an attorney, along with client, for failing to disclose at the settlement conference that funds were never paid into the directory. Mulei v. Jet Courier Serv., Inc., 860 P.2d 569 (Colo. App. 1993).

Applied in Coerber v. Rath, 164 Colo. 294, 435 P.2d 228 (1967); People ex rel. Aisenberg v. Young, 198 Colo. 26, 599 P.2d 257 (1979).

Rule 251.5. Grounds for Discipline

Misconduct by an attorney, individually or in concert with others, including the following acts or omissions, shall constitute grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship:

(a) Any act or omission which violates the provisions of the Code of Professional Responsibility or the Colorado Rules of Professional Conduct;

(b) Any criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; provided that conviction thereof in a criminal proceeding shall not be a prerequisite to the institution of disciplinary proceedings, and provided further that acquittal in a criminal proceeding shall not necessarily bar disciplinary action;

(c) Any act or omission which violates these Rules or which violates an order of

discipline or disability; or

(d) Failure to respond without good cause shown to a request by the committee, the Regulation Counsel, or the Board of Trustees of the Colorado Attorneys' Fund for Client Protection or obstruction of the committee, the Regulation Counsel, or the Board or any part thereof in the performance of their duties. Good cause includes, but is not limited to, an assertion that a response would violate the respondent's constitutional privilege against self-incrimination.

This enumeration of acts and omissions constituting grounds for discipline is not exclusive, and other acts or omissions amounting to unprofessional conduct may constitute grounds for discipline.

Source: Amended and adopted June 25, 1998, effective January 1, 1999; (b) amended and effective June 16, 2011.

Editor's note: This rule was previously numbered as 241.6.

ANNOTATION

I. GENERAL CONSIDERATION.

Law reviews. For article, "The Perjurious Defendant: A Proposed Solution to the Defense Lawyer's Conflicting Ethical Obligations to the Court and to His Client", see 59 Den. L.J. 75 (1981). For Article, "Incriminating Evidence: What to do With a Hot Potato", see 11 Colo. Law. 880 (1982). For article, "The Search for Truth Continued: More Disclosure, Less Privilege", see 54 U. Colo. L. Rev. 51 (1982). For article, "The Search for Truth Continued, The Privilege Retained: A Response to Judge Frankel", see 54 U. Colo. L. Rev. 67 (1982). For article, "Descriptions of Disciplinary Matters", see 14 Colo. Law. 1418 (1985).

Annotator's note. The following annotations include cases decided under former provisions similar to this rule.

Constitutionality upheld. This rule is not unconstitutionally vague on its face or as applied. People v. Morley, 725 P.2d 510 (Colo. 1986).

Standards used in determining constitutional challenges to rule. Same standards used in determining a constitutional challenge to a statute are used in determining constitutional challenge to this rule or a disciplinary rule under the code of professional responsibility. People v. Morley, 725 P.2d 510 (Colo. 1986).

Presumption of constitutionality attaches to such enactment, and the burden is on the party challenging an enactment to demonstrate its unconstitutionality beyond a reasonable doubt. People v. Morley, 725 P.2d 510 (Colo. 1986).

Since a disciplinary rule is promulgated for the purpose of guiding lawyers in their professional conduct, and is not directed to the public at large, the central consideration in resolving a vagueness challenge should be whether the nature of the proscribed conduct encompassed by the rule is readily understandable to a licensed lawyer. People v. Morley, 725 P.2d 510 (Colo. 1986).

ABA standards for imposing lawyer sanctions utilized to determine proper sanction in disciplinary proceeding and certain findings as to aggravating and mitigating factors made. People v. Susman, 787 P.2d 1119 (Colo. 1990); In re Quiat, 979 P.2d 1029 (Colo. 1999); In re Meyers, 981 P.2d 143 (Colo. 1999); People v. Sweetman, 218 P.3d 1123 (Colo. O.P.D.J. 2008).

Applied in People v. Schermerhorn, 193 Colo. 364, 567 P.2d 799 (1977); People v. Pittam, 194 Colo. 104, 572 P.2d 135 (1977); People v. Voss, 196 Colo. 485, 587 P.2d 787 (1978); People v. Harthun, 197 Colo. 1, 593 P.2d 324 (1979); People ex rel. Gallagher v. Hertz, 608 P.2d 335 (Colo. 1979); People ex rel. Goldberg v. Gordon, 199 Colo. 296, 607 P.2d 995 (1980); People v. Barbour, 199 Colo. 126, 612 P.2d 1082 (1980); People v. Hilgers, 200 Colo. 211, 612 P.2d 1134 (1980); People v. Lanza, 200 Colo. 241, 613 P.2d 337 (1980); People v. Dixon, 200 Colo. 520, 616 P.2d 103 (1980); People v. Hurst, 200 Colo. 537, 618 P.2d 1113 (1980); People v. Berge, 620 P.2d 23 (Colo. 1980); People v. Davis, 620 P.2d 725 (Colo. 1980); People v. Gottsegen, 623 P.2d 878 (Colo. 1981); People v. Luxford, 626 P.2d 675 (Colo. 1981); People v. Dutton, 629 P.2d 103

(Colo. 1981); People v. Rotenberg, 635 P.2d 220 (Colo. 1981); People v. Barbour, 639 P.2d 1065 (Colo. 1982); People v. Whitcomb, 676 P.2d 11 (Colo. 1983); People v. Emmert, 676 P.2d 672 (Colo. 1983); People v. Spangler, 676 P.2d 674 (Colo. 1983); People v. Moore, 681 P.2d 480 (Colo. 1984); People v. Underhill, 683 P.2d 349 (Colo. 1984); People v. Simon, 698 P.2d 228 (Colo. 1985); People v. Franco, 698 P.2d 230 (Colo. 1985); People v. Madrid, 700 P.2d 558 (Colo. 1985); People v. Blanck, 700 P.2d 560 (Colo. 1985); People v. Danker, 735 P.2d 874 (Colo. 1987); People v. Quintana, 752 P.2d 1059 (Colo. 1988); People v. Smith, 778 P.2d 685 Colo. (1989).

II. GROUNDS.

A. In General.

Violation of election laws sufficient to justify public censure. People v. Casias, 646 P.2d 391 (Colo. 1982).

Actions taken by attorney contrary to court order violate this rule and justify suspension. People v. Awenius, 653 P.2d 740 (Colo. 1982).

Demonstration of rehabilitation required for readmittance to bar. Where a practicing attorney breached fiduciary duties to his client in misrepresenting his dealings and in handling of funds given to him in trust, his conduct warranted disbarment, and before he may seek readmittance to the state bar association, he must first demonstrate to the grievance committee that rehabilitation has occurred and that he is entitled to a new start. People ex rel. Buckley v. Beck, 199 Colo. 482, 610 P.2d 1069 (1980).

Actions of a suspended attorney who took part in a complex real estate transaction and engaged in the practice of law by representing, counseling, advising, and assisting a former client warranted suspension until he demonstrates by clear and convincing evidence that (1) he has been rehabilitated; (2) he has complied with and will continue to comply with all applicable disciplinary orders and rules; and (3) he is competent and fit to practice law. People v. Belfor, 200 Colo. 44, 611 P.2d 979 (1980).

Maximum suspension of three years rather than disbarment appropriate for attorney who violated a number of disciplinary rules including filing a false claim for loss of unemployment damages; failure to prepare case for trial over two-year period; failure to file affidavit required under grandparent visitation statute; arriving at settlement conference in intoxicated state; failure to file complaint and representing to client that case was close to being settled; and failure to notify disciplinary counsel of conviction of driving while ability impaired. People v. Anderson, 828 P.2d 228 (Colo. 1992).

Aggravating factors present in case include attorney's substantial experience in the practice of law, attorney's prior disciplinary record, attorney's pattern of misconduct taking place over several years and involving multiple offenses, the practice of deceit by attorney to mislead clients concerning the status of their cases, the obstruction of disciplinary proceedings by attorney's intentional failure to respond to requests for investigation, and the display of indifference to making restitution by the failure to repay a retainer after promising to do so. People v. Fahrney, 791 P.2d 1116 (Colo. 1990).

Aggravating factors present in case were: (1) A dishonest and selfish motive on the part of the respondent; (2) a pattern of misconduct; (3) multiple offenses; and (4) substantial experience in the practice of law. People v. Finesilver, 826 P.2d 1256 (Colo. 1992).

Aggravating factors present in case include: (1) The attorney's prior disciplinary record; (2) a dishonest or selfish attitude on the part of the attorney; (3) a pattern of misconduct; (4) the attorney's refusal to acknowledge the wrongfulness of his conduct; (5) the vulnerability of the client's wife and her children during the attorney's representation of them; and (6) the attorney's substantial experience in the practice of law. In re Quiat, 979 P.2d 1029 (Colo. 1999).

Aggravating factors present in case include: (1) Attorney's history of prior discipline; (2) the vulnerable status of the attorney's victims; and (3) the attorney's obstruction of the disciplinary process. In re Meyers, 981 P.2d 143 (Colo. 1999).

Aggravating factors present in case include the respondent attorney's dishonest and selfish motive, pattern of misconduct and multiple offenses, refusal to acknowledge the wrongful nature of the conduct, the vulnerability of the victims, the respondent's substantial experience with the law, and the respondent's indifference to making restitution. People v. Sweetman, 218 P.3d 1123 (Colo. O.P.D.J. 2008).

Mitigating factors present in case included the respondent's full and free disclosure to the grievance committee and the hearing board, good character and reputation, and the respondent's remorse for wrongdoing. People v. Finesilver, 826 P.2d 1256 (Colo. 1992).

Insofar as respondent's addiction to illegal drugs was a symptom of more deeply seated psychological and emotional problems, the respondent established the existence of these allegedly mitigating factors. However, even though the respondent testified that none of the converted funds were used to purchase illegal drugs, the supreme court is inclined to view the respondent's drug use itself as an aggravating rather than mitigating factor. People v. Finesilver, 826 P.2d 1256 (Colo. 1992).

Several significant aggravating factors are that the respondent engaged in multiple offenses and in a pattern of misconduct, failed to coop-

erate with the grievance committee in the attorney discipline proceedings, and submitted false statements and false evidence to the court in a related proceeding. People v. Hellewell, 827 P.2d 527 (Colo. 1992).

Aggravating factors in case where three-year suspension rather than disbarment imposed include prior disciplinary offenses, pattern of misconduct, multiple offenses, submission of false evidence, false statements, or other deceptive practices during disciplinary process, refusal to acknowledge the wrongful nature of conduct, vulnerability of victim, and substantial experience in the practice of law. Mitigating factors include remoteness of prior offenses and gesture of restitution. People v. Anderson, 828 P.2d 228 (Colo. 1992).

Public censure was appropriate where attorney made false statements in the course of discovery in cases where the attorney was the plaintiff. Evidence showed that the attorney was suffering from a psychiatric condition at the time, and the assistant disciplinary counsel could not prove that the attorney's false statements were knowing, but only that they were negligent. People v. Dillings, 880 P.2d 1220 (Colo. 1994).

Mitigating factors present in case include: (1) At the time of the misconduct, the attorney was experiencing personal problems; (2) the attorney cooperated during the disciplinary proceedings; (3) the attorney has a good character and reputation in the community; and (4) there has been a substantial delay in these disciplinary proceedings. In re Quiat, 979 P.2d 1029 (Colo. 1999).

Attorney's depression did not qualify as mitigating factor of mental disability where no testimony showed depression caused the misconduct. People v. Reynolds, 933 P.2d 1295 (Colo. 1997).

The Americans with Disabilities Act of 1990 did not prevent the Colorado supreme court from disciplining attorney who suffered from depression in light of finding that the depression had not been shown to have directly caused his misconduct. People v. Reynolds, 933 P.2d 1295 (Colo. 1997).

Demonstration of drug rehabilitation and of improved business practices required for reinstatement. Where attorney was suspended for misuse of client funds due to confusion and inattention resulting from cocaine addiction, he would be required to demonstrate a history of negative drug screening tests and that he had educated himself about the business aspects of practicing law, including the handling of trust accounts, to qualify for reinstatement following three-year suspension. People v. Schubert, 799 P.2d 388 (Colo. 1990).

Demonstration of participation in a course of therapy for clinical depression required for reinstatement where attorney was suspended for inattention resulting from such depression. People v. Barr, 855 P.2d 1386 (Colo. 1993).

Demonstration of four conditions required for attorney publicly censured after conviction of driving while ability impaired: Continue psychotherapy, remain on antabuse, submit monthly reports regarding progress on antabuse, and execute written authorization to therapist to release medical information regarding status on antabuse. People v. Rotenberg, 911 P.2d 642 (Colo. 1996).

Pattern of misconduct involving failure to render services, multiple offenses, and conversion of client's property sufficient to justify disbarment. People v. Vermillion, 814 P.2d 795 (Colo. 1991).

Conduct found to violate this rule. People v. Bugg, 635 P.2d 881 (Colo. 1981).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Barnthouse, 941 P.2d 916 (Colo. 1997).

Conduct violating this rule sufficient to justify public censure. People v. Bollinger, 648 P.2d 620 (Colo. 1982); People v. Bergmann, 716 P.2d 1089 (Colo. 1986); People v. Mayer, 716 P.2d 1094 (Colo. 1986); People v. Carpenter, 731 P.2d 726 (Colo. 1987); People v. Horn, 738 P.2d 1186 (Colo. 1987); People v. Stauffer, 745 P.2d 240 (Colo. 1987); People v. Wilson, 745 P.2d 248 (Colo. 1987); People v. Dowhan, 759 P.2d 4 (Colo. 1988); People v. Wyman, 769 P.2d 1076 (Colo. 1989); People v. Smith, 769 P.2d 1078 (Colo. 1989); People v. Feiman, 778 P.2d 830 (Colo. 1990); People v. Vigil, 779 P.2d 372 (Colo. 1989); People v. Malman, 779 P.2d 380 (Colo. 1989). People v. Barr, 805 P.2d 440 (Colo. 1991); People v. Volk, 805 P.2d 1116 (Colo. 1991); People v. Tatum, 814 P.2d 388 (Colo. 1991); People v. Shunneson, 814 P.2d 800 (Colo. 1991); People v. Mulvihill, 814 P.2d 805 (Colo. 1991); People v. Gebauer, 821 P.2d 782 (1991); People v. Borchard, 825 P.2d 999 (Colo. 1992); People v. Dillings, 880 P.2d 1220 (Colo. 1994); People v. Tauger, 893 P.2d 121 (Colo. 1995).

Evidence sufficient to justify suspension from the practice of law. People v. Belfor, 197 Colo. 223, 591 P.2d 585 (1979); People v. Goss, 646 P.2d 334 (Colo. 1982).

Conduct violating this rule sufficient to justify suspension. People v. Yaklich, 646 P.2d 938 (Colo. 1982); People v. Craig, 653 P.2d 1115 (Colo. 1982); People v. Kane, 655 P.2d 390 (Colo. 1982); People v. Vernon, 660 P.2d 879 (Colo. 1982); People v. Tyler, 678 P.2d 1014 (Colo. 1984); People v. Pilgrim, 698 P.2d 1322 (Colo. 1985); People v. Spurlock, 713 P.2d 829 (Colo. 1985); People v. Doolittle, 713 P.2d 834 (Colo. 1985); People v. Foster, 716 P.2d 1069 (Colo. 1986); People v. Coca, 716 P.2d 1073 (Colo. 1986); People v. Barnett, 716

P.2d 1076 (Colo. 1986); People v. Larson, 716 P.2d 1093 (Colo. 1986); People v. McPhee, 728 P.2d 1292 (Colo. 1986); People v. Yost, 729 P.2d 348 (Colo. 1986); People v. Holmes, 731 P.2d 677 (Colo. 1987); People v. May, 745 P.2d 218 (Colo. 1987); People v. Turner, 746 P.2d 49 (Colo. 1987); People v. Geller, 753 P.2d 235 (Colo. 1988); People v. Convery, 758 P.2d 1338 (Colo. 1988); People v. Lustig, 758 P.2d 1342 (Colo. 1988); People v. Goldberg, 770 P.2d 408 (Colo. 1989); People v. Barnthouse, 775 P.2d 545 (Colo. 1989), cert. denied, 493 U.S. 1026, 110 S. Ct. 734, 107 L. Ed. 2d 752 (1990); People v. Fahrney, 782 P.2d 743 (Colo. 1989); People v. Bottinelli, 782 P.2d 746 (Colo. 1989); People v. Chappell, 783 P.2d 838 (Colo. 1989); People v. Gregory, 788 P.2d 823 (Colo. 1990); People v. Bergmann, 790 P.2d 840 (Colo. 1990); People v. Hensley-Martin, 795 P.2d 262 (Colo. 1990); People v. Garrett, 802 P.2d 1082 (Colo. 1990); People v. Crimaldi, 804 P.2d 863 (Colo. 1991); People v. Mandell, 813 P.2d 732 (Colo. 1991); People v. Whitaker, 814 P.2d 812 (Colo. 1991); People v. Dowhan, 814 P.2d 822 (Colo. 1991); People v. Nulan, 820 P.2d 111 (Colo. 1991); People v. Williams, 824 P.2d 813 (Colo. 1992); People v. Dieters, 825 P.2d 478 (Colo. 1992); People v. Eaton, 828 P.2d 246 (Colo. 1992); People v. Williams, 915 P.2d 669 (Colo. 1996); People v. Pierson, 917 P.2d 275 (Colo. 1996); People v. Reynolds, 933 P.2d 1295 (Colo. 1997); People v. Graham, 933 P.2d 1321 (Colo. 1997); People v. Nelson, 941 P.2d 922 (Colo. 1997).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Ashley, 817 P.2d 965 (Colo. 1991); People v. Rouse, 817 P.2d 967 (Colo. 1991); People v. Calt, 817 P.2d 969 (Colo. 1991); People v. Koransky, 824 P.2d 819 (Colo. 1992); People v. Brown, 840 P.2d 348 (Colo. 1992); People v. Bennett, 843 P.2d 1385 (Colo. 1993); People v. Walsh, 880 P.2d 766 (Colo. 1994); People v. Madigan, 938 P.2d 1162 (Colo. 1997); People v. Odom, 941 P.2d 919 (Colo. 1997); People v. Clyne, 945 P.2d 1386 (Colo. 1997); In re Hugen, 973 P.2d 1267 (Colo. 1999).

Conduct violating this rule sufficient to justify disbarment. People v. Dwyer, 652 P.2d 1074 (Colo. 1982); People v. Golden, 654 P.2d 853 (Colo. 1982); People v. Blanck, 713 P.2d 832 (Colo. 1985); People v. Martinez, 739 P.2d 838 (Colo. 1987), cert. denied, 484 U.S. 1054, 108 S. Ct. 1003, 98 L. Ed. 2d 970 (1988); People v. Lovett, 753 P.2d 205 (Colo. 1988); People v. Brooks, 753 P.2d 208 (Colo. 1988); People v. Cantor, 753 P.2d 238 (Colo. 1988); People v. Turner, 758 P.2d 1335 (Colo. 1988); People v. Danker, 759 P.2d 14 (Colo. 1988); People v. Reeves, 766 P.2d 1192 (Colo. 1988); People v. Felker, 770 P.2d 402 (Colo. 1989); People v. Kengle, 772 P.2d 605 (Colo. 1989); People v. Greene, 773 P.2d 528 (Colo. 1989); People v. Vernon, 782 P.2d 745 (Colo. 1989); People v. Johnston, 782 P.2d 1195 (Colo. 1989); People v. Hedicke, 785 P.2d 918 (Colo. 1990); People v. Dulaney, 785 P.2d 1302 (Colo. 1990); People v. Gregory, 797 P.2d 42 (Colo. 1990); People v. Stayton, 798 P.2d 903 (Colo. 1990); People v. Dohe, 800 P.2d 71 (Colo. 1990); People v. Broadhurst, 803 P.2d 478 (Colo. 1990); People v. Goens, 803 P.2d 480 (Colo. 1990); People v. Bergmann, 807 P.2d 568 (Colo. 1991); People v. Rhodes, 814 P.2d 787 (Colo. 1991); People v. Wilson, 814 P.2d 791 (Colo. 1991); People v. Grossenbach, 814 P.2d 810 (Colo. 1991); People v. Hansen, 814 P.2d 816 (Colo. 1991); People v. Kramer, 819 P.2d 77 (Colo. 1991); People v. Finesilver, 826 P.2d 1256 (Colo. 1992); People v. Kelley, 840 P.2d 1068 (Colo. 1992); People v. Littlefield, 893 P.2d 773 (Colo. 1995); People v. Townshend, 933 P.2d 1327 (Colo. 1997); People v. Mason, 212 P.3d 141 (Colo. O.P.D.J. 2009).

B. Violation of Code of Professional Responsibility.

Law reviews. For article, "Punishing Ethical Violations: Aggravating and Mitigating Factors", see 20 Colo. Law. 243 (1991).

Annotator's note. For additional annotations, see the annotations under the disciplinary rules for the canons included in the Code of Professional Responsibility.

Disbarment is warranted where attorney converted client funds and where factors in mitigation, although present, were not sufficient to justify a lesser sanction. People v. Ogborn, 887 P.2d 21 (Colo. 1994).

District attorney's failure to prosecute personal friend for possession of marijuana violates code of professional responsibility and warrants three-year suspension. People v. Larsen, 808 P.2d 1265 (Colo. 1991).

Suspension is generally appropriate when a lawyer knows of a conflict of interest and fails to disclose to a client the possible effect of that conflict. Respondent admittedly and knowingly failed to fully disclose to a client the possible effect of a conflict of interest and was therefore suspended from the practice of law for ninety days, stayed upon the successful completion of a one-year period of probation. People v. Fischer, 237 P.3d 645 (Colo. O.P.D.J. 2010).

Suspension for one year and one day was warranted for attorney who violated C.R.P.C. 1.1 and C.R.P.C. 8.4 by preparing and filing child support worksheets that failed to properly reflect the new stipulation concerning custody and where aggravating factors included a previous disciplinary history and failure to appear in the grievance proceedings in violation of section (7) of this rule. People v. Davies, 926 P.2d 572 (Colo. 1996).

One-year suspension warranted when attorney's behavior constituted nine separate violations of the Colorado rules of professional conduct by challenging a final judgment repeatedly in state, federal, and water courts and pursuing a frivolous federal Racketeer Influenced and Corrupt Organizations Act lawsuit without a rudimentary analysis of the facts, while disregarding a judge's order to cease collateral attacks. People v. Maynard, 238 P.3d 672 (Colo. O.P.D.J. 2009).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Smith, 819 P.2d 497 (Colo. 1991).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Moya, 793 P.2d 1154 (Colo. 1990); People v. Creasey, 793 P.2d 1159 (Colo. 1990); People v. Schmad, 793 P.2d 1162 (Colo. 1990); People v. Lopez, 796 P.2d 957 (Colo. 1990); People v. Sullivan, 802 P.2d 1091 (Colo. 1990); People v. Lamberson, 802 P.2d 1098 (Colo. 1990); People v. Rhodes, 803 P.2d 514 (Colo. 1991); People v. Flores, 804 P.2d 192 (Colo. 1991); People v. Ross, 810 P.2d 659 (Colo. 1991); People v. Dash, 811 P.2d 36 (Colo. 1991); People v. Honaker, 814 P.2d 785 (Colo. 1991); People v. Heilbrunn, 814 P.2d 819 (Colo. 1991); People v. Mulligan, 817 P.2d 1028 (Colo. 1991); People v. Redman, 819 P.2d 495 (Colo. 1991); People v. Rader, 822 P.2d 950 (Colo. 1992); People v. Farrant, 852 P.2d 452 (Colo. 1993); People v. Robinson, 853 P.2d 1145 (Colo. 1993); People v. Barr, 855 P.2d 1386 (Colo. 1993); People v. Dickinson, 903 P.2d 1132 (Colo. 1995); In re Demaray, 8 P.3d 427 (Colo. 1999).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Lyons, 762 P.2d 143 (Colo. 1988); People v. Frank, 782 P.2d 769 (Colo. 1989); In re Bilderback, 971 P.2d 1061 (Colo. 1999).

C. Violation of Legal Ethics.

Where severe sanctions necessitated. Where misconduct is grievous and demonstrates insensitivity to the professional obligations of a lawyer, it necessitates a severe sanction to reflect the gravity of the breach of ethical standards and to protect the public from future unprofessional conduct. People v. Razatos, 636 P.2d 666 (Colo. 1981), appeal dismissed, 455 U.S. 930, 102 S. Ct. 1415, 71 L. Ed. 2d 639 (1982).

Of more concern is our responsibility to protect the public interest by ensuring continued confidence of the people of this state in the function and role of the office of district attorney and the integrity of the legal profession and the judicial system. People v. Brown, 726 P.2d 638 (Colo. 1986).

The public has a right to expect that one who engages in such gregarious professional misconduct shall be disciplined appropriately. People v. Kendrick, 646 P.2d 337 (Colo. 1982).

Where an attorney demonstrates an extreme indifference to the welfare of his clients and the status of their cases and an extreme insensitivity to his professional duties in the face of adverse judgments due to neglect, client complaints, and repeated disciplinary proceedings, disbarment is the appropriate sanction. People v. Wyman, 782 P.2d 339 (Colo. 1989).

Total disregard of obligation to protect a client's rights and interests over an extended period of time in conjunction with the violation of a number of disciplinary rules and an extended prior record of discipline requires most severe sanction of disbarment. People v. O'Leary, 783 P.2d 843 (Colo. 1989).

The severity of the ethical violations may be balanced by lack of prior discipline, absence of injury to clients, compliance with court ordered treatment plan, and dismissal of criminal charges in felony prosecution. People v. Abelman, 744 P.2d 486 (Colo. 1987).

Continued representation of clients with conflicting interests violates this rule and warrants discipline. People v. Awenius, 653 P.2d 740 (Colo. 1982).

Adjudicating, as a judge, the criminal case of a person who is his client in a divorce proceeding warrants public censure because it is the duty of an attorney-judge to promptly disclose conflicts of interest and to disqualify himself without suggestion from anyone. People v. Perrott, 769 P.2d 1075 (Colo. 1989).

Unauthorized recordation of telephone conversation established unethical conduct. Telephone conversation, which attorney initiated and recorded without the permission of other party to conversation, established unethical conduct on attorney's part. People v. Wallin, 621 P.2d 330 (Colo. 1981).

Suggesting that witness have ex parte communication with chief justice. Where an attorney suggested to a principal witness in a pending grievance proceeding against that attorney that he write a letter on behalf of the attorney to the chief justice of the state supreme court, substantially recanting his testimony in the grievance proceeding, the attorney's conduct violated this rule and the code of professional responsibility. Public censure is the appropriate discipline for this breach of professional obligations. People v. Hertz, 638 P.2d 794 (Colo. 1982).

Most severe punishment is required when a lawyer disregards his professional obligations and converts his clients' funds to his own use. People v. Kluver, 199 Colo. 511, 611 P.2d 971 (1980); People v. Kendrick, 646 P.2d 337 (Colo. 1982); People v. Bealmear, 655 P.2d 402 (Colo.

1982); People v. Costello, 781 P.2d 85 (Colo. 1989).

Conversion of client funds is conduct warranting disbarment because it destroys the trust essential to the attorney-client relationship, severely damages the public's perception of attorneys, and erodes public confidence in our legal system. People v. Radosevich, 783 P.2d 841 (Colo. 1989).

When an attorney converts client property, disbarment is an appropriate sanction. People v. Hellewell, 827 P.2d 527 (Colo. 1992).

Disbarment justified. Misappropriation of client's funds, falsifying billing records of clients, failure to disclose conviction, and disbarment from another state's bar warrant disbarment. People v. Miller, 744 P.2d 489 (Colo. 1987).

Disbarment warranted where attorney accepted fees to represent clients after an order of suspension was entered against the attorney and the attorney failed to notify certain of his clients and opposing counsel of his suspension. People v. Zimmermann, 960 P.2d 85 (Colo. 1998).

Disbarment was the proper remedy in view of the numerous and grave instances of professional misconduct, including the intentional misappropriation of client funds. People v. Lefly, 902 P.2d 361 (Colo. 1995).

Aiding client to violate custody order sufficient to justify disbarment. People v. Chappell, 927 P.2d 829 (Colo. 1996).

Misappropriation of funds, failure to account, and deceit and fraud in handling the affairs of a client necessitate that an attorney be disbarred. People v. Bealmear, 655 P.2d 402 (Colo. 1982).

Misuse of funds by a lawyer strikes at the heart of the legal profession by destroying public confidence in lawyers. The most severe punishment is required when a lawyer disregards his professional obligations and converts his clients' funds to his own use. People v. Buckles, 673 P.2d 1008 (Colo. 1984).

Attorney's misuse of funds, writing of bad checks, and neglect in handling a legal matter justify disbarment. People v. Murphy, 778 P.2d 658 (Colo. 1989).

A stipulation of misconduct admitting to withdrawing money while acting as personal representative so that one's corporation can post an appeal bond, converting funds from estates while serving as personal representative, converting settlement proceeds, and converting funds while serving as president of endowment foundation warrant disbarment. People v. Costello, 781 P.2d 85 (Colo. 1989).

Converting estate or trust funds for one's personal use, overcharging for services rendered, neglecting to return inquiries relating to client matters, failing to make candid disclosures to grievance committee, and attempting to conceal wrongdoing during disciplinary proceedings violates this rule and warrants the severe sanction of disbarment. People v. Gerdes, 782 P.2d 2 (Colo. 1989).

Exploiting a client's friendship and trust to extort funds for one's personal use, failing to take any action on behalf of a client, and failing to cooperate with the grievance committee in its investigation of complaints with respect to such matters violates this rule and warrants disbarment. People v. McMahill, 782 P.2d 336 (Colo. 1989).

Commingling trust funds, failing to maintain complete records of client's funds, and failure to render appropriate accounts to client constitutes grounds for discipline. People v. Wright, 698 P.2d 1317 (Colo. 1985).

Failure to deposit funds in trust account, to notify client of receipt of funds and provide accounting, and to forward file promptly to new attorney and communicating with former client on the subject of representation after client had obtained new legal counsel, along with other offenses, warrants public censure. People v. Swan, 764 P.2d 54 (Colo. 1988).

Public censure justified. Failure to place client's funds in interest bearing account to detriment of client, wrongful disbursement of funds, misrepresentation to the court, and failure to comply with court order to produce documentation warrant, at the very least, public censure. People v. C de Baca, 744 P.2d 512 (Colo. 1987).

Refusal to provide accounting for money and jewelry delivered to him, and refusal to itemize the services performed and the costs incurred, warrants disbarment. People v. Lanza, 660 P.2d 881 (Colo. 1983).

Failure and refusal to refund unearned portions of fees collected from two clients constituted violations of this rule, DR 9-102, Code of Prof. Resp., and DR 2-110, Code of Prof. Resp. People v. Gellenthien, 621 P.2d 328 (Colo. 1981).

Suspension justified considering respondent's violations of ethical duties to client and other aggravating factors including a pattern of misconduct, a substantial experience in the practice of law, and the vulnerability of respondent's client. People v. Grossenbach, 803 P.2d 961 (Colo. 1991).

Where money was accepted for investment plans which were totally false, fictitious, and fraudulent, attorney violated legal ethics and disbarment was appropriate. People v. Kramer, 819 P.2d 77 (Colo. 1991).

An attorney's appearance as counsel of record in numerous court proceedings following an order of suspension constituted grounds for attorney discipline. People v. Kargol, 854 P.2d 1267 (Colo. 1993).

Attorney's admitted initiation of sexual contact and sexual intrusion on a client violate sections (2), (3), and (5) of this rule. People v. Dawson, 894 P.2d 756 (Colo. 1995).

D. Violation of Honesty, Justice, or Morality.

Attorney never to obstruct justice or judicial process. An attorney has a high duty as an officer of the court to never participate in any scheme to obstruct the administration of justice or the judicial process. People v. Kenelly, 648 P.2d 1065 (Colo. 1982); People v. Haase, 781 P.2d 80 (Colo. 1989).

A lawyer who holds the position of district attorney, with the substantial powers of that office, assumes responsibilities beyond those of other lawyers and must be held to the highest standard of conduct. When those powers are abused and duties ignored, the discipline must be commensurate with the act. People v. Brown, 726 P.2d 638 (Colo. 1986).

Conduct of counsel found contrary to standards of honesty, justice and integrity. People v. Emmert, 632 P.2d 562 (Colo. 1981).

Submission of false transcript to obtain admission to law school and to qualify for admission as a member of the bar is a violation of this rule and requires that respondent's admission to the bar be voided. People v. Culpepper, 645 P.2d 5 (Colo. 1982).

Failure to disclose conviction and disbarment from another state's bar. An attorney's failure to disclose her conviction and a subsequent disbarment from bar of another state prior to being admitted to the Colorado bar constitutes conduct involving fraud, deceit, and misrepresentation prejudicial to the administration of justice. People v. Mattox, 639 P.2d 397 (Colo. 1982).

Attorney's failure to disclose felony conviction and subsequent disbarment from bar of another state is sufficient for disbarment. People v. Brunn, 764 P.2d 1165 (Colo. 1988).

Attorney/real estate broker lying to salesperson working for attorney/real estate broker regarding progress and completion of transfer of salesperson's license was a violation even though salesperson was not a client. People v. Susman, 747 P.2d 667 (Colo. 1987).

Accepting marijuana in exchange for legal services warrants one-year suspension from practice of law. People v. Davis, 768 P.2d 1227 (Colo. 1989).

Alcohol and health problems not excuse. Alcohol and health problems, as well as emotional problems, do not excuse an attorney's dilatory practices and false statements to his clients. People v. Goss, 646 P.2d 334 (Colo. 1982).

Efforts at rehabilitation do not excuse conduct which includes dishonesty and fraud, failing to preserve identity of client funds, and failing to properly pay or deliver client funds, and which otherwise warrants disbarment. People v. Shafer, 765 P.2d 1025 (Colo. 1988).

Attorney's conduct (committing fraud by check) provides grounds for discipline under rules of civil procedure and violates the code of professional responsibility. People v. Proffitt, 731 P.2d 1257 (Colo. 1987).

Chief deputy district attorney's theft of less than $50 constitutes conduct warranting public censure where significant mitigating factors exist. People v. Buckley, 848 P.2d 353 (Colo. 1993).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Rader, 822 P.2d 950 (Colo. 1992).

Attorney's failure to file personal state and federal income tax returns and to pay withholding taxes for federal income taxes and FICA, and use of cocaine and marijuana constitute conduct warranting suspension for one year and one day. People v. Holt, 832 P.2d 948 (Colo. 1992).

Suspension of one year and one day warranted where attorney sexually mistreated employees of his law firm. People v. Lowery, 894 P.2d 758 (Colo. 1995).

Suspension for one year and one day appropriate when attorney terminated representation without reasonable notice, failed to provide client with accounting and refund, and failed to meet continuing education requirements. Restitution required as condition of reinstatement. People v. Rivers, 933 P.2d 6 (Colo. 1997).

Suspension for one year and one day warranted where attorney knowingly submitted a false statement to the small business administration for the purpose of obtaining a loan. People v. Mitchell, 969 P.2d 662 (Colo. 1998).

Attorney's commission of bank fraud constitutes misconduct involving an act or omission violating the highest standards of honesty, justice, or morality and warrants disbarment. People v. Terborg, 848 P.2d 346 (Colo. 1993).

Six-month suspension justified where attorney knowingly failed to perform services for client, knowingly violated court order, engaged in dishonest conduct, and intentionally failed to respond to formal complaint or to cooperate with grievance committee without good cause. People v. Smith, 880 P.2d 763 (Colo. 1994).

Attorney's admitted initiation of sexual contact and sexual intrusion on a client violate sections (2), (3), and (5) of this rule. People v. Dawson, 894 P.2d 756 (Colo. 1995).

Public censure warranted for attorney's solicitation of prostitution during telephone conversation with wife of client whom he was representing in a dissolution of marriage proceeding. People v. Bauder, 941 P.2d 282 (Colo. 1997).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Eastepp, 884 P.2d 305 (Colo. 1994).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Sims, 913 P.2d 526 (Colo. 1996); People v. Allbrandt, 913 P.2d 532 (Colo. 1996).

E. Gross Negligence.

Lawyer owes obligation to client to act with diligence in handling his client's legal work and in his representation of his client in court. People v. Bugg, 200 Colo. 512, 616 P.2d 133 (1980).

Attorney violated section (4) by engaging in two non-sufficient funds transactions involving his "special" account, and 22 non-sufficient funds transactions in his personal account. People v. Johnson, 944 P.2d 524 (Colo. 1997).

Failure to take action on behalf of client. In failing to represent or take any action on behalf of his client after he was retained and entrusted with work and in making representations to his client which were false, an attorney violates this rule and the code of professional responsibility. People v. Southern, 638 P.2d 787 (Colo. 1982).

Failing to record deeds of trust. An attorney's conduct in borrowing money from his former clients and in failing to record deeds of trust on their behalf to be used as security constitutes professional misconduct and is sufficient to justify suspension. People v. Brackett, 667 P.2d 1357 (Colo. 1983).

Continued pattern of conduct involving neglect and misrepresentation. Attorney disbarred for continued pattern of conduct involving neglect and misrepresentation, and for failure to cooperate in investigation by grievance committee. People v. Young, 673 P.2d 1003 (Colo. 1984); People v. Johnston, 759 P.2d 10 (Colo. 1988).

Pattern of neglect which has not been corrected despite lesser sanctions requires imposition of suspension for protection of public. People v. Mayer, 744 P.2d 509 (Colo. 1987).

Repeated neglect and delay in handling legal matters and failure to comply with the directions contained in a letter of admonition and to answer letter of complaint from the grievance committee constitute a violation of this rule and, with other offenses of the code of professional responsibility, are sufficient to justify suspension for three years. People v. Hebenstreit, 764 P.2d 51 (Colo. 1988).

Abandoning clients sufficient to justify disbarment. People v. Sanders, 713 P.2d 837 (Colo. 1985); People v. Susman, 787 P.2d 1119 (Colo. 1990).

Conduct manifesting gross carelessness in representation of clients is sufficient to justify suspension. People v. Roehl, 655 P.2d 1381 (Colo. 1983).

Attorney's neglect of dissolution case and misrepresentation to client concerning the filing of dissolution petition was especially egregious in view of client's desire to remarry. Conduct, in addition to number and severity of other instances of misconduct, taking into account mitigating factors, is sufficient for suspension. People v. Griffin, 764 P.2d 1166 (Colo. 1988).

Failure to perform adequate research on statute of limitations problem, given the time available and the urgings of clients to proceed, constitutes gross negligence within meaning of this rule. Attorney's claimed reliance on federal court decision declaring statute of limitations unconstitutional was objectively unreasonable in light of state court decision which expressly disagreed with federal court decision. People v. Barber, 799 P.2d 936 (Colo. 1990).

Suspension is appropriate discipline given the number and severity of instances of misconduct, including pattern of neglect over clients' affairs over lengthy period and in variety of circumstances and misrepresentation in dissolution case to client who wished to remarry concerning the filing of a dissolution petition. Considering proper mitigating factors such as attorney's lack of experience, absence of prior discipline, attorney's willingness to undergo psychiatric evaluation and accept transfer to disability inactive status, suspension without credit for time on disability inactive status is appropriate. People v. Griffin, 764 P.2d 1166 (Colo. 1988).

Undertaking to provide services to clients in areas in which one lacks experience, which would ordinarily result in a reprimand, warrants a 30-day suspension when coupled with continued neglect after private censure. People v. Frank, 752 P.2d 539 (Colo. 1988).

Neglect of client matters, use of cocaine, and failure to respond to complaint and client correspondence warrant public censure in light of participation in comprehensive rehabilitation programs. People v. Driscoll, 716 P.2d 1086 (Colo. 1986).

Respondent's continued neglect of matters entrusted to him, including his failure to deliver a promissory note and his failure to record a deed of trust, and respondent's acceptance of a retainer and his subsequent failure to litigate the matter warrant suspension from the practice of law for two years. Respondent's misconduct was aggravated by his failure to cooperate with the grievance committee. People v. Fagan, 791 P.2d 1123 (Colo. 1990).

Failure to timely file a paternity action constitutes neglect of a legal matter that warrants public censure. People v. Good, 790 P.2d 331 (Colo. 1990).

Suspension for one year and one day appropriate where attorney violated section (4) by not returning or accounting for client funds held for emergencies after the clients fired the attorney and for negligently converting other client funds to the attorney's own use. People v.

Johnson, 944 P.2d 524 (Colo. 1997).

Abandonment of law practice and conversion of clients' funds to attorney's own use justifies disbarment of attorney. People v. Franks, 791 P.2d 1 (Colo. 1990).

Disbarment is appropriate discipline for attorney who caused potentially serious injury to clients by abandoning his practice, knowingly failing to perform services for clients, and engaging in pattern of neglect. People v. Nichols, 796 P.2d 966 (Colo. 1990).

Aggravating factors in case were the previous issuance of a letter of admonition for a disciplinary offense, the lawyer's actions in dealing with clients which establish a dishonest or selfish motive, the acceptance of new clients and the charging of retainers immediately before lawyer moved to Ireland, multiple offenses and a repetition of the same conduct, the bad faith obstruction of the disciplinary process, the utilization of the substantial experience and expertise of the lawyer in the practice of law to collect substantial fees for services that the lawyer knew he could not perform, and the total indifference of the lawyer to making restitution and to repaying misappropriated funds. People v. Franks, 791 P.2d 1 (Colo. 1990).

Neglect of a legal matter entrusted to the attorney and misrepresentation to the client in connection with a real estate transaction constituted violations of this rule and various other rules. People v. Susman, 787 P.2d 1119 (Colo. 1990).

Failure to file petition for dissolution of marriage and failure to return unearned legal fees sufficient to warrant 45-day suspension. People v. Combs, 805 P.2d 1115 (Colo. 1991).

Attorney's lack of preparation for trial constituted gross negligence. People v. Butler, 875 P.2d 219 (Colo. 1994).

F. Criminal Behavior.

Disciplinary proceedings are sui generis in nature, and conviction of a criminal offense is not a condition precedent to the institution of such proceedings nor does acquittal constitute a ban to such proceedings. People v. Harfmann, 638 P.2d 745 (Colo. 1981); People v. Morley, 725 P.2d 510 (Colo. 1986).

Acquittal may be considered by grievance committee. Although an acquittal is not a bar to disciplinary action, it may be considered by the grievance committee. People v. Kenelly, 648 P.2d 1065 (Colo. 1982).

Disbarment warranted by attorney's conviction of conspiracy to deliver counterfeited federal reserve notes, serious neglect of several legal matters, unjustified retention of clients' property, failure to respond to the grievance committee, and previous disciplinary record. People v. Mayer, 752 P.2d 537 (Colo. 1988).

Felonious conduct and violation of code of professional responsibility justifies disbarment. Where a lawyer's conduct not only constitutes a violation of the code of professional responsibility, but also involves felonious conduct, clearly and convincingly proven by testimony of sheriff's officers, the grievance committee is justified in requiring disbarment. People v. Harfmann, 638 P.2d 745 (Colo. 1981).

Conviction of a district attorney of two felonies and a misdemeanor while in office warrants the most severe sanction — disbarment. People v. Brown, 726 P.2d 638 (Colo. 1986).

Conviction of a serious felony involving dishonesty, fraud, deceit, and conversion of clients funds in another state and failure to notify Colorado authorities of same justifies disbarment. People v. Hedicke, 785 P.2d 918 (Colo. 1990).

Use of license to practice law for the purpose of bringing into being an illegal prostitution enterprise renders disbarment the only possible form of discipline. Any lesser sanction would unduly depreciate such misconduct in the eyes of the public and the legal profession. People v. Morley, 725 P.2d 510 (Colo. 1986).

Disbarment not unjust discipline for embezzling funds from estate of client, conversion of money belonging to employer, and convictions of theft and unlawful distribution and possession of controlled substance, after consenting to entry of disbarment in another jurisdiction. People v. Fitzke, 716 P.2d 1065 (Colo. 1986).

Where there is a great weight of mitigating evidence, even when an attorney has engaged in serious criminal conduct which would ordinarily justify disbarment, a three-year suspension and the requirement to pay costs of the disciplinary proceeding may be appropriate in lieu of disbarment. People v. Preblud, 764 P.2d 822 (Colo. 1988).

Existence of numerous mitigating factors warrant three-year suspension and payment of costs rather than disbarment for attorney convicted of felony violations of the California Revenue and Taxation Code. People v. Mandell, 813 P.2d 732 (Colo. 1991).

Felony theft held sufficient grounds for suspension. People v. Petrie, 642 P.2d 519 (Colo. 1982).

Defendant intentionally and without permission took eyeglass frames from two retail stores and thereby violated section (5). There were many aggravating factors, the only mitigating factor was a suspension eight years prior. One year suspension levied. People v. Barnthouse, 948 P.2d 534 (Colo. 1997).

Conviction for sale of narcotic drug warrants disbarment and action striking attorney's name from the role of lawyers authorized to practice before the court. People v. McGonigle, 198 Colo. 315, 600 P.2d 61 (1979).

Conviction of conspiracy to violate drug laws. A lawyer who enters into a conspiracy to violate the law by importing narcotic drugs for

distribution should be disbarred. People v. Unruh, 621 P.2d 948 (Colo. 1980).

Conviction for conspiracy to possess with intent to distribute cocaine warrants disbarment and the striking of the attorney's name from the roll of attorneys licensed to practice in this state. People v. Avila, 778 P.2d 657 (Colo. 1989).

Use of professional status to accomplish illicit commercial transaction. Violation of the criminal laws of Colorado is grounds for discipline, and the use of one's professional status to accomplish an illicit commercial transaction for profit demands the most severe sanction. People v. McGonigle, 198 Colo. 315, 600 P.2d 61 (1979).

Attorney's use of his position as director of a bank to arrange financial transactions in a manner prohibited by federal law, where his conduct was deliberate, carefully planned, and extended over a period of a year and a half, justified disbarment, notwithstanding such factors as attorney's full restitution to bank, his cooperation with federal officials, his lack of any prior criminal record, his history of community service, and the existence of psychological problems which may have precipitated his illegal activity and which have been acknowledged and solved. People v. Loseke, 698 P.2d 809 (Colo. 1985).

Structuring financial transaction to avoid reporting requirements, a felony under federal law, warranted disbarment. In re DeRose, 55 P.3d 126 (Colo. 2002).

Committing offense of bigamy and placing unauthorized signatures upon land deeds warranted public censure. People v. Tucker, 755 P.2d 452 (Colo. 1988).

Committing offense of third-degree sexual assault on a client and recklessly accusing a lawyer and judge of having an improper ex parte communication warranted suspension for a year and a day, and, for purposes of a disciplinary proceeding, the sexual assault only had to be proved by clear and convincing evidence, not beyond a reasonable doubt. In re Egbune, 971 P.2d 1065 (Colo. 1999).

Neglect of client matters, use of cocaine, and failure to respond to complaint and client correspondence warrant public censure in light of participation in comprehensive rehabilitation programs. People v. Driscoll, 716 P.2d 1086 (Colo. 1986).

Public censure appropriate in light of mitigating circumstances for possession of cocaine in violation of state and federal controlled substance laws. People v. Gould, 912 P.2d 556 (Colo. 1996).

Discharging firearm in direction of spouse while intoxicated, although not a crime involving dishonesty, goes beyond mere negligence and public censure is appropriate. Mitigating factors, although present, were insufficient to warrant making censure private. People v. Senn, 824 P.2d 822 (Colo. 1992).

Adopting a conscious scheme to take ownership of homes, collect rents from tenants, make virtually no efforts to sell the homes, and permit foreclosures to occur on which the department of housing and urban development (HUD) would absorb the losses constituted equity skimming in violation of § 18-5-802 and constitutes a violation of sections (A)(4) and (A)(6) for which suspension for one year is appropriate. People v. Phelps, 837 P.2d 755 (Colo. 1992).

Suspension of one year and one day warranted for attorney who entered guilty plea to class 5 felony of failure to pay employee income tax withheld and who violated other disciplinary rules involving neglect of legal matter, failure to seek lawful objectives of client, intentional failure to carry out employment contract resulting in intentional prejudice or damage to client. People v. Franks, 866 P.2d 1375 (Colo. 1994).

Suspension of two years warranted for attorney who reached a consent settlement with the securities and exchange commission stating that he had employed devices, schemes, or artifices to defraud or made untrue statements of material fact or engaged in acts, practices, or courses of business which operated as a fraud or deceit upon persons in violation of the Securities and Exchange Act. People v. Hanks, 967 P.2d 141 (Colo. 1998).

Where deputy district attorney was convicted of possession of cocaine under federal law, one-year suspension is appropriate due to seriousness of offense and fact that attorney had higher responsibility to the public by virtue of engaging in law enforcement. People v. Robinson, 839 P.2d 4 (Colo. 1992).

Guilty pleas of deputy district attorney for acting as an accessory to a crime and for official misconduct relating to the disposal of drug paraphernalia warrants six-month suspension. Respondent's status as a deputy district attorney at the time she committed the offenses is an aggravating factor because public officials engaged in law enforcement have assumed an even greater responsibility to the public than have other lawyers. People v. Freeman, 885 P.2d 205 (Colo. 1994).

Suspension of one year and one day appropriate for experienced attorney and judicial officer who pled guilty to unlawful use of a controlled substance. People v. Stevens, 866 P.2d 1378 (Colo. 1994).

Attorney who was not charged or convicted of a substance abuse related crime was suspended. The attorney's drug problem was self-reported, he had voluntarily hospitalized himself and undergone an after-care program, and he had over one year of sustained recovery. People v. Ebbert, 873 P.2d 731 (Colo. 1994).

Suspension of three years was appropriate for attorney who drove a vehicle on at least four occasions after his driver's license was revoked and who also failed to appear in two cases involving his illegal driving. People v. Hughes, 966 P.2d 1055 (Colo. 1998).

Attorney offered money to two police officers in the context of releasing his client from custody. The attorney alleged such action was a joke intended to teach his client that the police would not release the client from custody. Such activity was determined to be bribery even though the attorney was not charged by the police and sufficient for a three-year suspension. In re Elinoff, 22 P.3d 60 (Colo. 2001).

Suspension for one year and one day warranted where attorney failed to appear in county court on a charge of driving under the influence. People v. Myers, 969 P.2d 701 (Colo. 1998).

Entering guilty pleas to multiple counts of bank fraud evidences serious criminal conduct warranting disbarment. People v. Vidakovich, 810 P.2d 1071 (Colo. 1991).

Pleading guilty to a single count of bank fraud evidences serious criminal conduct warranting disbarment. People v. Terborg, 848 P.2d 346 (Colo. 1993).

Entering guilty plea to committing mail fraud evidences serious criminal conduct warranting disbarment. People v. Bollinger, 859 P.2d 901 (Colo. 1993).

When a lawyer knowingly converts client funds, disbarment is virtually automatic, at least in the absence of significant factors in mitigation. People v. McDonnell, 897 P.2d 829 (Colo. 1995).

Convictions for conspiring to commit fraud against the United States and impeding an officer of a United States court justify disbarment. People v. Pilgrim, 802 P.2d 1084 (Colo. 1990).

Conviction for bankruptcy fraud warrants disbarment. People v. Brown, 841 P.2d 1066 (Colo. 1992).

Disbarment is warranted where attorney was convicted of felony offense of forging a federal bankruptcy judge's signature and had engaged in multiple types of other dishonest conduct and where there was an insufficient showing of mental disability. People v. Goldstein, 887 P.2d 634 (Colo. 1994).

Suspension justified where respondent violated federal and state laws by failing to file personal income tax returns, failing to pay withholding taxes, using cocaine, and using marihuana. People v. Holt, 832 P.2d 948 (Colo. 1992).

The fact that no specific client of the respondent was actually harmed by the respondent's misconduct misses the point in proceeding for suspension of an attorney. While the primary purpose of attorney discipline is the protection of the public and not to mete punishment to the offending lawyer, lawyers are, nonetheless, charged with obedience to the law, and intentional violation of those laws subjects an attorney to the severest discipline. People v. Holt, 832 P.2d 948 (Colo. 1992).

Lack of prior disciplinary record insufficient to call for sanction less than disbarrment where attorney convicted of bankruptcy fraud, conspiracy to commit bankruptcy fraud and other federal offenses. People v. Schwartz, 814 P.2d 793 (Colo. 1991).

Although attorney had not previously been disciplined, sanction of disbarment was warranted where attorney's felony conviction for possession of a firearm occurred while he was still on probation for a felony conviction for possession of marijuana. People v. Laquey, 862 P.2d 278 (Colo. 1993).

Lack of prior disciplinary record insufficient to call for sanction less than disbarment where attorney pleaded guilty to bribery. People v. Viar, 848 P.2d 934 (Colo. 1993).

Conviction for aiding fugitive to flee warrants disbarment despite lack of a prior disciplinary record. People v. Bullock, 882 P.2d 1390 (Colo. 1994).

Respondent given two-year suspension for aiding and abetting aliens' entry into the United States and by advising clients to make misrepresentations for such entry. Such an act generally warrants disbarment, but respondent's full disclosure during proceedings, expression of remorse, and the fact that a prior offense was remote in time were mitigating factors. Respondent also required to discontinue the representation of clients before INS and the Department of Labor. People v. Boyle, 942 P.2d 1199 (Colo. 1997).

Six-month suspension justified for attorney pleading guilty to making and altering a false and forged prescription for a controlled substance and of criminal attempt to obtain a controlled substance by forgery and alteration, where mitigating factors included: (1) No prior disciplinary history; (2) personal or emotional problems at time of misconduct; (3) full and free disclosure by attorney to grievance committee; (4) imposition of other penalties and sanctions resulting from criminal proceeding; (5) demonstration of genuine remorse; and (6) relative inexperience in the practice of law. People v. Moore, 849 P.2d 40 (Colo. 1993).

Six-month suspension appropriate for respondent convicted of drunken driving offense and assault. People v. Shipman, 943 P.2d 458 (Colo. 1997); People v. Reaves, 943 P.2d 460 (Colo. 1997).

Chief deputy district attorney's theft of less than $50 constitutes conduct warranting public censure where significant mitigating factors exist. People v. Buckley, 848 P.2d 353 (Colo. 1993).

Attorney's failure to file personal state and federal income tax returns and to pay withholding taxes for federal income taxes and FICA, and use of cocaine and marijuana constitute conduct warranting suspension for one year and one day. People v. Holt, 832 P.2d 948 (Colo. 1992).

Failure to file federal income tax returns in combination with mitigating factors of no prior discipline and significant personal problems at the time of the misconduct warrants public censure. People v. Tauger, 893 P.2d 121 (Colo. 1995).

Public censure was appropriate where significant mitigating factors were present. Attorney was convicted of vehicular assault, a class 4 felony, and two counts of driving under the influence of alcohol. The crimes are strict liability offenses for which attorney must serve three years in the custody of the department of corrections, followed by a two-year mandatory period of parole. Section 18-1-105(3) provides that, while he is serving his sentence, attorney is disqualified from practicing as an attorney in any state courts. The sentence and disqualification from practicing law are a significant "other penalty[] or sanction[]" and therefore a mitigating factor in determining the level of discipline. In re Kearns, 991 P.2d 824 (Colo. 1999) (decided under former C.R.C.P. 241.6(5)).

Public censure was warranted where attorney twice requested arresting officers in driving under the influence cases not to appear at license revocation hearings before the department of motor vehicles. People v. Carey, 938 P.2d 1166 (Colo. 1997).

Public censure was appropriate where an already suspended attorney was the subject of prior discipline for misdemeanor convictions of assault and driving while impaired and where an additional period of suspension would have little, if any, practical effect and would not have afforded a meaningful measure of protection for the public. People v. Flores, 871 P.2d 1182 (Colo. 1994).

Public censure warranted for attorney's solicitation of prostitution during telephone conversation with wife of client whom he was representing in a dissolution of marriage proceeding. People v. Bauder, 941 P.2d 282 (Colo. 1997).

Suspension for 180 days is warranted based upon conviction of third degree assault charges. People v. Knight, 883 P.2d 1055 (Colo. 1994).

The conduct of an attorney who is convicted of domestic violence and who fails to report the conviction substantially reflects adversely on the attorney's fitness to practice. The aggravating factors outweigh the mitigating factors; accordingly, the proper form of discipline is six months' suspension. In re Hickox, 57 P.3d 403 (Colo. 2002).

Disbarment is warranted for driving while impaired, marihuana possession, improperly executing agreement without authority, and failing to perform certain professional duties, despite the lack of a prior record. People v. Gerdes, 891 P.2d 995 (Colo. 1995).

Attorney's admitted initiation of sexual contact and sexual intrusion on a client violate sections (2), (3), and (5) of this rule. People v. Dawson, 894 P.2d 756 (Colo. 1995).

Disbarment warranted where attorney was convicted of two separate sexual assaults on a client and a former client and attorney's previous dishonest conduct was an aggravating factor as well as findings of the attorney's selfish motive in engaging in the sexual misconduct, the two clients' vulnerability, the attorney's more than 20 years practicing law, and the attorney's failure to acknowledge the wrongful nature of his conduct. People v. Bertagnolli, 922 P.2d 935 (Colo. 1996).

Notwithstanding the entry of attorney's "Alford" plea in sexual assault proceedings, for purpose of disciplinary proceeding the attorney was held to have actually committed the acts necessary to accomplish third degree sexual assault and therefore the attorney knowingly had sexual contact with a former client and with a current client without either woman's consent. People v. Bertagnolli, 922 P.2d 935 (Colo. 1996).

Disbarment warranted for attorney convicted of criminal attempt to commit sexual exploitation of a child, a class 4 felony. People v. Damkar, 908 P.2d 1113 (Colo. 1996).

Disbarment warranted for attorney convicted of one count of sexual assault on a child, notwithstanding lack of a prior record of discipline. People v. Espe, 967 P.2d 159 (Colo. 1998).

Disbarment warranted for attorney convicted in Hawaii of second-degree murder. People v. Draizen, 941 P.2d 280 (Colo. 1997).

Disbarment appropriate sanction for attorney who intentionally killed another person. Despite a lack of prior discipline in this state, giving full faith and credit to another state's law and its jury finding that attorney intentionally took her husband's life by shooting him 10 times with a firearm, disbarment is an appropriate sanction. People v. Sims, 190 P.3d 188 (Colo. O.P.D.J. 2008).

Disbarment warranted for writing nonsufficient funds checks while practicing law during a period of suspension and committing several other disciplinary rules violations. People v. Fager, 938 P.2d 138 (Colo. 1997).

Disbarment justified in a reciprocal discipline proceeding where attorney convicted of knowingly making false statements to obtain a loan from a federal savings and loan institution. Attorney was also disbarred by the United States court of federal claims and had

his license revoked by the Virginia state bar for the same offense. Unless certain exceptions exist, the same discipline that was imposed in the foreign jurisdiction is generally imposed in a reciprocal discipline proceeding. People v. Kiely, 968 P.2d 110 (Colo. 1998).

Disbarment warranted for knowingly abandoning clients, converting their funds, and causing actual financial and emotional harm to them. Attorney violated duty to preserve clients' property, to diligently perform services on their behalf, to be candid with them during the course of the professional relationship, and to abide by the legal rules of substance and procedure that affect the administration of justice. People v. Martin, 223 P.3d 728 (Colo. O.P.D.J. 2009).

Disbarment warranted for attorney convicted of conspiracy to commit tax fraud, tax evasion, and aiding and assisting in the preparation of a false income tax return. People v. Evanson, 223 P.3d 735 (Colo. O.P.D.J. 2009).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Allbrandt, 913 P.2d 532 (Colo. 1996); In re Tolley, 975 P.2d 1115 (Colo. 1999) (decided under former rule 241.6).

G. Violation of Other Rules.

Disbarment in another state violates this rule and warrants disbarment. People v. Montano, 744 P.2d 480 (Colo. 1987); People v. Brunn, 764 P.2d 1165 (Colo. 1988).

Disbarment from practice in federal court violates this rule and warrants discipline. People v. Awenius, 653 P.2d 740 (Colo. 1982).

Suspension from practice in federal tax court violates this rule and warrants discipline. People v. Hartman, 744 P.2d 482 (Colo. 1987).

Pattern of neglect which has not been corrected despite lesser sanctions requires imposition of suspension for protection of public. People v. Mayer, 744 P.2d 509 (Colo. 1987).

Repeated neglect and delay in handling legal matters and failure to comply with the directions contained in a letter of admonition and to answer letter of complaint from the grievance committee constitute a violation of this rule and, with other offenses of the code of professional responsibility, are sufficient to justify suspension for three years. People v. Hebenstreit, 764 P.2d 51 (Colo. 1988).

Repeated misconduct charges warranted suspension of licenses. Where respondent had been disciplined three times previously, once by private censure and twice by letters of admonition and where two of the matters involved delay and the respondent's failure to inform his clients of the status of their cases, subsequent misconduct warranted that respondent's license to practice law be suspended for six months. People ex rel. Silverman v. Anderson, 200 Colo. 76, 612 P.2d 94 (1980).

Two-year suspension was not excessively harsh where previous suspension and vulnerability of young, unsophisticated client in current matter are properly considered as aggravating factors in fixing punishment. People v. Yaklich, 744 P.2d 504 (Colo. 1987).

Continuing to represent client and failing to comply with disciplinary rule after initial suspension from practice of law warrants suspension for additional year. People v. Underhill, 708 P.2d 790 (Colo. 1985).

Continuing to practice while suspended is conduct justifying disbarment. People v. James, 731 P.2d 698 (Colo. 1987).

Conduct violating this rule, in conjunction with other disciplinary rules, sufficient to justify disbarment where the attorney continued to practice law while on suspension, repeatedly neglecting his clients and failing to take reasonable steps to protect clients' interests. People v. Fager, 938 P.2d 138 (Colo. 1997).

Multiple criminal and traffic convictions demonstrate a pattern of misconduct, and the presence of multiple offenses warrants suspension for six months with the requirement of reinstatement proceedings. People v. Van Buskirk, 962 P.2d 975 (Colo. 1998).

H. Failure to Respond to Grievance Committee.

Failure to answer a disciplinary complaint is itself a violation of the disciplinary rules. People v. Richards, 748 P.2d 341 (Colo. 1987).

Because an attorney has a duty to cooperate with disciplinary proceedings under this rule, default judgments are not subject to being set aside easily. In re Weisbard, 25 P.3d 24 (Colo. 2001).

Continued pattern of conduct involving neglect and misrepresentation. Attorney disbarred for continued pattern of conduct involving neglect and misrepresentation, and for failure to cooperate in investigation by grievance committee. People v. Young, 673 P.2d 1003 (Colo. 1984); People v. Johnston, 759 P.2d 10 (Colo. 1988).

Stipulation of deputy public defender that he failed to communicate with a client for seven months and failed to answer in a timely manner either the request for investigation or the formal complaint in the disciplinary matter, and his neglect of six separate professional matters over a three-year period warrant a 30-day suspension where substantial mitigating factors exist, including the absence of a prior disciplinary history, the absence of a selfish or dishonest motive, the presence of serious personal and emotional problems, a cooperative attitude throughout the disciplinary proceedings, a good character and professional reputation, the impo-

sition of other penalties or sanctions, and the presence of remorse. People v. Bobbitt, 859 P.2d 902 (Colo. 1993).

Depositing personal funds into COLTAF account, paying personal bills from that account, and then knowingly failing to respond to the investigation into the use of the account justifies 60-day suspension with conditions of reinstatement. People v. Herrick, 191 P.3d 172 (Colo. O.P.D.J. 2008).

Failure to respond to informal complaints constitutes failure to respond to a request by the grievance committee without good cause. People v. Quick, 716 P.2d 1082 (Colo. 1986).

Neglect of client matters, use of cocaine, and failure to respond to complaint and client correspondence warrant public censure in light of participation in comprehensive rehabilitation programs. People v. Driscoll, 716 P.2d 1086 (Colo. 1986).

Failure to take action on behalf of client in civil action, failure to advise client of claim, attempt to place property beyond the reach of creditors, and failure to cooperate in disciplinary proceedings justifies three-year suspension of attorney. People v. Baptie, 796 P.2d 978 (Colo. 1990).

Suspension for three years is appropriate where lawyer failed to respond to motions or appear at hearing, resulting in dismissal of clients' bankruptcy proceeding, thereby increasing clients' debts tenfold. The hearing board further found that the attorney engaged in bad faith obstruction of the disciplinary proceedings and refused to acknowledge the wrongful nature of his conduct or the vulnerability of his clients. People v. Farrant, 883 P.2d 1 (Colo. 1994).

Fabrication of administrative decision and settlement discussions to conceal respondent's failure to prosecute client's wage claim unnecessarily wasted grievance committee's time and resources, warranting increased period of suspension and relatively high assessment of costs. People v. Gaimara, 810 P.2d 1076 (Colo. 1991).

Disbarment appropriate remedy for attorney who neglected client's legal matter, failed to return retainer after being requested to do so, abandoned law practice, evaded process, and failed to respond to request of grievance committee. People v. Williams, 845 P.2d 1150 (Colo. 1993).

Disbarment appropriate remedy for attorney who neglected a legal matter, misappropriated funds and property, abandoned client, engaged in fraud, evaded process, and failed to cooperate in disciplinary investigation. People v. Hindman, 958 P.2d 463 (Colo. 1998).

Disbarment warranted for attorney who abandoned her law practice, disregarded court orders, made misrepresentations to her clients, and failed to respond or appear, with aggravating factors. People v. Valley, 960 P.2d 141 (Colo. 1998).

Failure to respond to request for investigation from grievance committee is a violation of former section (7). People v. Taylor, 799 P.2d 930 (Colo. 1990); People v. Dash, 811 P.2d 36 (Colo. 1991); People v. Creasey, 811 P.2d 40 (Colo. 1991); People v. Ashley, 817 P.2d 965 (Colo. 1991); People v. Kramer, 819 P.2d 77 (Colo. 1991); People v. Hebenstreit, 823 P.2d 125 (Colo. 1992); People v. Raubolt, 831 P.2d 462 (Colo. 1992); People v. Honaker, 847 P.2d 640 (Colo. 1993); People v. Honaker, 863 P.2d 337 (Colo. 1993); People v. Thomas, 925 P.2d 1081 (Colo. 1996).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Titoni, 893 P.2d 1322 (Colo. 1995).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension when attorney currently on disability inactive status. People v. Moya, 793 P.2d 1154 (Colo. 1990).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Taylor, 799 P.2d 930 (Colo. 1990); People v. Raubolt, 831 P.2d 462 (Colo. 1992); People v. Scott, 936 P.2d 573 (Colo. 1997); People v. Swarts, 239 P.3d 441 (Colo. O.P.D.J. 2010).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Whitcomb, 819 P.2d 493 (Colo. 1991); People v. Fritsche, 897 P.2d 805 (Colo. 1995); People v. Marsh, 908 P.2d 1115 (Colo. 1996); People v. Mannix, 936 P.2d 1285 (Colo. 1997); People v. Fager, 938 P.2d 138 (Colo. 1997); People v. Holmes, 955 P.2d 1012 (Colo. 1998).

Rule 251.6. Forms of Discipline

Any of the following forms of discipline may be imposed in those cases where grounds for discipline have been established:

(a) Disbarment. Disbarment is the revocation of an attorney's license to practice law in this state, subject to readmission as provided by C.R.C.P. 251.29(a). Disbarment shall be for at least eight years;

(b) Suspension. Suspension is the temporary suspension of an attorney's license to practice law in this state, subject to reinstatement as provided in C.R.C.P. 251.29(b). Suspension, which may be stayed in whole or in part, shall be for a definite period of time

not to exceed three years;

(c) Public Censure. Public censure is a reproach published with other grievance decisions and made available to the public; and

(d) Private Admonition. Private admonition is an unpublished reproach. An attorney who has been admonished by the committee and who wishes to challenge the order of admonition may, by written petition filed with the Regulation Counsel within 21 days after the date the letter of admonition was mailed to the admonished attorney or personally read to the attorney, demand as a matter of right that imposition of the admonition be vacated, that a complaint be filed against the attorney, and that disciplinary proceedings continue in the manner prescribed by these rules.

Source: Amended and adopted June 25, 1998, effective January 1, 1999; (d) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Editor's note: This rule was previously numbered as 241.7.

ANNOTATION

Annotator's note. The following annotations include cases decided under former provisions similar to this rule.

Constitutionality upheld. This rule provides sufficient guidelines to impose discipline to comply with due process of law. People v. Morley, 725 P.2d 510 (Colo. 1986); People v. Varallo, 913 P.2d 1 (Colo. 1996).

Standards used in determining constitutional challenges. Same standards used in determining a constitutional challenge to a statute are used in determining constitutional challenge to this rule. People v. Morley, 725 P.2d 510 (Colo. 1986).

A statute passes constitutional muster for the purposes of imposing professional discipline if it prescribes the possible penalties that can be imposed for a violation of a statutory provision. People v. Morley, 725 P.2d 510 (Colo. 1986).

An attorney-at-law is an officer of court exercising a privilege or franchise to the enjoyment of which he has been admitted not as a matter of right, but upon proof of fitness through evidence of his possession of satisfactory legal attainments and fair private character. People v. Howard, 147 Colo. 501, 364 P.2d 380 (1961), cert. denied, 369 U.S. 819, 82 S. Ct. 830, 7 L. Ed. 2d 784 (1962).

An attorney is continually accountable to the court. People v. Howard, 147 Colo. 501, 364 P.2d 380 (1961), cert. denied, 369 U.S. 819, 82 S. Ct. 830, 7 L. Ed. 2d 784 (1962).

The privilege to practice law may at any time be declared forfeited for misconduct, whether professional or nonprofessional, as shows him to be an unfit or unsafe person to manage the business of others in the capacity of an attorney. People v. Howard, 147 Colo. 501, 364 P.2d 380 (1961), cert. denied, 369 U.S. 819, 82 S. Ct. 830, 7 L. Ed. 2d 784 (1962).

The power to declare a forfeiture of the privilege to practice is a summary one inherent in the courts and exists not to mete out punishment to an offender, but rather so that the administration of justice may be safeguarded and the courts and the public protected from the misconduct or unfitness of those who are licensed to perform the important functions of the legal profession. People v. Howard, 147 Colo. 501, 364 P.2d 380 (1961), cert. denied, 369 U.S. 819, 82 S. Ct. 830, 7 L. Ed. 2d 784 (1962).

It is not an adversary proceeding. People v. Howard, 147 Colo. 501, 364 P.2d 380 (1961), cert. denied, 369 U.S. 819, 82 S. Ct. 830, 7 L. Ed. 2d 784 (1962).

Where complaints are resolved against an attorney, the committee may recommend public censure. People v. Radinsky, 176 Colo. 357, 490 P.2d 951 (1971).

Disbarment is generally appropriate when a lawyer in an official or governmental position knowingly misuses the position with the intent to obtain a significant benefit or advantage for himself or another. People v. Brown, 726 P.2d 638 (Colo. 1986).

Disbarment held not to be excessive. Use of a license to practice law for the purpose of bringing into being an illegal prostitution enterprise renders disbarment the only possible from of discipline. Any lesser sanction would unduly depreciate such misconduct in the eyes of the public and the legal profession. People v. Morley, 725 P.2d 510 (Colo. 1986).

Disbarment may be recommended when attorney found guilty of crime. Where the committee finds that the nature of a crime of which an attorney has been found guilty is such as to render him an unfit person to be licensed to practice law, he therefore should be disbarred, and the committee recommend such disbarment. People v. Wilson, 176 Colo. 389, 490 P.2d 954 (1971).

Disciplinary recommendation of grievance

committee is advisory only and is not binding on the supreme court. People v. Smith, 773 P.2d 528 Colo. 1989).

Disbarment was the only available remedy to protect the interest of the public where attorney had been afforded multiple opportunities including two suspensions and court ordered rehabilitation, and where attorney's conduct demonstrated (a) neglect of legal matters entrusted to him; (b) misrepresentation to his client and the grievance committee; and (c) a pattern of neglect followed by the respondent that had the potential of causing serious injury to his clients. People v. Susman, 787 P.2d 1119 (Colo. 1990).

Disbarment proper when attorney failed to timely answer complaint, put on evidence at hearing on amount of damages, answer amended complaint which included punitive damages that the court awarded and respond to grievance committee. The attorney had history of prior discipline for seriously neglecting client matters. Additional aggravating factors included the presence of multiple offenses, failing to cooperate in the disciplinary proceedings, and having substantial experience in the practice of law. There were no mitigating factors. In the Matter of Scott, 979 P.2d 572 (Colo. 1999).

Disbarment is appropriate, in the absence of aggravating or mitigating factors, where lawyer knowingly converts client property and deceives client with the intent to benefit the lawyer or another and causes serious injury to a client. People v. Mulligan, 817 P.2d 1028 (Colo. 1991).

Disbarment is the presumptive sanction for conversion of client funds. Where attorney knowingly converted, used, and failed to return client funds, disbarment was warranted. The attorney's failure to participate in disciplinary proceedings or present significant factors in mitigation further precluded any deviation from the presumptive sanction. People v. Young, 201 P.3d 1273 (Colo. O.P.D.J. 2008).

In the absence of aggravating or mitigating circumstances, disbarment is generally appropriate when (a) a lawyer abandons the practice and causes serious or potentially serious injury to a client; or (b) a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client; or (c) a lawyer engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client. People v Southern, 832 P.2d 946 (Colo. 1992).

The ultimate sanction for multiple charges of misconduct generally should be greater than the sanction for the most serious conduct. People v. Schubert, 799 P.2d 388 (Colo. 1990).

Court makes 90-day suspension consecutive to previously imposed one year and a day suspension where existing suspension imposed for unrelated conduct. In re Meyers, 981 P.2d 143 (Colo. 1999).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to warrant suspension. People v. Smith, 828 P.2d 249 (Colo. 1992).

Maximum period of suspension was warranted in light of multiple instances of misconduct and necessity for respondent to complete drug rehabilitation program. People v. Schubert, 799 P.2d 388 (Colo. 1990); People v. Driscoll, 830 P.2d 1019 (Colo. 1992).

Established facts demonstrating that attorney knowingly practiced law after he had been administratively suspended by Colorado supreme court for failing to comply with his CLE and attorney fee registration requirements merited short suspension of attorney from practice of law. Upon consideration of the nature of attorney's misconduct, his mental state, the potential harm he caused, the aggravating factors, and the absence of significant mitigating factors, the ABA standards for imposing lawyer sanctions and Colorado supreme court case law both support short suspension. Of particular salience here was attorney's failure to participate in disciplinary proceedings. People v. Swarts, 239 P.3d 441 (Colo. O.P.D.J. 2010).

Attorney received suspension for charging excessive fee in another state. The action taken in the other state had resulted in the attorney's receipt of a one-year conditional suspension. Usually the court will impose the same discipline as that which was imposed in the foreign jurisdiction, but because Colorado does not provide for conditional suspensions public censure was deemed appropriate. People v. Nash, 873 P.2d 764 (Colo. 1994).

Applied in People v. Barbary, 164 Colo. 588, 437 P.2d 57 (1968); People v. Creasey, 811 P.2d 40 (Colo. 1991).

Rule 251.7. Probation

(a) Eligibility. When an attorney has demonstrated that the attorney:

(1) Is unlikely to harm the public during the period of probation and can be adequately supervised;

(2) Is able to perform legal services and is able to practice law without causing the courts or profession to fall into disrepute; and,

(3) Has not committed acts warranting disbarment, then the attorney may be placed on probation. Probation shall be imposed for a specified period of time in conjunction with a

suspension which may be stayed in whole or in part. Such an order shall be regarded as an order of discipline. The period of probation shall not exceed three years unless an extension is granted upon motion by either party. A motion for an extension must be filed prior to the conclusion of the period originally specified.

(b) Conditions. The order placing an attorney on probation shall specify the conditions of probation. The conditions shall take into consideration the nature and circumstances of the attorney's misconduct and the history, character, and health status of the attorney and shall include no further violations of the Colorado Rules of Professional Conduct. The conditions may include but are not limited to the following:

(1) Making periodic reports to the Regulation Counsel or to the attorneys' peer assistance program as provided in subsection (d) of this Rule;

(2) Monitoring the attorney's practice or accounting procedures;

(3) Establishing a relationship with an attorney-mentor, and regular reporting with respect to the development of that relationship;

(4) Satisfactory completion of a course of study;

(5) Successful completion of the multi-state professional responsibility examination;

(6) Refund or restitution;

(7) Medical evaluation or treatment;

(8) Mental health evaluation or treatment;

(9) Evaluation or treatment in a program that specializes in treating disorders related to sexual misconduct;

(10) Evaluation or treatment in a program that specializes in treating matters relating to perpetration of family violence, including but not limited to domestic partner, elder, and child abuse;

(11) Substance abuse evaluation or treatment;

(12) Abstinence from alcohol and drugs; and

(13) No further violations of the Colorado Rules of Professional Conduct.

(c) Costs. The attorney shall also be responsible for all costs of evaluation, treatment and supervision. Failure to pay these costs prior to termination of probation shall constitute a violation of probation.

(d) Monitoring. The Regulation Counsel shall monitor the attorney's compliance with the conditions of probation imposed under these rules. When appropriate, the Regulation Counsel may delegate its monitoring role to the attorneys' peer assistance program. In cases in which the attorneys' peer assistance program is the designated monitor, regular reports regarding the progress of the attorney shall be submitted by the attorneys' peer assistance program to the Regulation Counsel.

(e) Violations. If, during the period the attorney is on probation, the Regulation Counsel receives information that any condition may have been violated, the Regulation Counsel may file a motion with the Presiding Disciplinary Judge specifying the alleged violation and seeking an order requiring the attorney to show cause why the stay should not be lifted and the sanction activated for violation of the condition. The filing of such a motion shall toll any period of suspension until final action. A hearing shall be held upon motion of either party before the Presiding Disciplinary Judge. At the hearing, the Regulation Counsel has the burden of establishing by a preponderance of the evidence the violation of a condition of probation. When, in a revocation hearing, the alleged violation of a condition is the attorney's failure to pay restitution or costs, the evidence of the failure to pay shall constitute prima facie evidence of a violation. Any evidence having probative value shall be received regardless of its admissibility under the rules of evidence if the attorney is accorded a fair opportunity to rebut hearsay evidence. At the conclusion of a hearing, the Presiding Disciplinary Judge shall prepare a report setting forth findings of fact and decision.

(f) Termination. Unless otherwise provided in the order of suspension, within 28 days and no less than 14 days prior to the expiration of the period of probation, the attorney shall file an affidavit with the Regulation Counsel stating that the attorney has complied with all terms of probation and shall file with the Presiding Disciplinary Judge notice and a copy of such affidavit and application for an order showing successful completion of the period of probation. Upon receipt of this notice and absent objection from the Regulation

Counsel, the Presiding Disciplinary Judge shall issue an order showing that the period of probation was successfully completed. The order shall become effective upon the expiration of the period of probation.

(g) **Independent Charges.** A motion for revocation of an attorney's probation shall not preclude the Regulation Counsel from filing independent disciplinary charges based on the same conduct as alleged in the motion.

Source: Amended and adopted June 25, 1998, effective July 1, 1998; (f) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

ANNOTATION

Applied in In re Green, 982 P.2d 838 (Colo. 1999).

Rule 251.8. Immediate Suspension

(a) **Immediate Suspension.** Immediate suspension is the temporary suspension by the Supreme Court of an attorney's license to practice law for a definite or indefinite period of time while proceedings conducted pursuant to this Rule and these Rules are pending against the attorney.

Although an attorney's license to practice law shall not ordinarily be suspended during the pendency of such proceedings, the Supreme Court may order the attorney's license to practice law immediately suspended when there is reasonable cause to believe that:

(1) the attorney is causing or has caused immediate and substantial public or private harm and the attorney:

(A) has been convicted of a serious crime as defined by C.R.C.P. 251.20(e);

(B) has converted property or funds;

(C) has abandoned clients; or

(D) has engaged in conduct which poses an immediate threat to the effective administration of justice.

(b) **Petition for Immediate Suspension.**

(1) When it is believed that an attorney should be immediately suspended, the committee or Regulation Counsel shall file a petition with the Presiding Disciplinary Judge. The petition shall be supported by an affidavit setting forth sufficient facts to give rise to reasonable cause that the alleged conduct has in fact occurred. A copy of the petition shall be served on the attorney pursuant to these Rules.

(2) The Presiding Disciplinary Judge, or the Supreme Court, by any justice thereof, may order the issuance of an order to show cause directing the attorney to show cause why the attorney should not be immediately suspended, which order shall be returnable within 14 days. After the issuance of an order to show cause, and after the period for response has passed without a response having been filed, or after consideration of any response and reply, the Presiding Disciplinary Judge shall prepare a report setting forth findings of fact and recommendation and file the report with the Supreme Court. After receipt of the report the Supreme Court may enter an order immediately suspending the attorney from the practice of law, or dissolve the order to show cause.

(3) If a response to the order to show cause is filed and the attorney requests a hearing on the petition, said hearing shall be held within 14 days before the Presiding Disciplinary Judge. Thereafter, the Presiding Disciplinary Judge shall submit a transcript of the hearing and a report setting forth findings of fact and a recommendation to the Supreme Court within 7 days after the conclusion of the hearing. Upon the receipt of the recommendation and the record relating thereto, the Supreme Court may enter an order immediately suspending the attorney from the practice of law or dissolve the order to show cause.

(4) When the Supreme Court enters an order immediately suspending the attorney, the Regulation Counsel shall promptly prepare and file a complaint against the attorney as provided in C.R.C.P. 251.14, notwithstanding the provisions of C.R.C.P. 251.10 and

C.R.C.P. 251.12. Thereafter the matter shall proceed as provided by these Rules.

(5) An attorney who has been immediately suspended pursuant to this Rule shall have the right to request an accelerated disposition of the allegations which form the bases for the immediate suspension by filing a notice with the Regulation Counsel requesting accelerated disposition. After the notice has been filed, the Regulation Counsel shall promptly file a complaint pursuant to these Rules and the matter shall be docketed by the Presiding Disciplinary Judge for accelerated disposition. Thereafter the matter shall proceed and be concluded without appreciable delay.

(c) [Transferred to Rule 251.8.5]

Source: Amended and adopted June 25, 1998, effective July 1, 1998; (c) transferred to Rule 251.8.5, effective January 1, 1999; (b)(2) amended and effective June 28, 2007; (a) amended and effective February 5, 2009; (b)(2) and (b)(3) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Editor's note: Paragraph (a) was previously numbered as 241.8. Paragraph (b) is new.

ANNOTATION

Annotator's note. The following annotations include cases decided under former C.R.C.P. 259, which was similar to this rule.

Applied in People v. McMichael, 199 Colo. 433, 609 P.2d 633 (1980); People v. Harfmann, 638 P.2d 745 (Colo. 1981); In re Green, 982 P.2d 838 (Colo. 1999).

Rule 251.8.5. Suspension for Nonpayment of Child Support, or for Failure to Comply with Warrants Relating to Paternity or Child Support Proceedings

(a) Application. The provisions of this rule shall apply to an attorney licensed or admitted to practice law in Colorado who is in arrears in payment of child support or who is in arrears under a child support order as defined by section 26-13-123 (a), C.R.S., or who fails to comply with a warrant relating to paternity or child support proceedings.

Proceedings commenced against an attorney under the provisions of this rule are not disciplinary proceedings. Suspension of an attorney's license to practice law under the provisions of this rule is not a form of discipline, and shall not necessarily bar disciplinary action.

(b) Petition for Suspension.

(1) Upon receipt of reliable information that an attorney is in arrears in payment under a child support order, or has failed to comply with subpoenas or warrants relating to paternity or child support proceedings, regulation counsel may file a petition for suspension with the presiding disciplinary judge. The petition shall be supported by an affidavit setting forth sufficient facts to give rise to reasonable cause to believe that the attorney is in arrears on a child support order, or has failed to comply with a subpoena or a warrant relating to paternity or child support proceedings. A copy of the petition shall be served on the attorney pursuant to these rules.

(2) The presiding disciplinary judge shall order the issuance of an order to show cause directing the attorney to show cause why the attorney's license to practice law should not be immediately suspended, which order shall be returnable within 28 days. After the issuance of an order to show cause, and after the period for response has passed without a response having been filed, or after consideration of any response and reply, the presiding disciplinary judge shall enter an order immediately suspending the attorney from the practice of law, unless within the 28-day period: the attorney has paid the past-due obligation, negotiated a payment plan approved by the court or the state child support enforcement agency or agency having jurisdiction over the child support order, requested a hearing before the presiding disciplinary judge, or complied with the warrant or subpoena.

(3) If a response to the order to show cause is timely filed and the attorney or the

regulation counsel requests a hearing before the presiding disciplinary judge on the petition, the hearing shall be held within 14 days of the request, or as soon thereafter as is practicable. At the hearing, the burden is initially on the regulation counsel to prove the allegations in the petition by a preponderance of the evidence. If the presiding disciplinary judge has determined that the regulation counsel has proved the allegations in the petition by a preponderance of the evidence, he or she shall issue an order immediately suspending the attorney, unless the attorney proves by a preponderance of the evidence that: (1) there is a mistake in the identity of the attorney; (2) there is a bona fide disagreement currently before a court or an agency concerning the amount of the child support debt, arrearage balance, retroactive support due, or the amount of the past-due child support when combined with maintenance; (3) all child support payments were made when due; (4) the attorney has complied with the subpoena or warrant; (5) the attorney was not served with the subpoena or warrant; or (6) there was a technical defect with the subpoena or warrant. No evidence with respect to the appropriateness of the underlying child support order or ability of the attorney in arrears to comply with such order shall be received or considered by the presiding disciplinary judge. Upon conclusion of the hearing, the presiding disciplinary judge shall promptly prepare an opinion setting forth his or her findings of facts and decision.

(c) Appeal. For purposes of this rule, the decision of the presiding disciplinary judge shall be final, and an appeal may be commenced as set forth in C.R.C.P. 251.26.

(d) Reinstatement.

(1) If, after an attorney's license has been suspended, the attorney has paid the past-due obligations, entered into a payment plan approved by the court or the agency having jurisdiction over the child support order, or complied with the warrant or subpoena, the attorney may seek reinstatement by filing a verified petition, with evidence of compliance, with the presiding disciplinary judge.

(2) Immediately upon receipt of a petition for reinstatement, the regulation counsel shall have 28 days or, upon a showing of good cause, such greater time as authorized by the presiding disciplinary judge within which to conduct any investigation deemed necessary. The attorney shall cooperate in any such investigation. At the end of the period of time allowed for the investigation, the regulation counsel shall file an answer. Based on the petition and answer, the presiding disciplinary judge may order reinstatement or hold a hearing to determine whether the attorney shall be reinstated. The attorney shall bear the burden of establishing the right to be reinstated by a preponderance of the evidence.

(3) If the petition for reinstatement is denied by the presiding disciplinary judge, the attorney may proceed pursuant to C.R.C.P. 251.26.

Source: Entire rule added and adopted October 29, 1998, effective January 1, 1999; entire rule amended and effective February 17, 2000; (b)(2), (b)(3), and (d)(2) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Editor's note: Prior the January 1, 1999, this rule was contained in paragraph (c) of Rule 251.8.

ANNOTATION

Law reviews. For article, "The Duty of Loyalty and Preparations to Compete", see 34 Colo. Law. 67 (November 2005).

Rule 251.8.6. Suspension for Failure to Cooperate

(a) Application. The provisions of this rule shall apply in all cases where there is a request for investigation pending against an attorney under these rules, alleging serious misconduct. If the attorney fails to cooperate either by failing to respond to the request for investigation or by failing to produce information or records requested by Regulation Counsel, then Regulation Counsel may file a petition for suspension of the attorney's license to practice law. Proceedings commenced against an attorney under the provisions

of this rule are not disciplinary proceedings. Suspension of an attorney's license to practice law under the provisions of this rule is not a form of discipline, and shall not necessarily bar disciplinary action.

(b) Petition for Suspension. Regulation Counsel may file a petition for suspension with the supreme court alleging that the attorney has not responded to requests for information, has not responded to the request for investigation, or has not produced records or documents requested by Regulation Counsel and has not interposed a good-faith objection to producing the records or documents. The petition shall be supported by an affidavit setting forth sufficient facts to give rise to reasonable cause to believe that the serious misconduct alleged in the request for investigation has in fact occurred. The affidavit shall also include the efforts undertaken by Regulation Counsel to obtain the attorney's cooperation. A copy of the petition shall be served on the attorney pursuant to C.R.C.P. 251.32(b). The failure of the attorney to file a response in opposition to the petition within 14 days may result in the entry of an order suspending the attorney's license to practice law until further order of the court. The attorney's response shall set forth facts showing that the attorney has complied with the requests, or the reasons why the attorney has not complied and may request a hearing.

Upon consideration of a petition for suspension and the attorney's response, if any, the supreme court may suspend the attorney's license to practice law for an indefinite period pending further order of the court; it may deny the petition; or it may issue any other appropriate orders. If a response to the petition is filed and the attorney requests a hearing on the petition, the supreme court may conduct such a hearing or it may refer the matter to the presiding disciplinary judge for resolution of contested factual matters. The presiding disciplinary judge shall submit a report setting forth findings of fact and a recommendation to the supreme court within 7 days of the conclusion of the hearing.

(c) Reinstatement. An attorney suspended under this rule may apply to the supreme court for reinstatement upon proof of compliance with the requests of Regulation Counsel as alleged in the petition, or as otherwise ordered by the court. A copy of the application must be delivered to Regulation Counsel, who may file a response to the application within two business days after being served with a copy of the application for reinstatement. The supreme court will summarily reinstate an attorney suspended under the provisions of this Rule upon proof of compliance with the requests of Regulation Counsel.

Source: Entire rule and Comment added and effective October 29, 2001; (b) and (c) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

COMMENT

This rule addresses problems caused by relatively few attorneys who fail to cooperate with the regulation counsel after a request for investigation has been filed against the attorney. In general, it would not apply after formal proceedings have been commenced against the attorney by the filing of a complaint. The rule would still apply, however, even after formal proceedings have begun, with respect to matters outside of the complaint.

Suspension under the rule is not discipline. In this sense, it is similar to a summary administrative suspension for failing to pay the attorney registration fee or to file a registration statement, see C.R.C.P. 227(A)(4), or for noncompliance with mandatory continuing legal education requirements, see C.R.C.P. 260.6. It is also similar to a suspension for nonpayment of child support, see C.R.C.P. 251.8.5, except resort in the first instance is made to the supreme court rather than the presiding disciplinary judge. Like those other rules, the intent of this rule is to ensure that an attorney complies with the requirements of the rules governing the legal profession, in this case the attorney's duty to cooperate with regulation counsel in the investigation of a request for investigation. See C.R.C.P. 251.1(a); C.R.C.P. 251.5(d); Colo. RPC 8.4(d). By this rule, the supreme court intends to facilitate communication between the attorney and regulation counsel. The rule is not designed to threaten or punish lawyers who have a good reason for not complying with regulation counsel's request, such as an inability to comply or possession of a good-faith objection to production. For example, an attorney will not be suspended under this rule merely because the attorney is out of the office on vacation.

Rule 251.9. Request for Investigation

(a) Commencement. Proceedings as provided in these Rules shall be commenced:

(1) Upon a request for investigation made by any person and directed to the Regulation Counsel; or

(2) Upon a report made by a judge of any court of record of this state and directed to the Regulation Counsel, as provided in C.R.C.P. 251.4;

(3) By the committee upon its own motion; or

(4) By the Regulation Counsel with the concurrence of the Chair or Vice-Chair of the committee.

(b) Determination to Proceed. Immediately upon receipt of a request for investigation, a report made by a judge, or a motion made by the committee, as provided in subsection (a) of this Rule, the matter shall be referred to the Regulation Counsel to determine:

(1) If the attorney in question is subject to the disciplinary jurisdiction of the Supreme Court;

(2) If there is an allegation made against the attorney in question which, if proved, would constitute grounds for discipline; and

(3) If the matter should be investigated as provided by C.R.C.P. 251.10 or addressed by means of an alternative to discipline as provided by C.R.C.P. 251.13.

In making a determination whether to proceed, the Regulation Counsel may make inquiry regarding the underlying facts and consult with the Chair of the committee. The decision of the Regulation Counsel shall be final, and the complaining witness shall have no right to appeal.

Source: Amended and adopted June 25, 1998, effective July 1, 1998.

Editor's note: This rule was previously numbered as 241.9.

Rule 251.10. Investigation of Allegations

(a) When Commenced. If, pursuant to C.R.C.P. 251.9, the Regulation Counsel makes a determination to proceed with an investigation, the Regulation Counsel shall give the attorney in question written notice that the attorney is under investigation and of the general nature of the allegations made against the attorney. The attorney in question shall file with the Regulation Counsel a written response to the allegations made against the attorney within 21 days after notice of the investigation is given.

Upon receipt of the attorney's response, or at the expiration of the 21-day period if no response is received, the matter shall be assigned to an Investigator for investigation and report.

(b) Procedures for Investigation.

(1) The Investigator. A member of the committee, the Regulation Counsel, a member of the Regulation Counsel's staff, or an attorney enlisted pursuant to C.R.C.P. 251.2(b)(1) may act as Investigator. The Investigator shall expeditiously conduct an investigation of the allegations made against the attorney in question.

(2) Procurement of Evidence During Investigation. In the course of an investigation conducted pursuant to these Rules, the Investigator, acting pursuant to and in conformity with these Rules, shall have the power to administer oaths and affirmations.

In connection with an investigation of allegations made against an attorney, the Chair of the committee or the Regulation Counsel may issue subpoenas to compel the attendance of witnesses, including the attorney in question, and the production of pertinent books, papers, documents, or other evidence in proceedings before the Investigator. All such subpoenas shall be subject to the provisions of C.R.C.P. 45. Any challenge to the power to subpoena as exercised pursuant to this Rule shall be directed to the Presiding Disciplinary Judge.

Any person who fails or refuses to comply with a subpoena issued pursuant to this Rule may be cited for contempt of the Supreme Court.

Any person who knowingly obstructs the Regulation Counsel or the committee or any

part thereof in the performance of their duties may be cited for contempt of the Supreme Court.

Any person having been duly sworn to testify who refuses to answer any proper question may be cited for contempt of the Supreme Court.

A contempt citation may be issued by the Supreme Court upon recommendation of the Presiding Disciplinary Judge. A copy of the recommendation, together with the findings of fact made by the Presiding Disciplinary Judge surrounding the contemptuous conduct, shall be filed with the Supreme Court. The Supreme Court shall then determine whether to impose contempt.

(3) Investigator's Report. When the Investigator is not a member of the Regulation Counsel's staff, the Investigator shall submit a written report of investigation and recommendation to the committee for a determination as provided in C.R.C.P. 251.12. If the Investigator is a member of the Regulation Counsel's staff, the matter shall be submitted as provided in C.R.C.P. 252.11.

(4) Conditional Admission. While the matter is under investigation, the attorney in question and the Regulation Counsel may tender an agreed upon conditional admission of misconduct as provided in C.R.C.P. 251.22 to the committee when the form of discipline is no greater than a private admonition. When the form of discipline is greater than a private admonition or, if a range of disciplinary measures is specified in the conditional admission, then the conditional admission shall be tendered to the Presiding Disciplinary Judge. When a conditional admission is tendered pursuant to this Rule, the person acting as Investigator may forego submitting a written report of investigation and recommendation to the committee as provided in subsection (3) of this Rule.

Source: Amended and adopted June 25, 1998, effective July 1, 1998; (b)(2) amended and adopted December 13, 2001, effective January 1, 2002; (a) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Editor's note: This rule was previously numbered as 241.10.

ANNOTATION

Attorney under investigation is a "party" to the investigative proceedings and, therefore, entitled, as required by the specific discovery provisions of the rules of civil procedure, to notice of the investigative subpoena and subpoena documents. Given the plain language of the rules, present and historic interpretation by attorney regulation counsel (ARC) of the rules, and the implications of a contrary interpretation that would render other rules in attorney discipline system moot and create a secretive system that discourages informal resolution of discipline claims, Attorney E was a "party" in his own investigation. Accordingly, ARC appropriately followed the specific provisions of C.R.C.P. 45, 26(a)(1)(B), and 30 by providing the attorney with notice of its subpoena and the documents produced from that subpoena. In re Attorney E, 78 P.3d 300 (Colo. 2003).

Rule 251.11. Determination by the Regulation Counsel

During the investigation or at the conclusion thereof, the Regulation Counsel may determine that the matter should be diverted to the alternatives to discipline program as provided in C.R.C.P. 251.13.

At the conclusion of an investigation of a matter that has not been diverted, the Regulation Counsel shall either dismiss the allegations or report to the committee for a determination as provided in C.R.C.P. 251.12. If the Regulation Counsel dismisses the allegations as provided herein, the person making the allegations against the attorney in question may request review of the Regulation Counsel's decision. If review is requested, the committee shall review the matter and make a determination as provided by C.R.C.P. 251.12; provided, however, that the committee shall sustain the dismissal unless it deter-

mines that the Regulation Counsel's determination constituted an abuse of discretion. When the committee sustains a dismissal, it shall furnish the person making the allegations with a written explanation of its determination.

Source: Amended and adopted June 25, 1998, effective July 1, 1998.

Editor's note: This rule was previously numbered as 241.10.5.

Rule 251.12. Determination by the Committee

If, at the conclusion of an investigation, the Regulation Counsel believes that the committee should order private admonition imposed or authorize the Regulation Counsel to prepare and file a complaint, the Regulation Counsel shall submit a report of investigation and recommendation to the committee, which shall determine whether there is reasonable cause to believe grounds for discipline exist and shall either:

(a) Direct the Regulation Counsel or other investigator appointed pursuant to C.R.C.P. 251.2(b)(1) to conduct further investigation;

(b) Dismiss the allegations and furnish the person making the allegations with a written explanation of its determination;

(c) Divert the matter to the alternatives to discipline program as provided by C.R.C.P. 251.13;

(d) Order private admonition imposed; or

(e) Authorize the Regulation Counsel to prepare and file a complaint against the attorney.

In determining whether to authorize the Regulation Counsel to file a complaint, the committee shall consider the following:

(1) Whether it is reasonable to believe that misconduct warranting discipline can be proved by clear and convincing evidence;

(2) The level of injury;

(3) Whether the attorney previously has been disciplined; and

(4) Whether the conduct in question is generally considered to warrant the commencement of disciplinary proceedings because it involves misrepresentation, conversion or commingling of funds, acts of violence, or criminal or other misconduct that ordinarily would result in public censure, suspension or disbarment.

Source: Amended and adopted June 25, 1998, effective July 1, 1998.

Editor's note: This rule was previously numbered as 241.11.

Rule 251.13. Alternatives to Discipline

(a) Referral to Program. The Regulation Counsel, the committee, the Presiding Disciplinary Judge, a Hearing Board, or the Supreme Court may offer diversion to the alternatives to discipline program to the attorney. The alternatives to discipline program may include, but is not limited to, diversion or other programs such as mediation, fee arbitration, law office management assistance, evaluation and treatment through the attorneys' peer assistance program, evaluation and treatment for substance abuse, psychological evaluation and treatment, medical evaluation and treatment, monitoring of the attorney's practice or accounting procedures, continuing legal education, ethics school, the multistate professional responsibility examination, or any other program authorized by the Court.

(b) Participation in the Program. As an alternative to a form of discipline, an attorney may participate in an approved diversion program in cases where there is little likelihood that the attorney will harm the public during the period of participation, where the Regulation Counsel can adequately supervise the conditions of diversion, and where participation in the program is likely to benefit the attorney and accomplish the goals of the program. A matter generally will not be diverted under this Rule when:

(1) The presumptive form of discipline in the matter is likely to be greater than public censure;

(2) The misconduct involves misappropriation of funds or property of a client or a third party;

(3) The misconduct involves a serious crime as defined by C.R.C.P. 251.20(e);

(4) The misconduct involves family violence;

(5) The misconduct resulted in or is likely to result in actual injury (loss of money, legal rights, or valuable property rights) to a client or other person, unless restitution is made a condition of diversion;

(6) The attorney has been publicly disciplined in the last three years;

(7) The matter is of the same nature as misconduct for which the attorney has been disciplined in the last five years;

(8) The misconduct involves dishonesty, deceit, fraud, or misrepresentation; or

(9) The misconduct is part of a pattern of similar misconduct.

(c) Diversion Agreement. If an attorney agrees to an offer of diversion as provided by this rule, the terms of the diversion shall be set forth in a written agreement. If the agreement is entered prior to a determination to proceed is made pursuant to C.R.C.P. 251.9, the agreement shall be between the attorney and Regulation Counsel. If diversion is offered and entered after a determination to proceed is made pursuant to C.R.C.P. 251.9 but before authorization to file a complaint, the diversion agreement between the attorney and Regulation Counsel shall be submitted to the committee for consideration. If the committee rejects the diversion agreement, the matter shall proceed as otherwise provided by these Rules. If diversion is offered and entered after a complaint has been filed pursuant to C.R.C.P. 251.14, the diversion agreement shall be submitted to the Presiding Disciplinary Judge or Supreme Court, whichever body before which the matter is pending for consideration. If the diversion agreement is rejected, the matter shall proceed as provided by these Rules.

The agreement shall specify the program(s) to which the attorney shall be diverted, the general purpose of the division, the manner in which compliance is to be monitored, and any requirement for payment of restitution or cost.

(d) Costs of the Diversion. The attorney shall pay all the costs incurred in connection with participation in any diversion program. The attorney shall also pay the administrative cost of the proceeding as set by the Supreme Court.

(e) Effect of Diversion. When the recommendation for diversion becomes final, the attorney shall enter into the diversion program(s) and complete the requirements thereof. Upon the attorney's entry into the diversion programs(s), the underlying matter shall be placed in abeyance, indicating diversion. Diversion shall not constitute a form of discipline.

(f) Effect of Successful Completion of the Diversion Program. If diversion is entered prior to a determination to proceed is made pursuant to C.R.C.P. 251.9(b)(3), and if Regulation Counsel determines that the attorney has successfully completed all requirements of the diversion program, the Regulation Counsel shall close the file. If diversion is successfully completed in a matter that was determined to warrant investigation or other proceedings pursuant to these Rules, the matter shall be dismissed and expunged pursuant to C.R.C.P. 251.33(d). After the file is expunged, the attorney may respond to any general inquiry as provided in C.R.C.P. 251.33(d).

(g) Breach of Diversion Agreement. The determination of a breach of a diversion agreement will be as follows:

(1) If the Regulation Counsel has reason to believe that the attorney has breached the diversion agreement, and the diversion agreement was entered prior to a decision to proceed pursuant to C.R.C.P. 251.9(b), and after the attorney has had an opportunity to respond, Regulation Counsel may elect to modify the diversion agreement or terminate the diversion agreement and proceed with the matter as provided by these rules.

(2) If Regulation Counsel has reason to believe that the attorney has breached the diversion agreement after a determination to proceed has been made, then the matter shall be referred to the Presiding Disciplinary Judge or Supreme Court, whichever body approved the diversion agreement, with an opportunity for the attorney to respond. The Regulation Counsel will have the burden by a preponderance of the evidence to establish the materiality of the breach, and the attorney will have the burden by a preponderance of

the evidence to establish justification for the breach. If after consideration of the information presented by the Regulation Counsel and the attorney's response, if any, it is determined that the breach was material without justification, the agreement will be terminated and the matter will proceed as provided for by these rules. If a breach is established but determined to be not material or to be with justification, the diversion agreement may be modified in light of the breach. If no breach is found, the matter shall proceed pursuant to the terms of the original diversion agreement.

(3) If the matter has been referred for determination to the committee, Presiding Disciplinary Judge, or the Supreme Court as provided for in section (g)(2) of this rule, upon motion of either party, the Presiding Disciplinary Judge shall hold a hearing on the matter. Upon conclusion of the hearing, the Presiding Disciplinary Judge shall prepare written findings of fact and conclusions and enter an appropriate order in those matters in which the Presiding Disciplinary Judge originally approved the diversion agreement. If the hearing is requested in a matter pending before the committee or Supreme Court for consideration, the Presiding Disciplinary Judge shall prepare findings of fact and recommendations and forward them to the body which originally approved the diversion agreement for its determination of the matter.

(h) Effect of Rejection of Recommendation for Diversion. If an Attorney rejects a diversion recommendation, the matter shall proceed as otherwise provided in these Rules.

(i) Confidentiality. All the files and records resulting from the diversion of a matter shall not be made public except by order of the Supreme Court. Information of misconduct admitted by the attorney to a treatment provider or a monitor while in a diversion program is confidential if the misconduct occurred before the attorney's entry into a diversion program.

Source: Amended and adopted June 25, 1998, effective July 1, 1998; entire rule amended and effective September 1, 2000; (c) and (i) corrected January 8, 2001, effective September 12, 2000; (d) amended and adopted October 6, 2005, effective January 1, 2006.

Editor's note: This rule was previously numbered as 241.11.5.

Rule 251.14. Complaint — Contents, Service

(a) Contents of Complaint. Complaints seeking to establish grounds for discipline of an attorney shall be filed as provided by these Rules with the Presiding Disciplinary Judge. An original and three copies of the complaint shall be filed.

The complaint shall set forth clearly and with particularity the grounds for discipline with which the respondent is charged and the conduct of the respondent which gave rise to those charges. All disciplinary and disability proceedings filed as herein provided shall be conducted in the name of the People of the State of Colorado and shall be prosecuted by the Regulation Counsel.

(b) Service of Complaint. The Regulation Counsel shall promptly serve upon the respondent, as provided in C.R.C.P. 251.32(b), a citation and a copy of the complaint filed against the respondent. The citation shall require the respondent within 21 days after service thereof to file an original and three copies of a written answer to the complaint, in compliance with C.R.C.P. 251.15.

Source: Amended and adopted June 25, 1998, effective January 1, 1999; (b) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Editor's note: This rule was previously numbered as 241.12.

ANNOTATION

Law reviews. For article, "Statutes and Cases Concerning Unauthorized Practice of Law in Colorado", see 24 Dicta 257 (1947). For note, "Standards of Discipline for Attorneys in Colorado and the Significance of the Code of Professional Responsibility", see 50

Den. L.J. 207 (1973).

Consideration of charges not made in formal complaint against an attorney constitutes a violation of the respondent's rights to procedural due process of law. People v. Emeson, 638 P.2d 293 (Colo. 1981) (decided under former C.R.C.P. 247).

Board's findings that attorney engaged in dishonest conduct in collection matter contravened requirement that the grounds for discipline be set forth "clearly and with particularity." The complaint and the issues identified for hearing did not adequately place the attorney on notice that he had violated the disciplinary rules prohibiting dishonest conduct. A proper charge of dishonesty would have identified conduct constituting violation of C.R.P.C. 4.1(a) (making a false statement of material fact or law to a third person) or 8.4(c) (engaging in conduct involving dishonesty, deceit, fraud, or misrepresentation); not 8.4(g) (engaging in conduct violating accepted standards of legal ethics). In re Quiat, 979 P.2d 1029 (Colo. 1999) (decided under rule in effect prior to the 1999 repeal and reenactment).

Rule 251.15. Answer — Filing, Failure to Answer, Default

(a) Answer. Within 21 days after service of the citation and complaint, or within such greater period of time as may be approved by the Presiding Disciplinary Judge, the respondent shall file an original and three copies of an answer to the complaint with the Presiding Disciplinary Judge and one copy with the Regulation Counsel. In the answer the respondent shall either admit or deny every material allegation contained in the complaint, or request that the allegation be set forth with greater particularity. In addition, the respondent shall set forth in the answer any affirmative defenses. Any objection to the complaint which a respondent may assert, including a challenge to the complaint for failure to charge misconduct constituting grounds for discipline, must also be set forth in the answer.

(b) Failure to Answer, and Default. If the respondent fails to file an answer within the period provided by subsection (a) of this Rule, the Regulation Counsel shall file a motion for default with the Presiding Disciplinary Judge. Thereafter, the Presiding Disciplinary Judge shall enter a default and the complaint shall be deemed admitted; provided, however, that a respondent who fails to file a timely answer may, upon a showing that the failure to answer was the result of mistake, inadvertence, surprise, or excusable neglect, obtain leave of the Presiding Disciplinary Judge to file an answer.

Notwithstanding the entry of a default, the Regulation Counsel shall give the respondent notice of the final hearing, at which the respondent may appear and present arguments to the Hearing Board regarding the form of discipline to be imposed.

Thereafter, the Hearing Board shall review all pleadings, arguments, and the report of investigation and shall prepare a report setting forth its findings of fact and its decision as provided in C.R.C.P. 251.19.

If, however, after the entry of default neither the respondent nor Regulation Counsel timely requests a hearing before the Hearing Board, then the sanctions hearing shall be held solely before the Presiding Disciplinary Judge.

Source: Amended and adopted June 25, 1998, effective January 1, 1999; (b) amended and adopted September 30, 2004, effective January 1, 2005; (a) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Editor's note: This rule was previously numbered as 241.13.

ANNOTATION

Annotator's note. The following annotations include cases decided under former C.R.C.P. 241.13, which was similar to this rule.

Both the charges and the well-pleaded facts are deemed admitted by the entry of a default judgment. People v. Richards, 748 P.2d 341 (Colo. 1987); People v. Young, 201 P.3d 1273 (Colo. O.P.D.J. 2008).

The allegations of fact were deemed admitted where attorney did not answer the complaint filed in the case and the hearing board entered a default against him. People v. Davies, 926 P.2d 572 (Colo. 1996); In re Demaray, 8 P.3d 427 (Colo. 1999).

A motion to set aside a default because the respondent failed to file a timely answer under this rule can be analogized to a motion under C.R.C.P. 60 (b)(1). The decision to grant relief is entrusted to the sound discretion of the trial court and will not be disturbed on appeal unless there is an abuse of discretion. In re Weisbard, 25 P.3d 24 (Colo. 2001).

In a motion to set aside a default judgment, the movant bears the burden of proving the grounds for relief by clear, strong, and satisfactory proof. In re Weisbard, 25 P.3d 24 (Colo. 2001).

Because an attorney has a duty to cooperate with disciplinary proceedings, default judgments are not subject to being set aside easily. In re Weisbard, 25 P.3d 24 (Colo. 2001).

In setting aside a default judgment on the grounds of excusable neglect, the court must determine: Whether the neglect causing the default was excusable; whether the movant has alleged a meritorious defense; and whether relief from the order would be equitable. In re Weisbard, 25 P.3d 24 (Colo. 2001).

Failure to act because of carelessness and negligence is not excusable neglect. In re Weisbard, 25 P.3d 24 (Colo. 2001).

Applied in People v. Moore, 681 P.2d 480 (Colo. 1984); People v. Stauffer, 745 P.2d 240 (Colo. 1987); People v. Jacobson, 747 P.2d 654 (Colo. 1987); People v. Dohe, 800 P.2d 71 (Colo. 1990); People v. Ashley, 817 P.2d 965 (Colo. 1991); People v. Rouse, 817 P.2d 967 (Colo. 1991); People v. Barr, 855 P.2d 1386 (Colo. 1993); In the Matter of Scott, 979 P.2d 572 (Colo. 1999).

Rule 251.16. Presiding Disciplinary Judge

(a) Presiding Disciplinary Judge. The office of the Presiding Disciplinary Judge of the Supreme Court of Colorado is hereby established. The Supreme Court shall appoint a Presiding Judge to serve at the pleasure of the Supreme Court.

(b) Qualifications. The Presiding Disciplinary Judge shall be an attorney, duly admitted to the Bar of Colorado, with more than five years experience in the practice of law. The Presiding Disciplinary Judge, while serving in that capacity, may hold any other public office.

(c) Powers and Duties of the Presiding Disciplinary Judge. The Presiding Disciplinary Judge shall be authorized and empowered to act in accordance with these Rules and to:

(1) Maintain and supervise a permanent office in the Denver metropolitan area to serve as the central office in which disciplinary and disability proceedings shall be conducted as provided in these Rules, under a budget approved by the Supreme Court;

(2) Select counsel and appoint a staff as necessary to assist the Presiding Disciplinary Judge in the administration of the judge's office and in the performance of the judge's duties;

(3) Order the parties in disciplinary proceedings to attend a settlement conference;

(4) Impose discipline on an attorney or transfer an attorney to disability inactive status as provided in these Rules;

(5) Periodically report to the Advisory Committee and the management committee on the operation of the office of the Presiding Disciplinary Judge;

(6) Recommend to the Advisory Committee proposed changes or additions to the rules of procedure for attorney discipline and disability proceedings; and

(7) Adopt such practices as may from time to time become necessary to govern the internal operation of the office of the Presiding Disciplinary Judge, as approved by the Supreme Court.

(8) Preside over contempt proceedings initiated under these Rules and C.R.C.P. 107 when appropriate.

(9) Preside over sanctions hearings pursuant to C.R.C.P. 251.15(b) and C.R.C.P. 251.19(c).

(d) Abstention. The Presiding Disciplinary Judge shall refrain from taking part in any proceedings in which a judge, similarly situated, would be required to abstain. No partner or associate in the law firm of the Presiding Disciplinary Judge, or any attorney in any way affiliated with the Presiding Disciplinary Judge or the Judge's law firm, may accept or continue in employment connected with any matter pending before the committee, the Judge, or a Hearing Board as long as the Judge is serving as the Presiding Disciplinary Judge.

(e) Disqualification. Presiding Disciplinary Judges shall not represent an attorney in

any matter as provided in these Rules during their terms of service. Former presiding disciplinary judges shall not represent an attorney in any matter that was being investigated or prosecuted as provided in these rules during their terms of service.

Source: Amended and adopted June 25, 1998, effective January 1, 1999; (e) amended and adopted October 29, 1998, effective January 1, 1999; entire rule amended and effective September 1, 2000; (d) corrected June 11, 2001, effective September 12, 2000; (c)(8) added and adopted December 13, 2001, effective January 1, 2002; (c)(9) added and adopted September 30, 2004, effective January 1, 2005.

Rule 251.17. Hearing Board

(a) Hearing Board. Hearing Boards are hereby established and empowered to act in accordance with these Rules.

(1) Members. The Supreme Court shall appoint a diverse pool of members of the Bar of Colorado and members of the public to serve as members of Hearing Boards. Persons appointed shall serve terms of six years. Terms shall be staggered to provide, so far as possible, for the expiration each year of the terms of an equal number of persons.

Persons appointed shall serve at the pleasure of the Supreme Court and may be dismissed from service at any time by order of the Supreme Court. Persons appointed may resign at any time.

(2) Vacancy. In the event of vacancies on the list of Hearing Board members, the Supreme Court shall, with the assistance of the Advisory Committee, appoint new persons to the list to serve on Hearing Boards.

(3) Reimbursement. Members of Hearing Boards shall be entitled to reimbursement for reasonable travel, lodging, and other expenses incurred in the performance of their official duties.

(b) Abstention of Members. Members of Hearing Boards shall refrain from taking part in any proceedings in which a judge, similarly situated, would be required to abstain. No partner or associate in the law firm of a member of the Hearing Board, or any attorney in any way affiliated with a member of the Hearing Board or the member's law firm, may accept or continue in employment connected with any matter pending before the Hearing Board on which the member is serving.

(c) Disqualification. Members of Hearing Boards shall not represent an attorney in any matter as provided in these Rules during their terms of service.

Source: Amended and adopted June 25, 1998, effective January 1, 1999; (b) and (c) amended and adopted October 29, 1998, effective January 1, 1999; (a)(1) amended and adopted November 24, 2004, effective January 1, 2005; (a)(1) amended and effective November 3, 2011.

Rule 251.18. Hearings Before the Hearing Board

(a) Notice. Not less than 56 days (8 weeks) before the date set for the hearing of a complaint, the Regulation Counsel shall give notice of such hearing as provided in C.R.C.P. 251.32(b) to the respondent, or the respondent's counsel, and to the complaining witness. The notice shall designate the date, place, and time of the hearing. The notice shall also advise the respondent that the respondent is entitled to be represented by counsel at the hearing, to cross-examine witnesses, and to present evidence in the respondent's own behalf.

The notice shall also advise the complaining witness that the complaining witness has a right to be present at the hearing and if there is a finding of misconduct to make a statement, orally or in writing, regarding the form of discipline.

(b) Designation of a Hearing Board.

(1) All hearings on complaints seeking disciplinary action against a respondent shall be conducted by a Hearing Board except as provided in subsection (b)(3). A Hearing Board shall consist of the Presiding Disciplinary Judge and two other members, one of whom shall be an attorney, who are to be selected at random from the pool of Hearing Board

Members by the clerk for the Presiding Disciplinary Judge. If the Presiding Disciplinary Judge has been disqualified, then a presiding officer shall be selected at random from among the attorneys on the list of Hearing Board members. The presiding officer shall, in all respects, act in accordance with these Rules.

(2) The Presiding Disciplinary Judge or the presiding officer shall rule on all motions, objections, and other matters presented after a complaint is filed and in the course of a hearing.

(3) Once a default has been entered against a respondent, the respondent or Regulation Counsel has 28 days after notice of the default order to request a sanctions hearing before a three-person Hearing Board. The party requesting this hearing shall send notice of such request, in writing, to the Presiding Disciplinary Judge and the opposing party. If neither party requests a sanctions hearing before a three-person Hearing Board, the sanction shall be decided by the Presiding Disciplinary Judge.

(c) Prehearing Conference. At the discretion of the Presiding Disciplinary Judge, a prehearing conference may be ordered.

(d) Procedure and Proof. Except as otherwise provided in these Rules, hearings and all matters commencing with filing the complaint as provided in C.R.C.P. 251.14 shall be conducted in conformity with the Colorado Rules of Civil Procedure, the Colorado Rules of Evidence, and the practice in this state in the trial of civil cases; provided, however, that proof shall be by clear and convincing evidence, and provided further that the respondent may not be required to testify or to produce records over the respondent's objection if to do so would be in violation of the respondent's constitutional privilege against self-incrimination.

In the course of proceedings conducted pursuant to this Rule, the Presiding Disciplinary Judge or the Presiding Officer, acting pursuant to and in conformity with these Rules, shall have the power to administer oaths and affirmations.

A complete record shall be made of all depositions and of all testimony taken at hearings before a Hearing Board.

(e) Order for Examination. When the mental or physical condition of the attorney in question has become an issue in the proceeding, the Presiding Disciplinary Judge, on motion of the Regulation Counsel, may order the attorney to submit to a physical or mental examination by a suitable licensed or certified examiner. The order may be made only upon a determination that reasonable cause exists and after notice to the attorney. The attorney will be provided the opportunity to respond to the motion of the Regulation Counsel, and the attorney may request a hearing before the Presiding Disciplinary Judge. If requested, the hearing shall be held within 28 days of the date of the attorney's request, and shall be limited to the issue of whether reasonable cause exists for such an order.

(f) Procurement of Evidence During Hearing.

(1) Subpoena. In the course of a hearing conducted pursuant to these Rules, and upon the petition of any party to the hearing, the clerk of the Presiding Disciplinary Judge may, for the use of a party, issue subpoenas to compel the attendance of witnesses and the production of pertinent books, papers, documents, or other evidence.

Witnesses shall be entitled to receive fees for mileage as provided by law for witnesses in civil actions.

(2) Quashing a Subpoena. Any challenge to the power to subpoena as exercised pursuant to this Rule shall be directed to the Presiding Disciplinary Judge or the Presiding Officer of the Hearing Board.

(3) Contempt. Any person who fails or refuses to comply with a subpoena issued pursuant to these Rules may be cited for contempt of the Supreme Court.

Any person who by misbehavior obstructs the Hearing Board or any part thereof in the performance of its duties may be cited for contempt of the Supreme Court.

Any person having been duly sworn to testify who refuses to answer any proper question may be cited for contempt of the Supreme Court.

A contempt citation may be issued by the Presiding Disciplinary Judge or the presiding officer. A copy of the contempt citation, together with the findings of fact made by the Presiding Disciplinary Judge or the presiding officer surrounding the contempt, shall be filed with the Supreme Court. The Supreme Court shall then determine whether to impose

contempt.

(4) Discovery.

(A) Purpose and Scope. Rules 16 and 26 of the Colorado Rules of Civil Procedure shall not apply to proceedings conducted pursuant to these Rules. This Rule shall govern discovery in attorney discipline and disability proceedings.

(B) Meeting. A meeting of the parties must be held no later than 14 days after the case is at issue to confer with each other about the nature and basis of the claims and defenses and discuss the matters to be disclosed.

(C) Disclosures. No later than 28 days after the case is at issue, the parties shall disclose:

(i) The name and, if known, the address, and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged in the pleadings, identifying who the person is and the subjects of the information;

(ii) A listing, together with a copy of, or a description of, all documents, data compilations, and tangible things in the possession, custody, or control of the parties that are relevant to the disputed facts in the pleadings; and

(iii) A statement of whether the parties anticipate use of expert witnesses, identifying the subject areas of the proposed experts.

(D) Trial Management Order. Upon the request of one of the parties or upon order of the Presiding Disciplinary Judge or the presiding officer of the Hearing Board, no later than 42 days prior to the trial date, the parties shall disclose to the other party and file a trial management order containing the following matters under the following captions and in the following order:

(i) Statement of Claims and Defenses to be Pursued or Withdrawn. The parties shall set forth a listing of the claims and defenses remaining for trial. Any claims or defenses set forth in the pleadings which will not be at issue at trial shall be designated as "withdrawn."

(ii) Stipulated Facts. The parties shall set forth a plain, concise statement of all facts which the Hearing Board shall accept as undisputed.

(iii) Pretrial Motions. The parties shall list motions, if any, which are anticipated to be filed before trial as well as motions, if any, which are pending before the Hearing Board. The parties shall indicate a deadline for the filing of such motions which shall be no later than 14 days prior to the date set for trial.

(iv) Legal Issues. The parties shall set forth a list of legal issues that are controverted, including appropriate citation of statutory, case or other authority. In addition, the parties shall indicate whether trial briefs will be filed, including a schedule for their filing. Trial briefs shall be filed no later than 7 days before the commencement of the trial.

(v) Identification of Witnesses and Exhibits. Each party shall provide the following information:

(a) Lay Witnesses. Each party shall include a list containing the name, address, and telephone number of any person whom the party will call and of any person whom the party may call as a witness at trial.

(b) Exhibits. Each party shall attach a list describing any physical or documentary evidence which the party intends to introduce at trial. Complainant shall assign a number and respondent shall assign a letter designation for each exhibit. If any party wishes to object to the authenticity or admissibility of any exhibit, such objection shall be noted, together with the grounds therefor.

(c) Expert Witnesses. Each party shall attach to the trial management order a list of the name, address, and telephone number of each person whom the party will call and any person whom the party may call as an expert witness at trial, indicating the anticipated length of testimony, including cross-examination. The list shall indicate whether the opposing party accepts or challenges the qualifications of a witness to testify as an expert as to the opinions expressed. If there is a challenge, the list shall be accompanied by a resume setting forth the basis for the expertise of the challenged witness. Copies of any expert reports shall be provided to the other party at this time.

(vi) Presentation of Testimony. If the testimony of any witness is to be presented by deposition or through any other acceptable means in lieu of live testimony, a copy shall be

submitted to the Hearing Board or the Presiding Disciplinary Judge if there is no Hearing Board and include the proponent's and opponent's anticipated designations of the pertinent portions of such testimony or a statement why designation is not feasible prior to trial. If any party wishes to object to the admissibility of the testimony or to any tendered question or answer therein, it shall be noted, setting forth the grounds therefor.

(vii) Trial Efficiencies. If the anticipated length of the trial has changed, the parties shall so indicate.

(E) Limitations. Except upon order by the Presiding Disciplinary Judge or the presiding officer of the Hearing Board for good cause shown, discovery shall be limited as follows:

(i) The Regulation Counsel may take one deposition of the respondent and two other persons in addition to the depositions of experts as provided in C.R.C.P. 26. The respondent may take one deposition of the complaining witness and two other persons in addition to the depositions of experts as provided in C.R.C.P. 26. The scope and manner of proceeding by way of deposition and the use thereof shall otherwise be governed by C.R.C.P. 26, 28, 29, 30, 31, 32, and 45.

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

(iii) The Regulation Counsel may obtain a physical or mental examination of the respondent pursuant to C.R.C.P. 251.18(e).

(iv) A party may serve the adverse party requests for production of documents pursuant to C.R.C.P. 34, except such requests for production shall be limited to 20 in number, each of which shall consist of a single request.

(v) A party may serve on the adverse party 20 requests for admission, each of which shall consist of a single request. The scope and manner of proceeding by means of requests for admission and the use thereof shall otherwise be governed by C.R.C.P. 36.

(F) In determining good cause pursuant to C.R.C.P. 251.18(f)(4)(E), the Presiding Disciplinary Judge or the presiding officer of the Hearing Board shall consider the following:

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

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

(iii) Whether the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the parties' resources, the importance of the issues in the litigation, and the importance of the proposed discovery in resolving the issues; and

(iv) Whether, because of the number of parties and their alignment with respect to the underlying claims and defenses, the proposed discovery is reasonable.

(G) Supplementation of Disclosures and Discovery Responses. A party is under a duty to supplement its disclosures under section (f)(4)(C) of this Rule when the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the disclosure or discovery process. A party is under a duty to amend a prior response to an interrogatory, request for production or request for admission when the party learns that the prior response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process. With respect to experts, the duty to supplement or correct extends both to information contained in the expert's report or summary disclosed pursuant to section (f)(4)(D)(v)(c) of this Rule and to information provided through any deposition of or interrogatory responses by the expert. Supplementation shall be performed in a timely manner.

Source: Amended and adopted June 25, 1998, effective January 1, 1999; (b) and (f)(4)(D)(vi) amended and adopted September 30, 2004, effective January 1, 2005; (a) 1st paragraph, (b)(3), (e), (f)(4)(B), IP(f)(4)(C), IP(f)(4)(D), (f)(4)(D)(iii), and (f)(4)(D)(iv) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Editor's note: This rule was previously numbered as 241.14.

ANNOTATION

Annotator's note. The following annotations include cases decided under former provisions similar to this rule.

Procedural due process does not include criminal defendant's rights. In every disciplinary proceeding a lawyer is entitled to procedural due process, but those rights do not extend so far as to guarantee the full panoply of rights afforded to an accused in a criminal case. People v. Harfmann, 638 P.2d 745 (Colo. 1981); People v. Morley, 725 P.2d 510 (Colo. 1986); People v. Varallo, 913 P.2d 1 (Colo. 1996); People v. Smith, 937 P.2d 724 (Colo. 1997).

Sixth amendment rights to jury trial and speedy trial do not attach in discipline cases, since by its terms the sixth amendment only applies in criminal cases. People v. Smith, 937 P.2d 724 (Colo. 1997).

Fifth amendment privilege against self-incrimination did not operate to preclude respondent from being compelled to attend his own deposition. People v. Smith, 937 P.2d 724 (Colo. 1997).

No due-process violation where presiding officer of the board also served on the hearing panel that reviews the board's action. People v. Fitzgibbons, 909 P.2d 1098 (Colo. 1996); People v. Smith, 937 P.2d 724 (Colo. 1997).

Consideration of charges not made in formal complaint against an attorney constitutes a violation of the respondent's rights to procedural due process of law. People v. Emeson, 638 P.2d 293 (Colo. 1981).

Right to call witnesses is a basic tenet of due process and applies to an attorney facing disciplinary charges. People v. Morley, 725 P.2d 510 (Colo. 1986).

This right, however, is not absolute. Due process does not vest a respondent in a disciplinary proceeding with a right to call any and all witnesses or elicit any testimony whatever; so long as the respondent is accorded a full and fair opportunity to present a defense to a charge, the tribunal hearing the case is entitled to exercise a sound discretion in limiting the type of evidence and the number of witnesses offered at a hearing. People v. Morley, 725 P.2d 510 (Colo. 1986).

Standard of proof in disciplinary proceeding. The disciplinary prosecutor has to prove allegations of misconduct by clear, convincing and substantial evidence. People v. Bugg, 635 P.2d 881 (Colo. 1981) (decided under former Rule 249, C.R.C.P.).

Clear and convincing evidence is proof which persuades the trier of fact that the truth contention is highly probable. It is evidence stronger than a preponderance by less than beyond reasonable doubt. People v. Distel, 759 P.2d 654 (Colo. 1988).

Evidence which clearly and unequivocally establishes unlawful conduct of a lawyer should be admissible in a disciplinary proceeding if the official misconduct does not shock the conscience of the court or is not in bad faith. People v. Harfmann, 638 P.2d 745 (Colo. 1981).

Unlike the rule applicable to a criminal proceeding, evidence of professional misconduct obtained by law enforcement officers should be admissible at a disciplinary proceeding unless the officers themselves engaged in outrageous misconduct or acted in bad faith in obtaining the challenged evidence. People v. Morley, 725 P.2d 510 (Colo. 1986).

If governmental officials act outrageously or in bad faith in obtaining challenged evidence, due process of law requires the exclusion of such evidence or perhaps the even more drastic remedy of dismissal. There is no "bright line" or "per se" rule in this area of the law and each case must be decided on the basis of its own peculiar facts. People v. Morley, 725 P.2d 510 (Colo. 1986).

Evidence of attorney's disciplinary record may be properly admitted to the extent allowed under the Colorado rules of evidence in order to refute claim that he regularly attended to client matters. People v. Yaklich, 744 P.2d 504 (Colo. 1987).

Such evidence may be introduced to impeach respondent's credibility. People v. Distel, 759 P.2d 654 (Colo. 1988).

When acting as fact finder in attorney disciplinary proceedings, grievance committee has duty to assess credibility of all evidence before it, both controverted and uncontroverted. People v. Distel, 759 P.2d 654 (Colo. 1988).

Presiding disciplinary judge (PDJ) has exclusive authority under section (b) of this rule to hear respondent's motion for sanctions under C.R.C.P. 11(a). The plain language of the rules, their context, and the design of the

attorney regulation system support conclusion that PDJ has exclusive authority to consider and rule on a C.R.C.P. 11(a) motion for sanctions. People v. Trupp, 51 P.3d 985 (Colo. 2002).

Abuse of discretion for presiding disciplinary judge to hold that assistant attorney regulation counsel violated rule when she advanced claim that attorney had violated C.R.P.C. 8.4(c). No evidence that assistant attorney regulation counsel failed to investigate either the facts or the law and she did not misrepresent them in the complaint. People v. Trupp, 92 P.3d 923 (Colo. 2004).

Applied in People ex rel. Goldberg v. Gordon, 199 Colo. 296, 607 P.2d 995 (1980).

Rule 251.19. Findings of Fact and Decision

(a) **Hearing Board Opinion and Decision.** Within 56 days (8 weeks) after the hearing, the Hearing Board shall prepare an opinion setting forth its findings of fact and its decision. In preparing its decision, the Hearing Board shall take into consideration the respondent's prior disciplinary record, if any. The opinion shall be signed by each concurring member of the Hearing Board. Two members are required to make a decision. Members of the Hearing Board who dissent shall also sign the opinion, provided they indicate the basis of their dissent in the opinion.

(b) **Decision of the Hearing Board.** When it renders its decision, the Hearing Board shall:

(1) Determine that the complaint is not proved and enter an order dismissing the complaint;

(2) Enter an order imposing private admonition, public censure, a definite period of suspension, or disbarment; or

(3) Enter an order conditioned on the agreement of the attorney diverting the case to the alternatives to discipline program.

The Hearing Board may also enter other appropriate orders including, without limitation, probation, and orders requiring the respondent to pay the costs of the disciplinary proceeding, to make restitution, or to refund money paid to the respondent.

(4) Within 14 days of entry of an order as provided in this Rule or such greater time as the Hearing Board may allow, a party may move for post-hearing relief as provided in C.R.C.P. 59. In the event a motion for post-hearing relief is filed, the Presiding Disciplinary Judge or the presiding officer shall consult with the other members of the Hearing Board and then rule on the motion.

(5) For purposes of this Rule, the decision of the Hearing Board shall be final and time for filing notice of appeal shall commence as set forth in C.R.C.P. 251.27.

(6) Unless stayed, vacated, reversed, or otherwise modified by order of the Supreme Court, a final decision of the Hearing Board under paragraph (b)(5) of this Rule shall be considered for all purposes an order of the Supreme Court.

(c) **Decision of the Presiding Disciplinary Judge.** When the Presiding Disciplinary Judge renders a decision without a Hearing Board as provided in these rules, the Presiding Disciplinary Judge shall:

(1) Enter an order imposing private admonition, public censure, a definite period of suspension, or disbarment; or

(2) Enter an order conditioned on the agreement of the attorney diverting the case to the alternatives to discipline program.

The Presiding Disciplinary Judge may also enter other appropriate orders including, without limitation, probation, and orders requiring the respondent to pay the costs of the disciplinary proceeding, to make restitution, or to refund money paid to the respondent.

(3) Within 14 days of entry of an order as provided in this Rule or such greater time as the Presiding Disciplinary Judge may allow, a party may move for post-hearing relief as provided in C.R.C.P. 59.

(4) For purposes of this Rule, the decision of the Presiding Disciplinary Judge shall be final and time for filing notice of appeal shall commence as set forth in C.R.C.P. 251.26.

Source: Amended and adopted June 25, 1998, effective January 1, 1999; (b)(6) added and adopted December 13, 2001, effective January 1, 2002; (c) added and adopted September 30, 2004, effective January 1, 2005; (b)(5) amended and effective February 5,

2009; (a), (b)(4), and (c)(3) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Editor's note: This rule was previously numbered as 241.15.

ANNOTATION

Annotator's note. The following annotations include cases decided under former provisions similar to this rule.

A disciplinary proceeding is an investigation by the court into the conduct of one of its officers and is neither a civil action nor a criminal proceeding, but a proceeding "sui generis", the object of which is not to punish the offender but to protect the court. People v. Howard, 147 Colo. 501, 364 P.2d 380 (1961), cert. denied, 369 U.S. 819, 82 S. Ct. 830, 7 L. Ed. 2d 784 (1962).

The grievance committee of the supreme court conducts the formal hearing on a complaint and makes a report, which sets forth its findings, conclusions, and recommendations. People v. Van Nocker, 176 Colo. 354, 490 P.2d 697 (1971).

Report and recommendation of grievance committee in disciplinary proceedings against lawyers is advisory, and the supreme court has the duty to review the recommendations and to increase or decrease the sanction imposed by the committee in a proper case. People v. Susman, 196 Colo. 458, 587 P.2d 782 (1978); People v. Morley, 725 P.2d 510 (Colo. 1986); People v. Jacobson, 747 P.2d 654 (Colo. 1987); People v. Shipp, 793 P.2d 574 (Colo. 1990); People v. Abelman, 804 P.2d 859 (Colo. 1991); People v. Larsen, 808 P.2d 1265 (Colo. 1991); People v. Gaimara, 810 P.2d 1076 (Colo. 1991); People v. Raubolt, 831 P.2d 462 (Colo. 1992).

While supreme court has always given the recommendation for discipline by the grievance committee great weight, the court reserves the right to exercise our independent judgment in arriving at the proper level of discipline. People v. Brown, 726 P.2d 638 (Colo. 1986); People v. Anderson, 817 P.2d 1035 (Colo. 1991); Colo. Supreme Ct. v. District Court, 850 P.2d 150 (Colo. 1993).

The supreme court's rule is to make an independent decision regarding the appropriate form of discipline, suited to the facts and circumstances of the particular case. People v. Grenemyer, 745 P.2d 1027 (Colo. 1987).

To warrant a finding of misconduct, the charges must be established by substantial, clear, convincing, and satisfactory evidence. People v. Howard, 147 Colo. 501, 364 P.2d 380 (1961), cert. denied, 369 U.S. 819, 82 S. Ct. 830, 7 L. Ed. 2d 784 (1962).

Proof of all elements of a criminal offense is necessary to establish misconduct on the basis of commission of a criminal act. Where one element of attempted theft was not proven by clear and convincing evidence, the attorney was not subject to sanction under C.R.P.C. 8.4(b). People v. Rosen, 199 P.3d 1241 (Colo. O.P.D.J. 2007).

This does not mean that strict rules of evidence apply in disbarment proceedings, although they are frequently invoked to insure a fair hearing. People v. Howard, 147 Colo. 501, 364 P.2d 380 (1961), cert. denied, 369 U.S. 819, 82 S. Ct. 830, 7 L. Ed. 2d 784 (1962).

Evidence taken at civil action that an attorney has been guilty of conduct justifying disbarment is admissible in disbarment proceeding. People v. Howard, 147 Colo. 501, 364 P.2d 380 (1961), cert. denied, 369 U.S. 819, 82 S. Ct. 830, 7 L. Ed. 2d 784 (1962).

The finding is not conclusive on the same question. The finding in a civil action that an attorney at law has been guilty of conduct justifying disbarment is not conclusive on the same question when presented for determination in an action for disbarment. Notwithstanding the finding in the civil action, the culpability of the attorney must be established in the disbarment action by a clear preponderance of the evidence. People v. Howard, 147 Colo. 501, 364 P.2d 380 (1961), cert. denied, 369 U.S. 819, 82 S. Ct. 830, 7 L. Ed. 2d 784 (1962).

Factual findings of grievance committee are binding on the supreme court, unless the supreme court, after considering the record as a whole, concludes that the findings are clearly erroneous and unsupported by substantial evidence. People v. Garnett, 725 P.2d 1149 (Colo. 1986) (apparently overruling People v. Mattox, 639 P.2d 397 (Colo. 1982)); People v. Susman, 747 P.2d 667 (Colo. 1987).

Letter of admonition concerning conduct which occurred after the events giving rise to the complaint in the instant case, but received prior to the time the hearing board held its hearing in the instant case, is part of the prior disciplinary record and may be properly considered. People v. Wolfe, 748 P.2d 789 (Colo. 1988).

Where an attorney fails to comply with condition pertaining to private censure, such failure provides basis for withdrawal of private censure and issuance of public censure. People v. Moore, 681 P.2d 480 (Colo. 1984).

Conduct found to violate disciplinary

rules. People v. Razatos, 636 P.2d 666 (Colo. 1981), appeal dismissed, 455 U.S. 930, 102 S. Ct. 1415, 71 L. Ed. 2d 639 (1982).

Hearing panel may modify recommendations of hearing board. People v. Shields, 905 P.2d 608 (Colo. 1995).

Modification by hearing panel of board's recommendation of discipline after it concluded a six-month suspension was insufficient in light of the attorney's prior discipline complied with this rule. People v. Brenner, 852 P.2d 456 (Colo. 1993).

Form of discipline imposed by hearing board for respondent's proven violations not unreasonable. Following ABA standards for imposing lawyer sanctions, violation of duty owed the public, even one involving dishonesty, fraud, deceit, or misrepresentation, as long as it is short of actual criminality, should generally be sanctioned by reprimand or censure. When dishonesty relates to practice of law, ABA standards recognize appropriateness of probation as a sanction if it will adequately protect the public. In re Rosen, 198 P.3d 116 (Colo. 2008).

Rule 251.20. Attorney Convicted of a Crime

(a) Proof of Conviction. Except as otherwise provided by these Rules, a certified copy of the judgment of conviction from the clerk of any court of criminal jurisdiction indicating that an attorney has been convicted of a crime in that court shall conclusively establish the existence of such conviction for purposes of disciplinary proceedings in this state and shall be conclusive proof of the commission of that crime by the respondent.

(b) Duty to Report Conviction. Every attorney subject to these Rules, upon being convicted of a crime, except those misdemeanor traffic offenses or traffic ordinance violations, not including the use of alcohol or drugs, shall notify the Regulation Counsel in writing of such conviction within 14 days after the date of the conviction. In addition, the clerk of any court in this state in which the conviction was entered shall transmit to the Regulation Counsel within 14 days after the date of the conviction a certificate thereof.

(c) Commencement of Disciplinary Proceedings Upon Notice of Conviction. Upon receiving notice that an attorney subject to these Rules has been convicted of a crime, other than a serious crime as hereinafter defined, the Regulation Counsel shall, following an investigation as provided in these Rules, make a determination as provided in C.R.C.P. 251.11 or refer the matter to the committee for further proceedings consistent with C.R.C.P. 251.12.

If the conviction is for a serious crime as hereinafter defined, the Regulation Counsel shall obtain the record of conviction and prepare and file a complaint against the respondent as provided in C.R.C.P. 251.14.

If a complaint is filed against a respondent pursuant to the provisions of this Rule, the Regulation Counsel shall present proof of the criminal conviction and may present any other evidence which the Regulation Counsel deems appropriate. If the respondent's criminal conviction is either proved or admitted, the respondent shall have the right to be heard by the Hearing Board only on matters of rebuttal of any evidence presented by the Regulation Counsel other than proof of the conviction.

(d) Conviction of a Serious Crime — Immediate Suspension. The Regulation Counsel shall report to the Supreme Court the name of any attorney who has been convicted of a serious crime, as hereinafter defined. The Supreme Court shall thereupon issue a citation directing the convicted attorney to show cause why the attorney's license to practice law should not be immediately suspended pursuant to C.R.C.P. 251.8. Upon full consideration of the matter, the Supreme Court may either impose immediate suspension for a definite or indefinite period or may discharge the rule to show cause. The fact that a convicted attorney is seeking appellate review of the conviction shall not limit the power of the Supreme Court to impose immediate suspension.

(e) Serious Crime Defined. The term serious crime as used in these Rules shall include:

(1) Any felony; and

(2) Any lesser crime a necessary element of which, as determined by its statutory or common law definition, involves interference with the administration of justice, false swearing, misrepresentation, fraud, willful extortion, misappropriation, or theft; or an attempt or conspiracy to commit such crime; or solicitation of another to commit such crime.

(f) Notice to Clients and Others of Immediate Suspension. An order of immediate suspension of an attorney pursuant to this Rule shall constitute a suspension of the attorney for the purpose of the provisions of C.R.C.P. 251.28.

(g) Automatic Reinstatement From Immediate Suspension When Conviction Reversed. An attorney suspended under the provisions of this Rule shall be reinstated to practice law immediately upon filing a certificate demonstrating that the underlying criminal conviction has been reversed; provided, however, that reinstatement of the attorney shall have no effect on any proceedings conducted pursuant to these Rules then pending against him.

(h) Conviction Defined. The term conviction as used in these Rules shall include any ultimate finding of fact in a criminal proceeding that an individual is guilty of a crime, whether the judgment rests on a verdict of guilty, a plea of guilty, or a plea of nolo contendere, and irrespective of whether entry of judgment or imposition of sentence is suspended or deferred by the court.

Source: Amended and adopted June 25, 1998, effective January 1, 1999; (b) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Editor's note: This rule was previously numbered as 241.16.

ANNOTATION

Annotator's note. The following annotations include cases decided under former provisions similar to this rule.

Attorney licensed to practice law in state of Colorado is subject to discipline by Colorado supreme court in the event of his conviction of a criminal offense in a foreign jurisdiction. People v. Swope, 621 P.2d 321 (Colo. 1981).

Attorney's conduct while in office not only resulted in convictions of second degree official misconduct, § 18-8-405, and failure to disclose a conflict of interest, § 18-8-308, but also flagrantly violated minimal standards of candor and honesty required by attorneys and justified suspension. People v. Tucker, 676 P.2d 680 (Colo. 1983).

Attorney pleading guilty to cultivation of marijuana and unlawful possession of a controlled substance is subject to discipline. While convicted felon was not trafficking or dealing in illegal substances and was instead engaged in horticultural preservation and storing substance for others, suspension for three years is appropriate penalty. People v. McPhee, 728 P.2d 1292 (Colo. 1986).

Accepting illegal drugs for legal services is serious criminal conduct warranting severe sanction even though it does not fit definition of serious crime provided in rule. People v. Davis, 768 P.2d 1227 (Colo. 1989).

Failure to report felony conviction in another state where crime involved conversion of client funds justifies disbarment. People v. Hedicke, 785 P.2d 918 (Colo. 1990).

Attorney's failure to report felony conviction including counts involving proof of intent to defraud is sufficient for disbarment. People v. Brunn, 764 P.2d 1165 (Colo. 1988); People v. Vidakovich, 810 P.2d 1071 (Colo. 1991).

Failure to report felony convictions in another state for two counts of failure to report income and two counts of filing false income tax returns warrants three-year suspension and payment of costs rather than disbarment in light of numerous mitigating factors. People v. Mandell, 813 P.2d 732 (Colo. 1991).

The conduct of an attorney who fails to report a domestic violence conviction substantially reflects adversely on the attorney's fitness to practice. Because there is no exception to the duty to report based upon mistake and because the aggravating factors outweigh the mitigating factors, the proper form of discipline is six months' suspension. In re Hickox, 57 P.3d 403 (Colo. 2002).

Failure to report felony conviction in another state for mail fraud warrants disbarment in absence of mitigating factors and where aggravating factor of a prior disciplinary record exists. People v. Bollinger, 859 P.2d 901 (Colo. 1993).

Lack of prior disciplinary record insufficient to call for sanction less than disbarment where attorney convicted of bank fraud. People v. Terborg, 848 P.2d 346 (Colo. 1993).

Guilty plea followed by deferred judgment was a "conviction" and failure to report warranted public censure even though the conviction occurred prior to the adoption of a specific definition for the term "conviction" in this section. People v. Barnthouse, 941 P.2d 916 (Colo. 1997).

Bar reinstatement required demonstration of possession of moral and professional qualifications. Where a state attorney had been

convicted of failing to file his federal income tax return and making false representations to a special agent of the Internal Revenue Service regarding the filing of income tax returns, and where the attorney was later found to have made a false statement in his application to the Arizona State Bar by answering in the negative an inquiry as to whether he had ever been questioned regarding the violation of any law, he was suspended from the practice of law in Colorado for three years, and was required to demonstrate upon application for reinstatement that he possessed moral and professional qualifications for admission to the bar of this state. People v. Gifford, 199 Colo. 205, 610 P.2d 485 (1980).

Bankruptcy fraud is a serious crime as defined by rule. People v. Brown, 841 P.2d 1066 (Colo. 1990).

Attorney's conviction of three counts of sexual assault on a child and three counts of aggravated incest conclusively established where the court notified him it intended to take judicial notice of the conviction and attorney neither responded to the substance of the notice nor denied the conviction occurred. Because of the nature and seriousness of the crimes for which the attorney was convicted, disbarment was appropriate. People v. Schwartz, 890 P.2d 82 (Colo. 1995).

Disbarment warranted for attorney convicted of criminal attempt to commit sexual exploitation of a child, a class 4 felony. People v. Damkar, 908 P.2d 1113 (Colo. 1996).

Attorney's violations constituted "serious crimes" as defined in subsection (e) of this rule where the attorney pleaded guilty to making and altering a false and forged prescription for Phentermine, a controlled substance, in violation of former § 12-22-315, a class 5 felony, and of criminal attempt to obtain a controlled substance by forgery and alteration in violation of § 18-2-101 and former § 12-22-315, a class 6 felony. People v. Moore, 849 P.2d 40 (Colo. 1993).

Lack of prior disciplinary record insufficient to call for sanction less than disbarment where attorney convicted of bankruptcy fraud and for conspiracy to commit bankruptcy fraud and other federal offenses. People v. Schwartz, 814 P.2d 793 (Colo. 1991).

Although attorney had not previously been disciplined, sanction of disbarment was warranted where attorney's felony conviction for possession of a firearm occurred while he was still on probation for a felony conviction for possession of marijuana. People v. Laquey, 862 P.2d 278 (Colo. 1993).

Conviction for aiding fugitive to flee warrants disbarment despite lack of a prior disciplinary record. People v. Bullock, 882 P.2d 1390 (Colo. 1994).

Respondent given two-year suspension for aiding and abetting aliens' entry into the United States and by advising clients to make misrepresentations for such entry. Such an act generally warrants disbarment, but respondent's full disclosure during proceedings, expression of remorse, and the fact that a prior offense was remote in time were mitigating factors. Respondent also required to discontinue the representation of clients before INS and the Department of Labor. People v. Boyle, 942 P.2d 1199 (Colo. 1997).

Disbarment is warranted for driving while impaired, marihuana possession, improperly executing agreement without permission, and failing to perform certain professional duties, despite the lack of a prior record. People v. Gerdes, 891 P.2d 995 (Colo. 1995).

Conviction of attempt to commit sexual assault in the second degree on a 17-year-old high school student filing clerk working at attorney's law firm is a serious crime as defined by the rule. The conviction together with sexual conduct toward a client warrant disbarment. People v. Dawson, 894 P.2d 756 (Colo. 1995).

Disbarment warranted for attorney convicted in Hawaii of second-degree murder. People v. Draizen, 941 P.2d 280 (Colo. 1997).

Disbarment warranted for writing nonsufficient funds checks while practicing law during a period of suspension and committing several other disciplinary rules violations. People v. Fager, 938 P.2d 138 (Colo. 1997).

Applied in People ex rel. MacFarlane v. Harthun, 195 Colo. 38, 581 P.2d 716 (1978); People v. Harfmann, 638 P.2d 745 (Colo. 1981); People v. Loseke, 698 P.2d 809 (Colo. 1985); People v. Proffitt, 731 P.2d 1257 (Colo. 1987); People v. Geller, 753 P.2d 235 (Colo. 1988); People v. Cantor, 753 P.2d 238 (Colo. 1988).

Rule 251.21. Discipline Imposed by Foreign Jurisdiction

(a) Proof of Discipline Imposed. Except as otherwise provided by these Rules, a final adjudication in another jurisdiction of misconduct constituting grounds for discipline of an attorney shall, for purposes of proceedings pursuant to these Rules, conclusively establish such misconduct.

(b) Duty to Report Discipline Imposed. Any attorney subject to these Rules against whom any form of public discipline has been imposed by the authorities of another jurisdiction, or who voluntarily surrenders the attorney's license to practice law in connection with disciplinary proceedings in another jurisdiction, shall notify the Regulation

Counsel of such action in writing within 14 days thereof.

(c) Commencement of Proceedings Upon Notice of Voluntary Surrender of License. Upon receiving notice that an attorney subject to these Rules has voluntarily surrendered his license to practice law in another jurisdiction, the Regulation Counsel shall, following investigation pursuant to these Rules, refer the matter to the committee for further proceedings consistent with C.R.C.P. 251.12.

(d) Commencement of Proceedings Upon Notice of Discipline Imposed. Upon receiving notice that an attorney subject to these Rules has been publicly disciplined in another jurisdiction, the Regulation Counsel shall obtain the disciplinary order and prepare and file a complaint against the attorney as provided in C.R.C.P. 251.14. If the Regulation Counsel intends either to claim that substantially different discipline is warranted or to present additional evidence, notice of that intent shall be given in the complaint.

If the attorney intends to challenge the validity of the disciplinary order entered in the foreign jurisdiction, the attorney must file with the Presiding Disciplinary Judge an answer and a full copy of the record of the disciplinary proceedings which resulted in the imposition of that disciplinary order within 21 days after service of the complaint or such greater time as the Presiding Disciplinary Judge may allow for good cause shown.

At the conclusion of proceedings brought under this Rule, the Hearing Board shall issue a decision imposing the same discipline as was imposed by the foreign jurisdiction, unless it is determined by the Hearing Board that:

(1) The procedure followed in the foreign jurisdiction did not comport with requirements of due process of law;

(2) The proof upon which the foreign jurisdiction based its determination of misconduct is so infirm that the Hearing Board cannot, consistent with its duty, accept as final the determination of the foreign jurisdiction;

(3) The imposition by the Hearing Board of the same discipline as was imposed in the foreign jurisdiction would result in grave injustice; or

(4) The misconduct proved warrants that a substantially different form of discipline be imposed by the Hearing Board.

(e) If Regulation Counsel does not seek substantially different discipline and if the respondent does not challenge the order based on any of the grounds set forth in (d)(1)(4) above, then the Presiding Disciplinary Judge may, without a hearing or a Hearing Board, issue a decision imposing the same discipline as imposed by the foreign jurisdiction.

Source: Amended and adopted June 25, 1998, effective January 1, 1999; (e) added and adopted September 30, 2004, effective January 1, 2005; (b) and (d) 2nd paragraph amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Editor's note: This rule was previously numbered as 241.17.

ANNOTATION

Annotator's note. The following annotations include cases decided under former provisions similar to this rule.

Disbarment from practice in another jurisdiction warrants disbarment in this state. People v. Payne, 738 P.2d 374 (Colo. 1987); People v. Montano, 744 P.2d 480 (Colo. 1987); People v. Kochel, 764 P.2d 68 (Colo. 1988); People v. Brunn, 764 P.2d 1165 (Colo. 1988); People v. Sousa, 943 P.2d 448 (Colo. 1997).

Public censure was appropriate discipline in this state for attorney who received public reprimand in Texas. People v. Campbell, 932 P.2d 312 (Colo. 1997).

Public censure was appropriate discipline for attorney who had been reprimanded in Connecticut for failure to file federal income tax return. People v. Perkell, 969 P.2d 703 (Colo. 1998).

Disbarment from practice in federal court violates this rule and warrants discipline. People v. Awenius, 653 P.2d 740 (Colo. 1982).

Suspension from practice in tax court is a determination of misconduct in another jurisdiction constituting grounds for discipline under these rules. People v. Hartman, 744 P.2d 482 (Colo. 1987).

Suspension from United States district court pursuant to a plea agreement in that court is a determination of misconduct in another jurisdiction and is grounds for suspension under these rules. People v. Gilson, 780 P.2d 1088

(Colo. 1989).

Imposition of same discipline as another jurisdiction. This rule calls for imposition of the same discipline as that imposed in another jurisdiction unless one of four listed exceptions has been established. People v. Gilson, 780 P.2d 1088 (Colo. 1989); People v. Breingan, 820 P.2d 1115 (Colo. 1991); People v. Mattox, 862 P.2d 276 (Colo. 1993); People v. Bengert, 885 P.2d 241 (Colo. 1994); People v. Calder, 897 P.2d 831 (Colo. 1995); People v. Cohan, 913 P.2d 523 (Colo. 1996); People v. Campbell, 932 P.2d 312 (Colo. 1997); People v. Rodriguez, 937 P.2d 1210 (Colo. 1997).

Where the thrust of the respondent's defense was that the proof upon which the foreign state's findings of misconduct were based was infirm, and a determination in the respondent's favor would require the hearing board to reweigh the credibility of the witnesses at the out-of-state hearing, board acted properly in declining to do so. People v. Calder, 897 P.2d 831 (Colo. 1995).

Where the thrust of the respondent's defense was that the proof upon which the Tenth Circuit Court of Appeals based its finding of misconduct was impermissibly infirm, and a determination in the respondent's favor would require the disciplinary panel to revisit issues that had been conclusively determined in a prior proceeding, the panel acted properly in declining to do so. People v. Smith, 937 P.2d 724 (Colo. 1997).

Although infirmity of proof is a basis on which to challenge disciplinary action by a foreign jurisdiction, it does not apply to the findings and recommendations of a hearing board and the supreme court grievance committee panel. People v. Smith, 937 P.2d 724 (Colo. 1997).

Multiple due-process challenges to procedure followed by federal appeals court were rejected in People v. Smith, 937 P.2d 724 (Colo. 1997).

Respondent was not entitled to an evidentiary hearing on the question of whether motions he had filed in a prior case were frivolous. People v. Smith, 937 P.2d 724 (Colo. 1997).

Sixth amendment rights to jury trial and speedy trial do not attach in discipline cases, since by its terms the sixth amendment only applies in criminal cases. People v. Smith, 937 P.2d 724 (Colo. 1997).

Fifth amendment privilege against self-incrimination did not operate to preclude respondent from being compelled to attend his own deposition. People v. Smith, 937 P.2d 724 (Colo. 1997).

Nine-month period of suspension recommended by the board and accepted by the hearing panel was not more severe than the indefinite suspension imposed by the tenth circuit court of appeals, hence respondent could not challenge suspension on this basis. People v. Smith, 937 P.2d 724 (Colo. 1997).

No due-process violation where presiding officer of the board also served on the hearing panel that reviews the board's action. People v. Fitzgibbons, 909 P.2d 1098 (Colo. 1996); People v. Smith, 937 P.2d 724 (Colo. 1997).

Failure to report suspension from the practice of law and felony conviction in another state justifies disbarment. People v. Hedicke, 785 P.2d 918 (Colo. 1990).

Failure to disclose prior discipline in Kentucky, Colorado, and U.S. district court for district of Colorado to the U.S. district court for the district of Nevada warranted suspension from the practice of law for one year. People v. Mattox, 862 P.2d 276 (Colo. 1993).

Virginia disciplinary proceedings provided defendant with due process. Imposition of same discipline, in this case, disbarment, in Colorado customary. People v. Williams, 892 P.2d 885 (Colo. 1995).

Discipline in foreign jurisdiction for sharing legal fees and forming a partnership with a nonlawyer and for failing to deposit client funds in required interest-bearing account was suspension for two years, with the period of suspension stayed, and three years of probation on condition that the respondent be actually suspended for six months. Colorado law does not provide for the conditional suspension of a period of suspension or for probation, but a period of suspension of one year and one day ensures that the respondent has complied with the conditions of the foreign state suspension. People v. Bengert, 885 P.2d 241 (Colo. 1994).

Attorney received suspension for charging excessive fee in another state. The action taken in the other state had resulted in the attorney's receipt of a one-year conditional suspension. Usually the court will impose the same discipline as that which was imposed in the foreign jurisdiction, but because Colorado does not provide for conditional suspensions public censure was deemed appropriate. People v. Nash, 873 P.2d 764 (Colo. 1994).

Applied in People v. Swope, 621 P.2d 321 (Colo. 1981); People v. Miller, 744 P.2d 489 (Colo. 1987); People v. Trevino, 803 P.2d 473 (Colo. 1990).

Rule 251.22. Discipline Based on Admitted Misconduct

(a) Acceptance of Admission. An attorney against whom proceedings are pending pursuant to these Rules may, at any point in the proceedings prior to final action by a Hearing Board, tender a conditional admission of misconduct constituting grounds for

discipline in exchange for a stipulated form of discipline. The conditional admission must be approved by the Regulation Counsel prior to being tendered to the committee or the Presiding Disciplinary Judge.

If the form of discipline stipulated to is private admonition, the conditional admission shall be tendered to the committee for its review. The committee shall either reject the conditional admission and order the proceedings continued in accordance with these Rules, or accept the conditional admission and order private admonition imposed.

If the form of discipline stipulated to is disbarment, suspension, public censure, or a range that includes any of the former and private admonition, the conditional admission shall be tendered to the Presiding Disciplinary Judge for review. The Presiding Disciplinary Judge or Presiding Officer of the Hearing Board shall, after conducting a hearing as provided in this Rule, if one is requested, either reject the conditional admission and order the proceedings continued in accordance with these Rules, or approve the conditional admission and enter an appropriate order.

Imposition of discipline pursuant to a conditional admission of misconduct shall terminate all proceedings conducted pursuant to these Rules and pending against the attorney in connection with that misconduct.

(b) Conditional Admission — Contents. A conditional admission of misconduct shall be set forth in the form of an affidavit, be submitted by the attorney, and shall contain:

(1) An admission of misconduct which constitutes grounds for discipline;

(2) An acknowledgment of the proceedings pending against the attorney; and

(3) A statement that the admission is freely and voluntarily made, that it is not the product of coercion or duress, and that the attorney is fully aware of the implications of the attorney's admission.

If the conditional admission is tendered before a complaint is filed as provided in C.R.C.P. 251.14, it shall remain confidential if the form of discipline stipulated to is private admonition and its contents shall not be publicly disclosed or made available for use in any proceedings outside this Chapter except as otherwise provided in these Rules or by order of the Supreme Court.

(c) Conditional Admission — Hearing.

(1) Procedure. Within 14 days of the date a conditional admission is filed, the respondent or the Regulation Counsel may request a hearing before the Presiding Disciplinary Judge. If a hearing is requested, it shall be set promptly.

(2) Notice. Not less than 14 days before the date set for the hearing on the conditional admission, the Regulation Counsel shall give notice of such hearing as provided in C.R.C.P. 251.32(b) to the respondent, the respondent's counsel, and the complaining witness. The notice shall designate the date, place, and time of the hearing. The notice shall advise the respondent that the respondent is entitled to be represented by counsel at the hearing and to present argument regarding the form of discipline to be ordered.

(3) Complaining Witness. In addition to the foregoing, the notice shall advise the complaining witness that the complaining witness has a right to be present at the hearing and to make a statement, orally or in writing, to the Presiding Disciplinary Judge regarding the form of discipline.

(d) Stay of Proceedings. Proceedings conducted pursuant to these Rules that are pending before the Presiding Disciplinary Judge at the time a conditional admission is tendered may be stayed by order of the Presiding Disciplinary Judge.

(e) Further Proceedings. If the conditional admission of misconduct is rejected and the matter is returned for further proceedings consistent with these Rules, the conditional admission may not be used against the attorney.

Source: Amended and adopted June 25, 1998, effective January 1, 1999; (c)(1) and (c)(2) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Editor's note: This rule was previously numbered as 241.18.

ANNOTATION

Annotator's note. The following annotations include cases decided under former provisions similar to this rule.

The supreme court will deny attorney's application to voluntarily surrender his license to practice law in the state of Colorado where the gravity of the attorney's wrongful conduct necessitates disbarment. People v. Murphy, 174 Colo. 182, 483 P.2d 224 (1971).

Surrender of a license pursuant to this rule is not confidential and will be made known to the National Disciplinary Data Bank for dissemination on a national basis to other agencies who license attorneys. People v. Culpepper, 645 P.2d 5 (Colo. 1982).

Stipulation to 18-month suspension is reasonable and warranted, given the number and seriousness of the charges balanced against the mitigating factors. People v. Taylor, 799 P.2d 930 (Colo. 1990).

Stipulation to disbarment is appropriate where attorney pleaded guilty to felony menacing and had history of discipline. People v. Littlefield, 893 P.2d 773 (Colo. 1995).

Attorney under investigation for misconduct may submit a stipulation and conditional admission at any time but inquiry panel should not normally accept it until the inquiry panel has authorized the disciplinary counsel to file a formal complaint. People v. Borchard, 825 P.2d 999 (Colo. 1992).

Mitigating factors warranting suspension for three years. Conviction for distribution of cocaine is "serious crime" as defined in C.R.C.P. 241.16(e). However, mitigating factors including personal and emotional problems, full disclosure and cooperation with the grievance committee and the office of disciplinary counsel, and participation in interim rehabilitation warrant suspension from practice for three years. People v. Rhodes, 829 P.2d 850 (Colo. 1992).

Mitigating factors warranting public censure. Attorney who stipulated to misconduct admitted to activities warranting public censure. People v. Odom, 829 P.2d 855 (Colo. 1992).

Respondent's multiple acts of violence are indicative of a dangerous volatility which might well prejudice his ability to effectively represent his client's interests. Although respondent had taken major steps toward rehabilitation the acts committed were of such gravity as to require a public censure and a three-month suspension. People v. Wallace, 837 P.2d 1223 (Colo. 1992).

Stipulated agreement and recommendations of disbarment based on conditional admission of misconduct warranted where respondent practiced law while suspended. People v. Redman, 902 P.2d 839 (Colo. 1995).

Also warranted where attorney misappropriated and commingled client funds, failed to communicate with clients, engaged in dishonest conduct and conduct prejudicial to the administration of justice, charged unreasonable fees, neglected legal matters, and failed to pay funds to which a third person was entitled. People v. Clyne, 945 P.2d 1386 (Colo. 1997).

Stipulated agreement and recommendations of disbarment warranted where respondent pled guilty to conspiracy to commit securities fraud and securities fraud. People v. Frye, 935 P.2d 10 (Colo. 1997).

Stipulated agreement and recommendations of suspension for nine months based upon conditional admission of misconduct were warranted for attorney who was suspended in another state for neglect, failure to communicate, and failure to surrender documents and other client property after termination of representation. People v. McKee, 942 P.2d 494 (Colo. 1997).

Stipulated agreement and recommendations of suspension for six months based upon conditional admission of misconduct were warranted for attorney who engaged in conduct that adversely reflects on the lawyer's ability to practice law and for violating criminal laws of a state or the United States. People v. McIntyre, 942 P.2d 499 (Colo. 1997).

Stipulated agreement and recommendation of suspension for 30 days based upon conditional admission of misconduct were warranted for attorney who committed unfair insurance claim settlement practices and tortious conduct in handling insurance investigation of fire claim that he was not competent to handle. People v. McClung, 953 P.2d 1282 (Colo. 1998).

Stipulated agreement and recommendation of public censure based on conditional admission of misconduct was warranted where respondent neglected and made misrepresentations in two separate legal matters. People v. Eagan, 902 P.2d 841 (Colo. 1995).

Stipulated agreement and recommendation of public censure based on conditional admission of misconduct was acceptable where respondent was convicted of driving while ability impaired and had also appeared in court while intoxicated on two consecutive days. People v. Coulter, 950 P.2d 176 (Colo. 1998).

Stipulated agreement and recommendation of public censure based on conditional admission of misconduct was warranted. People v. Williams, 936 P.2d 1289 (Colo. 1997).

Stipulated agreement and recommendation of public censure with certain conditions and monitoring based upon conditional admission of misconduct were warranted for attorney who required that his associates sign a

covenant that hindered a client's right to choose his or her own lawyer and which placed a financial hardship upon a departing associate who might not be able to represent the client if the associate's recovery would be limited to 25 percent or less of the total fee. People v. Wilson, 953 P.2d 1292 (Colo. 1998).

Applied in People v. Brackett, 667 P.2d 1357 (Colo. 1983).

Rule 251.23. Disability Inactive Status

(a) Disability Inactive Status. Where it is shown that an attorney is unable to fulfill professional responsibilities competently because of physical, mental or emotional infirmity or illness, including addiction to drugs or intoxicants, the attorney shall be transferred to disability inactive status. During such time as an attorney is on disability inactive status the attorney shall not engage in the practice of law.

Proceedings instituted against an attorney pursuant to this Rule are disability proceedings. Transfer to disability inactive status is not a form of discipline and does not involve a violation of the attorney's oath. The pendency of proceedings provided for by this Rule shall not defer or abate other proceedings conducted pursuant to these Rules, unless after a hearing the Presiding Disciplinary Judge determines that the attorney, is unable to assist in the defense of those other proceedings because of the disability. If such other proceedings are deferred, then the deferral shall continue until such time as the attorney is found to be eligible for reinstatement as provided by C.R.C.P. 251.30.

(b) Transfer to Disability Inactive Status Without a Hearing. Where an attorney who is subject to these Rules has been judicially declared mentally ill, or has been involuntarily committed to a mental hospital, or has voluntarily petitioned for the appointment of a guardian, or has been found not guilty by reason of insanity in a criminal proceeding in a court of record, the Presiding Disciplinary Judge, upon proper proof of the fact, shall enter an order transferring the attorney to disability inactive status. Such order shall remain in effect unless altered by the Presiding Disciplinary Judge or the Supreme Court. A copy of the order transferring an attorney to disability inactive status shall be served upon the attorney and upon either the attorney's guardian or the superintendent of the hospital in which the attorney is confined. Service shall be made in such manner as the Presiding Disciplinary Judge may direct.

(c) Procedure When Disability is Alleged. Whenever any interested party shall petition the Presiding Disciplinary Judge to determine whether an attorney is incapable of continuing to practice law by reason of physical, mental or emotional infirmity or illness, including addiction to drugs or intoxicants, or whether the attorney in a proceeding conducted pursuant to these Rules is so incapacitated as to be unable to proffer a defense, the Presiding Disciplinary Judge shall direct such action as it deems necessary or proper to determine whether the attorney is incapacitated, including an examination of the attorney by qualified medical experts designated by the Presiding Disciplinary Judge; provided, however, that before any medical examination or other action may be ordered, the Presiding Disciplinary Judge must afford the attorney an opportunity to show cause why such examination or action should not be ordered. If, upon due consideration of the matter, the Presiding Disciplinary Judge determines that the attorney is incapable of continuing to practice law or is incapable of defending in proceedings conducted pursuant to these Rules, the Presiding Disciplinary Judge shall enter an order transferring the attorney to disability inactive status. Such order shall remain in effect unless altered by the Presiding Disciplinary Judge or the Supreme Court.

An attorney against whom disability proceedings are pending shall be given notice of such proceedings. Notice shall be given in such a manner as the Presiding Disciplinary Judge may direct. The Presiding Disciplinary Judge may appoint counsel to represent the attorney if the attorney is without adequate representation.

(d) Procedure When Attorney During Course of Proceedings Alleges a Disability that Impairs the Attorney's Ability to Defend Himself. If in the course of proceedings conducted pursuant to these Rules the lawyer alleges disability by reason of physical, mental or emotional infirmity or illness, including addiction to drugs or intoxicants, that impairs the attorney's ability to defend adequately in such proceedings, such proceedings

shall be suspended and the Presiding Disciplinary Judge shall enter an order transferring the attorney to disability inactive status and order a medical examination of the attorney. Upon review of the report of the medical examination and other relevant information, the Presiding Disciplinary Judge may do any of the following:

(1) Order a hearing on the issue of whether the attorney suffers from a disability that impairs the attorney's ability to defend adequately in such other proceedings;

(2) Continue the order transferring the lawyer to disability inactive status;

(3) Discharge the order transferring the lawyer to disability inactive status, and order that the proceedings pending against the attorney be resumed;

(4) Enter any other appropriate order, including an order directing further examination of the attorney.

(e) Burden of Proof. In a disability proceeding seeking the transfer of an attorney to disability inactive status the party petitioning for transfer shall bear the burden of proof by clear and convincing evidence.

(f) Hearings. Any hearings held pursuant to this Rule shall be conducted by the Presiding Disciplinary Judge in the manner prescribed by C.R.C.P. 251.18 and C.R.C.P. 251.19, and a Hearing Board shall not be required.

(g) Compensation. The Presiding Disciplinary Judge may fix the compensation to be paid to any legal counsel or medical expert appointed by the Presiding Disciplinary Judge pursuant to this Rule. The Presiding Disciplinary Judge may direct that such compensation be assessed as part of the costs of a proceeding held pursuant to this Rule and that it be paid as such in accordance with law.

(h) Post-Hearing Relief and Notice of Appeal. The attorney may file a motion for post-hearing relief or a notice of appeal as provided in C.R.C.P. 251.19.

Source: Amended and adopted June 25, 1998, effective January 1, 1999; entire rule amended and effective September 1, 2000.

Editor's note: This rule was previously numbered as 241.19.

ANNOTATION

Annotator's note. The following annotations include cases decided under former provisions similar to this rule.

Former section (a) is not unconstitutional. Requiring attorney to prove mental illness by clear and convincing evidence was not contrary to § 13-25-127 (1), which establishes a preponderance of the evidence as the quantum of proof in civil cases, because an attorney disciplinary proceeding is not strictly a civil proceeding. People v. Sullivan, 802 P.2d 1091 (Colo. 1990).

Supreme court affirms order of presiding disciplinary judge (PDJ) transferring attorney to disability inactive status. The office of attorney regulation counsel (OARC) adequately petitioned PDJ for a disability proceeding under section (c) of this rule by filing status report. Because the status report unquestionably put attorney on notice of the disability proceeding and gave him or her a meaningful opportunity to oppose the OARC's request for an independent medical examination (IME), the report satisfied the "petition" requirement of section (c). In addition, the law of the case doctrine did not preclude the PDJ from reconsidering his or her decision to disregard the report of the first medical expert retained to conduct an IME of the attorney. In light of testimony of this expert, PDJ acted "upon proper grounds" when her or she decided to reconsider earlier ruling disregarding expert's report. Even without medical report, adverse inference of disability drawn by PDJ on the basis of attorney's disregard of orders to cooperate in second IME process was by itself sufficient to establish by clear and convincing evidence that the attorney suffers from a mental or emotional infirmity or illness and that such infirmity or illness prevents the attorney from both defending himself or herself in the consolidated disciplinary proceeding and fulfilling the responsibilities as an attorney, thereby requiring the attorney to petition for reinstatement under C.R.C.P. 251.30. In re Bass, 142 P.3d 1259 (Colo. 2006).

Applied in People v. Luxford, 626 P.2d 675 (Colo. 1981); People v. Southern, 638 P.2d 787 (Colo. 1982); People v. Barbour, 639 P.2d 1065 (Colo. 1982); People v. Dwyer, 652 P.2d 1074 (Colo. 1982); People v. Craig, 708 P.2d 787 (Colo. 1985).

Rule 251.24. Appellate Discipline Commission

Repealed, effective September 1, 2000.

Rule 251.25. Counsel for the Appellate Discipline Commission

Repealed, effective September 1, 2000.

Rule 251.26. Proceedings Before the Appellate Discipline Commission

Repealed, effective September 1, 2000.

Rule 251.27. Proceedings Before the Supreme Court

(a) Appellate Jurisdiction. Appellate review by the Supreme Court of every final decision of the Hearing Board in which public censure, a period of suspension, disbarment, or transfer to disability inactive status is ordered or in which reinstatement or readmission is denied shall be allowed as provided by these rules.

(b) Standard of Review. All disciplinary and disability proceedings filed in the Supreme Court as herein provided shall be conducted in the name of the People of the State of Colorado titled "IN THE MATTER OF [the name of the ATTORNEY-RESPONDENT]" and shall be prosecuted by the Regulation Counsel.

When proceedings are conducted before the Supreme Court as herein provided, the Supreme Court shall affirm the decision of the Hearing Board unless it determines that, based on the record, the findings of fact of the Hearing Board are clearly erroneous or that the form of discipline imposed by the Hearing Board (1) bears no relation to the conduct, (2) is manifestly excessive or insufficient in relation to the needs of the public, or (3) is otherwise unreasonable. The Supreme Court may conduct a de novo review of the conclusions of law.

The matter shall be docketed by the clerk of the Supreme Court as:

SUPREME COURT, STATE OF COLORADO
Case No.
ORIGINAL PROCEEDING IN DISCIPLINE [OR DISABILITY]

IN THE MATTER OF [the name of the ATTORNEY-RESPONDENT]

(c) Appeal—How Taken. An appeal from a Hearing Board to the Supreme Court shall be taken by filing a notice of appeal with the Supreme Court within the time set forth in this Rule. Upon the filing of the notice of appeal, the Supreme Court shall have the exclusive jurisdiction over the appeal and procedures concerning the appeal unless otherwise specified by these Rules. An advisory copy of the notice of appeal shall be served on the Presiding Disciplinary Judge within the time for its filing in the Supreme Court. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is a ground only for such action as the Supreme Court deems appropriate, which may include dismissal of the appeal. Content of the notice of appeal shall not be deemed jurisdictional.

(d) Contents of Notice of Appeal. Except as otherwise provided by these rules, and to the extent practicable, the notice of appeal shall conform to the requirements set forth in C.A.R. 3(e).

(e) Contents of Any Notice of Cross-Appeal. A notice of cross-appeal shall set forth the same information required for a notice of appeal and shall set forth the party initiating the cross-appeal and designate all cross-appellees.

(f) Number of Copies to be Filed. Five copies of the notice of appeal or cross-appeal shall be filed with the original.

(g) Appeal—When Taken. The notice of appeal required by this rule shall be filed with the Supreme Court with an advisory copy served on the Presiding Disciplinary Judge within 21 days of the date of mailing the decision from which the party appeals. If a timely notice of appeal is filed by a party, the other party may file a notice of appeal within 14 days of the date on which the first notice of appeal is filed, or within the time otherwise prescribed by this section (g), whichever period last expires.

The running of the time for filing a notice of appeal is terminated as to both parties by a timely motion filed with the Presiding Disciplinary Judge by either party pursuant to the Colorado Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by this section (g) commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: (1) granting or denying a motion under C.R.C.P. 52 or 59, to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (2) granting or denying a motion under C.R.C.P. 59, to alter or amend the judgment; (3) denying a motion for a new hearing under C.R.C.P. 59; (4) expiration of an extension of time granted by the Presiding Disciplinary Judge to file motion(s) for post-hearing relief under C.R.C.P. 59, where no motion is filed. The Hearing Board shall continue to have jurisdiction to hear and decide a motion under C.R.C.P. 59 regardless of the filing of a notice of appeal, provided the C.R.C.P. 59 motion is timely filed under C.R.C.P. 59(a) and determined within the time specified in C.R.C.P. 59(j). During such time, all proceedings in the Supreme Court shall be stayed. If the decision is transmitted to the parties by mail, the time for the filing of the notice of appeal shall commence from the date of the mailing of the decision.

Upon a showing of excusable neglect, the Supreme Court may extend the time for filing the notice of appeal by a party for a period not to exceed 28 days from the expiration of the time otherwise prescribed by this section (g). Such an extension may be granted before or after the time otherwise prescribed by this section (g) has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the Supreme Court shall deem appropriate.

(h) Stay Pending Appeal. Application for a stay of the decision of a Hearing Board pending appeal must ordinarily be made in the first instance to the Hearing Board. The application for stay pending appeal should be granted except when an immediate suspension has been ordered, or when no conditions of probation and supervision while the appeal is pending will protect the public. A motion for such relief may be made to the Supreme Court, but the motion shall show that application to the Hearing Board for the relief sought is not practicable, or that the Hearing Board has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the Hearing Board for its action. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion shall be filed such parts of the record as are relevant. Reasonable notice of the motion shall be given to all parties.

(i) Record on Appeal—Composition.

(1) The final pleadings which frame the issues before the Hearing Board; the findings of fact, conclusions of law and decision; motions for new trial and other post-trial motions, if any, and the Hearing Board's ruling; together with any other documents which by designation of either party or by stipulation are directed to be included shall constitute the record on appeal in all cases.

(2) The reporter's transcript, or such parts thereof as provided under section (j) of this rule, relevant depositions and exhibits may be made a part of the record.

(3) The records and files of the Hearing Board shall be certified by the clerk of the Presiding Disciplinary Judge.

(4) The original papers in all instances shall be in the record submitted. Except on written request by a party, the Presiding Disciplinary Judge need not duplicate or retain a copy of the papers or exhibits included in the record. The party requesting that a duplicate be retained shall advance the cost of preparing the copies.

(5) The record shall be properly paginated and fully indexed and shall be prepared and

bound under the direction of the Presiding Disciplinary Judge.

(j) Record of Proceedings; Duty of Appellant to Order; Notice to Appellee if Partial Record is Ordered; Costs. Within 14 days after filing the notice of appeal, the appellant shall file with the Presiding Disciplinary Judge and with the clerk of the Supreme Court either: (1) a statement that no portions of the record other than those numerated in section (i) are desired or (2) a detailed designation of record, setting forth specifically those portions of the record to be included and all dates of proceedings for which transcripts are requested and the name(s) of the court reporter(s) who reported the proceedings that the appellant directs to be included in the record. The appellant shall serve a copy of the designation of record on each court reporter listed therein. If the appellant contends that a finding or conclusion is not supported by the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion. Unless the entire transcript is to be included, the appellant shall include in the designation of record a description of the part of the transcript that the appellant intends to include in the record and a statement of the issues to be presented on appeal. If the appellee deems it necessary to include a transcript of other proceedings or other parts of the record, the appellee shall, within 14 days after the service of the statement or the appellant's designation of the record, file with the Presiding Disciplinary Judge and the Supreme Court, and serve on the appellant and on any court reporter who reported proceedings of which the appellee desires an additional transcript, a designation of the additional items to be included. Service on any court reporter of the appellant's designation of record or the appellee's additional designation of record shall constitute a request for transcription of the specified proceedings. Within 14 days after service of any such designation of record, each such court reporter shall provide in writing to all counsel in the appeal: (1) the estimated number of pages to be transcribed; (2) the estimated completion date; and (3) the estimated cost of transcription. Within 21 days after receiving the reporter's estimate, the designating party shall deposit the full amount of such estimate with the court reporter. For good cause shown, within said 21 days and upon the agreement of the court reporter, the Presiding Disciplinary Judge may order a payment schedule extending the time for payment. When the cost of the transcription will be paid by public funds, the public entity shall make arrangements with the court reporter for payment of the transcription costs. Within 28 days of the transmittal of the court reporter's cost estimate to the pro se party or counsel, the court reporter shall file with the Presiding Disciplinary Judge and Supreme Court a statement of: (1) the date the court reporter's estimate was provided and the date on which the reporter received full payment of the estimate; or (2) the schedule of payments approved by the Presiding Disciplinary Judge under a good cause extension; or (3) that the cost of the transcript will be paid from public funds. Each party shall advance the cost of preparing that part of the record designated by such party except as otherwise ordered by the Presiding Disciplinary Judge for good cause shown.

(k) Transmission of the Record.

(1) Time. The record on appeal, including the transcript and exhibits necessary for the determination of the appeal, shall be transmitted to the Supreme Court within 56 days (8 weeks) after the filing of the notice of appeal unless the time is shortened or extended by an order entered as provided in this rule. After filing the notice of appeal the appellant shall comply with the provisions of this rule and shall take any other action necessary to enable the Presiding Disciplinary Judge to assemble and transmit the record.

(2) Duty Of Presiding Disciplinary Judge To Transmit The Record. When the record, including any designated transcript, is complete for purposes of the appeal, the clerk of the Presiding Disciplinary Judge shall transmit it to the clerk of the Supreme Court. The clerk of the Presiding Disciplinary Judge shall number the documents comprising the entire designated record and shall transmit with the record a list of the documents correspondingly numbered and identified with reasonable definiteness. Documents of unusual bulk or weight and physical exhibits other than documents shall not be transmitted unless a party or the Supreme Court directs the Presiding Disciplinary Judge to do so. A party must make advance arrangements for the transportation and receipt of exhibits of unusual bulk or weight.

Transmission of the record is effected when the clerk of the Presiding Disciplinary Judge

mails or otherwise forwards the record to the clerk of the Supreme Court. The clerk of the Presiding Disciplinary Judge shall indicate, by endorsement on the face of the record or otherwise, the date upon which it is transmitted to the Supreme Court.

(3) Temporary Retention of Record by the Presiding Disciplinary Judge For Use In Preparing Appellate Papers. Notwithstanding the provisions of this rule, the parties may stipulate, or the Presiding Disciplinary Judge on motion of any party may order, that the record shall temporarily be retained by the Presiding Disciplinary Judge for use by the parties in preparing appellate papers. In that event, the appellant shall nevertheless cause the appeal to be docketed and the record to be filed within the time fixed or allowed for transmission of the record by complying with the provisions of this Rule and by presenting to the Supreme Court a partial record in the form of a copy of the docket entries, accompanied by a certificate of counsel for the appellant, or of the appellant if the appellant is without counsel, reciting that the record, including the transcript or parts thereof designated for inclusion and all necessary exhibits, is complete for purposes of the appeal. Upon receipt of the brief of the appellee, or at such earlier time as the parties may agree or the Supreme Court may order, the appellant shall request the Presiding Disciplinary Judge to transmit the record.

(4) Extension Of Time For Transmission Of The Record; Reduction Of Time. The Supreme Court for good cause shown may extend the time for transmitting the record. A request for extension must be made within the time originally prescribed or within an extension previously granted. Any request for extension of the period of time based upon the reporter's inability to complete the transcript shall be supported by an affidavit of the reporter specifying why the transcript has not yet been prepared, and the date by which the transcript can be completed and a statement by the court reporter that all payments due have been made. Failure to pay for the transcript in accordance with C.R.C.P. 251.27(j) is grounds for denial of a motion for extension. The Supreme Court may direct the Presiding Disciplinary Judge to expedite the preparation and transmittal of the record on appeal and, upon motion or sua sponte, take other appropriate action regarding preparation and completion of the record.

(5) Stipulation Of Parties That Parts of the Record Be Retained By the Presiding Disciplinary Judge. The parties may agree by written stipulation filed with the Presiding Disciplinary Judge that designated parts of the record shall be retained by the Presiding Disciplinary Judge unless thereafter the Supreme Court shall order or any party shall request their transmittal. The parts thus designated shall nevertheless be a part of the record on appeal for all purposes.

(6) Preliminary Record Transmitted to the Supreme Court. If prior to the time the record is transmitted, a party desires to make to the Supreme Court a motion for dismissal, for a stay pending appeal, or for any intermediate order, the Presiding Disciplinary Judge at the request of any party shall transmit to the Supreme Court such parts of the original record as any party shall designate.

(l) Docketing the Appeal.

(1) Filing. At the time of the filing of the notice of appeal or the time of filing any documents with the Supreme Court before the filing of the notice of appeal, the Appellant shall pay to the clerk of the Supreme Court a docket fee of $150 and the clerk shall enter the appeal upon the docket. The party appealing shall docket the case as provided in section (b) of this Rule.

(2) Leave to Proceed On Appeal In Forma Pauperis From Hearing Board to Supreme Court. A party to an action before a Hearing Board who desires to proceed on appeal in forma pauperis shall file with the Presiding Disciplinary Judge a motion for leave so to proceed, together with an affidavit showing an inability to pay costs, a belief that the party is entitled to redress, and a statement of the issues which the party intends to present on appeal. If the motion is granted, the party may proceed without further application to the Supreme Court and without prepayment of costs. If the motion is denied, the Presiding Disciplinary Judge shall state in writing the reasons for the denial.

Notwithstanding the provisions of the preceding paragraph, a party who has been permitted to proceed in an action before the Presiding Disciplinary Judge in forma pauperis may proceed on appeal in forma pauperis without further authorization unless, before or

after the notice of appeal is filed, the Presiding Disciplinary Judge shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled so to proceed, in which event the Presiding Disciplinary Judge shall state in writing the reasons for such certification or finding. A party proceeding under this subsection shall attach a copy of the Presiding Disciplinary Judge's order granting or denying leave to proceed in forma pauperis before the Hearing Board with the appendix to the notice of appeal.

(3) Filing Of The Record. Upon receipt of the record or papers authorized to be filed in lieu of the record under the provisions of subsections (k)(3) and (k)(6) of this rule following timely transmittal, the clerk of the Supreme Court shall file the record. The clerk shall immediately give notice to all parties of the date on which the record was filed.

(4) The appellant shall have 28 days after the filing with the clerk of the Supreme Court of the record on appeal within which to file an opening brief. The appellee shall have 28 days after the filing of the appellant's opening brief within which to file an answer brief. The appellant shall have 14 days after the filing of the answer brief within which to file a reply brief.

(m) General Provisions. Except as otherwise provided in these Rules, and to the extent practicable, appeals shall be conducted in conformity with the general provisions found in C.A.R. 25, 26, 27, 28, 29, 31, 32, 34, 36, 38, 39, 42, and 45.

(n) Oral Argument. Oral argument may be allowed at the discretion of the court in accordance with C.A.R. 34.

(o) Disposition. When proceedings are conducted before the Supreme Court as herein provided, the Supreme Court may resolve the matter by opinion or by order without opinion, as the court shall determine in its discretion.

Source: Amended and adopted June 25, 1998, effective January 1, 1999; (b) amended and adopted October 29, 1998, effective January 1, 1999; entire rule amended and effective September 1, 2000; (g) 1st and last paragraphs, (j), (k)(1), and (l)(4) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Editor's note: This rule was previously numbered as 241.20.

ANNOTATION

Law reviews. For article, "Constitutional Law", which discusses recent Tenth Circuit decisions dealing with questions of due process in attorney disciplinary hearings, see 63 Den. U. L. Rev. 247 (1986).

Annotator's note. The following annotations include cases decided under former provisions similar to this rule.

This rule does not constitute a denial of due process even though the final arbiters of fact, the justices of the Colorado supreme court, do not personally hear the testimony of the accused attorney or other witnesses. Razatos v. Colo. Supreme Court, 549 F. Supp. 798 (D. Colo.), appeal dismissed, 455 U.S. 930, 102 S. Ct. 1415, 71 L. Ed. 2d 639 (1982).

Recommendation of grievance committee's hearing panel is advisory only, and it is incumbent upon the supreme court to exercise its independent judgment, taking into consideration the facts, circumstances, and background of the lawyer, to increase or decrease the recommended sanction. People v. Mattox, 639 P.2d 397 (Colo. 1982).

While the supreme court has always given the recommendation for discipline by the grievance committee great weight, the court reserves the right to exercise our independent judgment in arriving at the proper level of discipline. People v. Brown, 726 P.2d 638 (Colo. 1986).

Under this rule, the supreme court may accept the recommendation of the grievance committee or may impose such other discipline as may be proper under the circumstances. People v. Radinsky, 176 Colo. 357, 490 P.2d 951 (1971).

The selection of discipline to be imposed is ultimately a decision to be made by the supreme court after considering the appropriate factors and the purposes to be served by disciplinary sanctions. People v. Vigil, 779 P.2d 372 (Colo. 1989).

As part of its constitutional and inherent powers, the supreme court has exclusive jurisdiction over lawyers, and possesses the plenary authority to regulate and supervise the practice of law in Colorado. In re Caldwell, 50 P.3d 897 (Colo. 2002).

Suspension of a license to practice law is not criminal punishment for purposes of the double jeopardy clause of the fifth amendment. In re Cardwell, 50 P.3d 897 (Colo. 2002).

The primary purpose of lawyer regulation proceedings is to protect the public, not to punish the offending lawyer. In re Caldwell, 50 P.3d 897 (Colo. 2002).

Factual findings of grievance committee are binding on the supreme court, unless the supreme court, after considering the record as a whole, concludes that the findings are clearly erroneous and unsupported by substantial evidence. People v. Garnett, 725 P.2d 1149 (Colo. 1986) (apparently overruling People v. Mattox, 639 P.2d 397 (Colo. 1982)).

Supreme court is bound by the factual findings of the hearing board unless those findings are clearly erroneous and not supported by substantial evidence in the record. Court reviews questions of law de novo as in any appeal. In re Quiat, 979 P.2d 1029 (Colo. 1999); In re Rosen, 198 P.3d 116 (Colo. 2008).

Where hearing board determined that an allegation of the complaint was not proven by clear and convincing evidence because it believed respondent's explanation of his actions rather than attorney regulation counsel's allegations, supreme court could not conclude, as a matter of law, that no reasonable fact finder could have made that determination. In re Rosen, 198 P.3d 116 (Colo. 2008).

An attorney may file exceptions to the findings of the grievance committee. People v. Wilson, 176 Colo. 389, 490 P.2d 954 (1971).

Exceptions to the report of the grievance committee will be ordered stricken where the attorney fails to support them by a reporter's transcript or such portions thereof as would be necessary to enable the court to pass upon the exceptions. People v. Van Nocker, 176 Colo. 354, 490 P.2d 697 (1971).

If an attorney files exceptions, he should also provide a reporter's transcript to enable the supreme court to pass on the exceptions. People v. Murphy, 174 Colo. 182, 483 P.2d 224 (1971).

Respondent's exceptions stricken for failure to designate record as required by subsection (b)(4) of this rule. People v. Lutz, 897 P.2d 807 (Colo. 1995).

There is no evaluation of evidence on review. In determining whether the board's findings are supported by substantial evidence, it is not within the province of the supreme court to measure the weight of the evidence or to resolve the credibility of witnesses. People v. Distel, 759 P.2d 654 (Colo. 1988).

Applied in People v. King, 191 Colo. 120, 550 P.2d 848 (1976); People v. Kane, 655 P.2d 390 (Colo. 1982).

Rule 251.28. Required Action After Disbarment, Suspension, or Transfer to Disability

(a) Effective Date of Order - Winding Up Affairs. Orders imposing disbarment or a definite suspension shall become effective 35 days after the date of entry of the decision or order, or at such other time as the Supreme Court, a Hearing Board, or the Presiding Disciplinary Judge may order. Orders imposing immediate suspension, transferring an attorney to disability inactive status, or for failure to comply with rules governing attorney registration or continuing legal education, shall become effective immediately upon the date of entry of the order, unless otherwise ordered by the Supreme Court, a Hearing Board, or the Presiding Disciplinary Judge. After the entry of an order of disbarment, suspension unless fully stayed (see C.R.C.P. 251.7(a)(3)), or transfer to disability inactive status, the attorney may not accept any new retainer or employment as an attorney in any new case or legal matter; provided, however, that during any period between the date of entry of an order and its effective date the attorney may, with the consent of the client after full disclosure, wind up or complete any matters pending on the date of entry of the order.

(b) Notice to Clients in Pending Matters. An attorney against whom an order of disbarment, suspension unless fully stayed, or transfer to disability inactive status has been entered shall promptly notify in writing by certified mail each client whom the attorney represents in a matter still pending of the order entered against the attorney and of the attorney's consequent inability to act as an attorney after the effective date of such order, and advising such clients to seek legal services elsewhere. In addition, the attorney shall deliver to each client all papers and property to which the client is entitled. An attorney who has been suspended as provided in the rules governing attorney registration or continuing legal education need not comply with the requirements of this subsection if the attorney has sought reinstatement as provided by the rules governing attorney registration or continuing legal education and reasonably believes that reinstatement will occur within 14 days of the date of the order of suspension. If the attorney is not reinstated within those 14 days, then the attorney must comply with this subsection.

(c) Notice to Parties in Litigation. An attorney against whom an order of disbarment,

suspension unless fully stayed, or transfer to disability inactive status is entered and who represents a client in a matter involving litigation or proceedings before an administrative body shall notify that client as required by section (b) of this rule, and shall recommend that the client promptly obtain substitute counsel. In addition, the lawyer must notify in writing by certified mail the opposing counsel of the order entered against the attorney and of the attorney's consequent inability to act as an attorney after the effective date of the order. The notice to opposing counsel shall state the place of residence of the client of the attorney against whom the order was entered. An attorney who has been suspended as provided in the rules governing attorney registration or continuing legal education need not comply with the requirements of this section if the attorney has sought reinstatement as provided by the rules governing attorney registration or continuing legal education and reasonably believes that reinstatement will occur 14 days of the date of the order of suspension. If the attorney is not reinstated within those 14 days, then the attorney must comply with this section.

If the client of the attorney against whom an order was entered does not obtain substitute counsel before the effective date of such order, the attorney must appear before the court or administrative body in which the proceeding is pending and move for leave to withdraw.

(d) Affidavit Filed With Supreme Court or the Hearing Board. Within 14 days after the effective date of the order of disbarment, suspension, or transfer to disability inactive status, or within such additional time as allowed by the Supreme Court, the Hearing Board, or the Presiding Disciplinary Judge, the attorney shall file with the Supreme Court or the Hearing Board an affidavit setting forth a list of all pending matters in which the attorney served as counsel and showing:

(1) That the attorney has fully complied with the provisions of the order and of this rule;

(2) That the attorney has served on Regulation Counsel, a list of the clients notified pursuant to subsection (b) of this rule and a copy of each notice provided;

(3) That the attorney has notified every other jurisdiction before which the attorney is admitted to practice law of the order entered against attorney; and

(4) That the attorney has served a copy of such affidavit upon the Presiding Disciplinary Judge and the Regulation Counsel. The list and notices described in (d)(2) shall only be attached to the affidavit provided to Regulation Counsel.

Such affidavit shall also set forth the address of the attorney to which communications may thereafter be directed.

In addition, the attorney shall continue to file a registration statement in accordance with C.R.C.P. 227 for a period of five years following the effective date of the order listing the attorney's residence or other address where communications may thereafter be directed to the attorney; provided, however, that the annual registration fee need not be paid during such five-year period unless and until the attorney is reinstated. Upon reinstatement the attorney shall pay the annual registration fee for the year in which reinstatement occurs.

(e) Public Notice of Order. The clerk of the Supreme Court or the Presiding Disciplinary Judge shall release for publication orders of disbarment, suspension, or transfer to disability inactive status entered against an attorney.

(f) Notice of Order to the Courts. The Presiding Disciplinary Judge or the clerk of the Supreme Court shall promptly transmit notice of the final order of disbarment, suspension, or transfer to disability inactive status to all courts in this state. The chief judge of each judicial district may make such further orders pursuant to C.R.C.P. 251.32(h) or otherwise as the Chief Judge deems necessary to protect the rights of clients of the attorney.

(g) Duty to Maintain Records. An attorney who has been disbarred, suspended, or transferred to disability inactive status shall keep and maintain records of any steps taken by the attorney pursuant to this rule as proof of compliance with this rule and with the order entered against the attorney. Failure to comply with this section without good cause shown shall constitute contempt of the Supreme Court. Proof of compliance with this section shall be a condition precedent to any petition for reinstatement or readmission.

Source: Amended and adopted June 25, 1998, effective January 1, 1999; entire rule amended and effective September 1, 2000; (a), (b), (c), and (d) amended and adopted

October 6, 2005, effective January 1, 2006; (a) amended and effective October 2, 2008; (a), (b), (c), and IP(d) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Editor's note: This rule was previously numbered as 241.21.

ANNOTATION

Annotator's note. The following annotations include cases decided under former provisions similar to this rule.

It is not necessary that an attorney give notice pursuant to section (b) if he has not practiced law and has no clients. People v. Culpepper, 645 P.2d 5 (Colo. 1982).

Technical violations of the disciplinary orders and rules will not always preclude reinstatement, rather the most important consideration is the nature of the violations. In re Price, 18 P.3d 185 (Colo. 2001).

But denial of reinstatement is justified where attorney's failure to provide required notice of suspension to each client has potential to cause harm and such failure adversely affects the protections afforded the public by the disciplinary orders and rules. In re Price, 18 P.3d 185 (Colo. 2001).

Continuing to practice while suspended is conduct justifying disbarment. People v. James, 731 P.2d 698 (Colo. 1987).

Total disregard of obligation to protect a client's rights and interests over an extended period of time in conjunction with the violation of a number of disciplinary rules, the continuation of the practice of law after suspension, and an extended prior record of discipline requires most severe sanction of disbarment. People v. O'Leary, 783 P.2d 843 (Colo. 1989).

Suspension of one year and one day imposed for failing to abide by notification procedures of this section in conjunction with violation of other disciplinary rules where attorney who was suspended from practice of law for failure to pay registration fee and subsequently failed to notify client in pending bankruptcy matter, failed to withdraw from bankruptcy matter before trial date, failed to take action to secure substitute counsel, move for continuance, or otherwise protect his client's interest, and who failed to inform court or opposing counsel. People v. Smith, 828 P.2d 249 (Colo. 1992).

Attorney's continued practice of law while under an order of suspension, with no efforts to wind up the legal practice, and the failure to take action to protect the legal interests of the attorney's clients warrants disbarment. People v. Wilson, 832 P.2d 943 (Colo. 1992).

An attorney who is suspended for failure to comply with CLE requirements is barred from practicing law under this rule and rule 5.5 of the Colorado rules of professional conduct, the same as if the attorney had been suspended following a disciplinary proceeding. Continuing to practice law after such an administrative suspension warranted an additional 18-month suspension. People v. Johnson, 946 P.2d 469 (Colo. 1997).

Winding up affairs unnecessary. Where an attorney is presently suspended from the practice of law, it is not necessary that he be granted time to wind up his legal affairs. Disbarment is therefore effective on the date that the opinion was announced. People v. Susman, 787 P.2d 1119 (Colo. 1990).

Accepting a retainer while suspended from the practice of law is sufficient, in conjunction with the violation of other disciplinary rules, to justify further suspension. People v. Redman, 819 P.2d 495 (Colo. 1991).

A lawyer's continued practice of law while under an order of suspension, with no efforts to wind up the legal practice, and failure to take action to protect the legal interests of the lawyer's clients, warrants disbarment. People v. Wilson, 832 P.2d 943 (Colo. 1992).

Suspension of one year and one day appropriate for admitted solicitation of sexual favors when extensive mitigating factors were present. The instances of misconduct occurred over a short period of time during which respondent was undergoing emotional and personal problems, respondent voluntarily underwent psychological counseling, the psychologist indicated in writing that a reoccurrence of the offenses was seen as unlikely, and respondent had already received the sanction of a criminal conviction as a result of pleading guilty to harassment. Respondent was also the subject of several newspaper articles that reported his misconduct. People v. Crossman, 850 P.2d 708 (Colo. 1993).

An attorney's appearance as counsel of record in numerous court proceedings following an order of suspension warrants further suspension for one year and one day. People v. Kargol, 854 P.2d 1267 (Colo. 1993).

Suspension for one year and one day is warranted where attorney mishandled client funds but where the court found several factors in mitigation such as the absence of a prior record, a reputation for honesty, and a demonstration of remorse. People v. Galindo, 884 P.2d 1109 (Colo. 1994).

Suspension for one year and one day appropriate when attorney terminated represen-

tation without reasonable notice, failed to provide client with accounting and refund, and failed to meet continuing education requirements. Restitution required as condition of reinstatement. People v. Rivers, 933 P.2d 6 (Colo. 1997).

Suspension for three years is warranted where attorney, in conjunction with violating numerous rules of professional conduct, violated this rule by failing to notify client by certified mail of order of suspension and attorney's inability to represent client. People v. Hohertz, 926 P.2d 560 (Colo. 1996).

Disbarment appropriate when attorney took no steps to protect the legal interests of his clients when he was placed under a suspension order. Attorney also had an extensive history of similar discipline. People v. Dolan, 873 P.2d 766 (Colo. 1994).

Conduct violating this rule in conjunction with other violations is sufficient to justify disbarment. People v. Ebbert, 925 P.2d 274 (Colo. 1996); People v. Mannix, 936 P.2d 1285 (Colo. 1997); People v. Fager, 938 P.2d 138 (Colo. 1997); People v. Swan, 938 P.2d 1164 (Colo. 1997); People v. Holmes, 955 P.2d 1012 (Colo. 1998); People v. Zimmermann, 960 P.2d 85 (Colo. 1998).

An attorney's continued practice of law while under suspension is negligent where there is evidence that the attorney incorrectly believed that he had been reinstated and where there is no evidence that misconduct caused any actual harm. People v. Dieters, 883 P.2d 1050 (Colo. 1994).

Suspension for 90 days is warranted for attorney's continued practice of law during a period of suspension in view of prior record and substantial experience in practice of law even if attorney incorrectly believed that he had been reinstated. People v. Dieters, 883 P.2d 1050 (Colo. 1994).

Suspension for 18 months is warranted where attorney failed to notify opposing counsel and trial court of suspension and where the attorney had extensive record of previous discipline. People v. Watson, 883 P.2d 1053 (Colo. 1994).

Public censure is warranted where, although the attorney failed to notify opposing counsel and appeared in one hearing after imposition of the suspension, the attorney's involvement was minimal, it occurred only upon request by the client, it did not result in any harm to the client, and the attorney did not receive any benefit from the appearance. People v. Pittam, 917 P.2d 710 (Colo. 1996).

Public censure warranted where, although respondent did not notify his clients and opposing counsel of his suspension, he did notify the court early in proceedings and did not go forward with court proceedings while on suspension and no actual harm was demonstrated to any of his clients. People v. Dover, 944 P.2d 80 (Colo. 1997).

Conduct violating this rule is sufficient to warrant public censure. People v. Williams, 936 P.2d 1289 (Colo. 1997).

Orders affecting disbarment or suspension are effective 30 days after the entry of the order or at such other time as the court may order. People v. Goldstein, 887 P.2d 634 (Colo. 1994).

Applied in People ex rel. MacFarlane v. Harthun, 195 Colo. 38, 581 P.2d 716 (1978); People v. Pacheco, 198 Colo. 455, 608 P.2d 333 (1979); People v. Gifford, 199 Colo. 205, 610 P.2d 485 (1980); People v. Dixon, 621 P.2d 322 (Colo. 1981); People v. Southern, 638 P.2d 787 (Colo. 1982); People v. Dwyer, 652 P.2d 1074 (Colo. 1982); People v. Roehl, 655 P.2d 1381 (Colo. 1983).

Rule 251.29. Readmission and Reinstatement After Discipline

(a) Readmission After Disbarment. A disbarred attorney may not apply for readmission until at least eight years after the effective date of the order of disbarment. To be eligible for readmission the attorney must demonstrate the attorney's fitness to practice law and professional competence, and must successfully complete the written examination for admission to the Bar. The attorney must file a petition for readmission, properly verified, with the Presiding Disciplinary Judge, and furnish a copy to the Regulation Counsel. Thereafter, the petition shall be heard in procedures identical to those outlined by these rules governing hearings of complaints, except it is the attorney who must demonstrate by clear and convincing evidence the attorney's rehabilitation and full compliance with all applicable disciplinary orders and with all provisions of this Chapter. A Hearing Board shall consider every petition for readmission and shall enter an order granting or denying readmission.

(b) Reinstatement After Suspension. Unless otherwise provided by the Supreme Court, a Hearing Board, or the Presiding Disciplinary Judge in the order of suspension, an attorney who has been suspended for a period of one year or less shall be reinstated by order of the Presiding Disciplinary Judge, provided the attorney files an affidavit with the Regulation Counsel within 28 days prior to the expiration of the period of suspension,

stating that the attorney has fully complied with the order of suspension and with all applicable provisions of this chapter. Upon receipt of the attorney's affidavit that has been timely filed, the Regulation Counsel shall notify the Presiding Disciplinary Judge of the attorney's compliance with this Rule. Upon receipt of the notice, the Presiding Disciplinary Judge shall issue an order reinstating the attorney. The order shall become effective upon the expiration of the period of suspension. If the attorney fails to file the required affidavit within the time specified, the attorney must seek reinstatement pursuant to section (c) of this Rule; provided, however, that a suspended attorney who fails to file a timely affidavit may obtain leave of the Presiding Disciplinary Judge to file an affidavit upon showing that the attorney's failure to file the affidavit was the result of mistake, inadvertence, surprise, or excusable neglect. An attorney reinstated pursuant to this section shall not be required to show proof of rehabilitation.

An attorney who has been suspended for a period longer than one year must file a petition with the Presiding Disciplinary Judge for reinstatement and must prove by clear and convincing evidence that the attorney has been rehabilitated, has complied with all applicable disciplinary orders and with all provisions of this chapter, and is fit to practice law.

If the attorney remains suspended for five years or longer, reinstatement shall be conditioned upon certification by the state board of law examiners of the attorney's successful completion, after the expiration of the period of suspension, of the examination for admission to practice law and upon a showing by the attorney of such other proof of professional competence as the Supreme Court or a Hearing Board may require; provided, however, that filing a petition for reinstatement within five years of the effective date of the suspension of the attorney tolls the five-year period until such time as the Hearing Board rules on the petition.

(c) Petition for Reinstatement. Any attorney who has been suspended for a period longer than one year must file a petition with the Presiding Disciplinary Judge for an order of reinstatement if the attorney wishes to be reinstated to practice law. The petition must be properly verified and, when filed, a copy must be furnished to the Regulation Counsel.

The petition for reinstatement must set forth:

(1) The date the order of suspension was entered and the effective date thereof, and a copy of the disciplinary order or opinion;

(2) The date on which all prior petitions for reinstatement were filed and the disposition thereof;

(3) The facts other than passage of time and absence of additional misconduct upon which the petitioning attorney relies to establish that the attorney possesses all of the qualifications required of applicants for admission to the Bar of Colorado, fully considering the previous disciplinary action taken against the attorney;

(4) Evidence of compliance with all applicable disciplinary orders and with all provisions of this Chapter regarding actions required of suspended lawyers;

(5) Evidence of efforts to maintain professional competence through continuing legal education or otherwise during the period of suspension; and

(6) A statement of restitution made as ordered to any persons and the Colorado Attorneys' Fund for Client Protection and the source and amount of funds used to make restitution.

(d) Reinstatement Proceedings. Immediately upon receipt of a petition for reinstatement the Regulation Counsel shall conduct any investigation the Regulation Counsel deems necessary. The petitioner shall cooperate in any such investigation.

The Regulation Counsel shall submit an answer to the petition. Thereafter, the petition for reinstatement shall be reviewed in procedures identical to those outlined by these Rules governing hearings of complaints.

The Regulation Counsel may present evidence bearing upon the matters in issue, and the attorney seeking reinstatement shall bear the burden of proving by clear and convincing evidence the averments in the petition.

(e) Hearing Board Decision. In deciding whether to grant or deny the petition, the Hearing Board shall consider the attorney's past disciplinary record. The Hearing Board may condition reinstatement upon compliance with any additional orders it deems appro-

priate, including but not limited to the payment of restitution to any person harmed by the misconduct for which the petitioner was suspended.

(f) Readmission and Reinstatement Proceedings Before the Supreme Court. An attorney whose petition for readmission or reinstatement is denied by the Hearing Board may proceed before the Supreme Court in a manner identical to that outlined in C.R.C.P. 251.27.

(g) Successive Petitions. No petition for reinstatement under this Rule shall be accepted within two years following a denial of a previous petition for reinstatement filed on behalf of the same person.

(h) Public Information. Notwithstanding the provisions of C.R.C.P. 251.31, and any Rule relating to the confidentiality of Bar admissions, petitions for reinstatement and applications for readmission shall be matters of public record.

Any hearing held under sections (a) and (d) of this Rule shall be open to the public.

(i) Cost Deposit. Petitions for readmission or reinstatement under this Rule shall be accompanied by a cost deposit of $500 to be used to pay all expenses connected with the reinstatement proceedings. If such costs should exceed $500, the Supreme Court, the Presiding Disciplinary Judge or the presiding officer of the Hearing Board may enter an order requiring the petitioner to supply an additional deposit. Upon the completion of proceedings held pursuant to this Rule an accounting shall be rendered and any portion of the cost deposit unexpended shall be returned to the petitioner.

(j) Reinstatement on Stipulation. Provided the petition for reinstatement under section (c) of this rule is filed within 28 days prior to the expiration of the period of suspension or 91 days (13 weeks) if the period of suspension is longer than one year and provided the attorney seeking reinstatement and the Regulation Counsel, after any investigation the Regulation Counsel deems necessary, stipulate to reinstatement, the Regulation Counsel shall file with the Presiding Disciplinary Judge the stipulation containing such terms and conditions of reinstatement, if any, as may be agreed. Upon receipt of the stipulation, the Presiding Disciplinary Judge may approve the stipulation following an appearance by the attorney before the Presiding Disciplinary Judge and enter an order of reinstatement on the terms and conditions contained in the stipulation or reject the stipulation and order that a hearing be held by a Hearing Board as provided in section (d) of this rule.

Source: Amended and adopted June 25, 1998, effective July 1, 1998; entire rule amended and effective September 1, 2000; (b) 1st paragraph and (j) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Editor's note: This rule was previously numbered as 241.22.

ANNOTATION

Annotator's note. The following annotations include cases decided under former provisions similar to this rule.

Readmission conditioned upon full compliance with section (a) and full payment of costs and restitution. People v. Young, 673 P.2d 1003 (Colo. 1984); People v. Rice, 708 P.2d 785 (Colo. 1985).

Readmission conditioned upon full compliance with disciplinary orders issued in foreign disbarment. People v. Montano, 744 P.2d 480 (Colo. 1987).

Even where suspension is only for six months, reinstatement can be conditioned on compliance with sections (c) and (e) of this section and the undergoing of a mental health examination by a licensed mental health professional. People v. Goens, 770 P.2d 1218 (Colo. 1989).

Attorney suspended for only six months may be required to petition for reinstatement under subsection (c). People v. Garrett, 802 P.2d 1082 (Colo. 1990).

Reinstatement after six-month suspension may be conditioned upon compliance with subsections (c) and (d) and a showing that the attorney's ability to fulfill his responsibilities as a lawyer is not impaired by any depression from which he is suffering. People v. Sullivan, 802 P.2d 1091 (Colo. 1990).

Person not entitled to admission to bar not entitled to reinstatement. Where a disciplined respondent was not qualified to take the bar examination in the first instance, he will never

be entitled to apply for reinstatement pursuant to this rule. People v. Culpepper, 645 P.2d 5 (Colo. 1982).

Rule permits court to negate automatic reinstatement provision in order of suspension for six months. People v. Mayer, 744 P.2d 509 (Colo. 1987).

Fact that psychiatric condition contributed to violations of code of professional responsibility requires application to grievance committee for reinstatement, including presentation of evidence of psychiatric and emotional condition that indicates fitness to practice law. People v. Fleming, 716 P.2d 1090 (Colo. 1986).

Requiring that a psychiatric evaluation precede reinstatement after suspension of longer than one year is justified by respondent's erratic behavior with respect to his handling of cases on which discipline is based and his conduct during the disciplinary proceedings, including his threatening manner toward prosecutor. People v. Fagan, 745 P.2d 249 (Colo. 1987).

Reinstatement conditioned upon compliance with subsection (b), payment of costs and restitution, and filing reports and making payments to referral service. People v. Taylor, 799 P.2d 930 (Colo. 1990).

Reinstatement conditioned upon compliance with subsections (c) and (d) of this rule and the payment of costs and restitution. People v. Anderson, 817 P.2d 1035 (Colo. 1991).

Reinstatement conditioned upon compliance with subsections (c) and (d), full payment of restitution ordered in connection with felony tax convictions, and costs of disciplinary proceeding. People v. Mandell, 732 P.2d 813 (Colo. 1991).

Reinstatement conditioned upon compliance with subsections (b) to (d) of this rule, demonstration of mental and emotional fitness to practice, and the payment of costs. People v. Smith, 830 P.2d 1003 (Colo. 1992); People v. Holmes, 921 P.2d 44 (Colo. 1996).

Reinstatement conditioned upon compliance with subsections (b) to (d) of this rule. People v. Moore, 849 P.2d 40 (Colo. 1993); People v. Regan, 871 P.2d 1184 (Colo. 1994).

Reinstatement conditioned upon compliance with subsections (b) to (d) of this rule, completion of drug and alcohol treatment, and the payment of costs and restitution. People v. Driscoll, 830 P.2d 1019 (Colo. 1992).

Reinstatement conditioned upon compliance with subsections (b) to (d) of this rule and payment of costs. People v. Genchi, 849 P.2d 28 (Colo. 1993).

Readmission of attorney disbarred after conviction for bank fraud conditioned upon demonstrating rehabilitation by clear and convincing evidence, including whether he restored all amounts lost by the banks for which he is or was personally liable. People v. Terborg, 848 P.2d 346 (Colo. 1993).

Reinstatement conditioned on proof by clear and convincing evidence of rehabilitation. People v. Brenner, 852 P.2d 456 (Colo. 1993).

Reinstatement conditioned upon compliance with subsections (b) to (d) of this rule along with the conditions of reinstatement set forth in the Finding of Fact, Conclusions and Recommendation of the hearing board. People v. Kargol, 854 P.2d 1267 (Colo. 1993).

Reinstatement of attorney suspended for one year and one day conditioned upon attorney demonstrating what amount of harm client suffered as a result of his misconduct, that he made appropriate restitution to her for that harm, and that attorney is emotionally and psychologically able to practice law. People v. Davies, 926 P.2d 572 (Colo. 1996).

Complainant's specific averments refuting attorney-respondent's averments contained in the petition for reinstatement did not constitute affirmative defenses to the petition for reinstatement, thus shifting the burden of proof borne by attorney-respondent under C.R.C.P. 241.22(d) (now this rule) to the complainant. In re Price, 18 P.3d 185 (Colo. 2001).

It was appropriate to require an attorney to petition for reinstatement under this rule, even though his period of suspension for violating disciplinary rule did not exceed one year, where the extraordinary number of previous matters in which the attorney was cited for neglect showed the need for a demonstration that he had been rehabilitated. People v. C. De Baca, 862 P.2d 273 (Colo. 1993).

Applied in People v. Dixon, 621 P.2d 322 (Colo. 1981); People v. Archuleta, 638 P.2d 255 (Colo. 1981); People v. Barbour, 639 P.2d 1065 (Colo. 1982); People v. Goss, 646 P.2d 334 (Colo. 1982); People v. Dwyer, 652 P.2d 1074 (Colo. 1982); People v. Awenius, 653 P.2d 740 (Colo. 1982); People v. Craig, 653 P.2d 1115 (Colo. 1982); People v. Kane, 655 P.2d 390 (Colo. 1982); People v. Roehl, 655 P.2d 1381 (Colo. 1983); People v. Brackett, 667 P.2d 1357 (Colo. 1983); People v. Whitcomb, 676 P.2d 11 (Colo. 1983); People v. Tucker, 676 P.2d 680 (Colo. 1983); People v. Baca, 691 P.2d 1136 (Colo. 1984).

Rule 251.30. Reinstatement after Transfer to Disability Inactive Status

(a) Reinstatement Upon Termination of Disability. An attorney who has been transferred to disability inactive status pursuant to C.R.C.P. 251.23 shall be entitled to petition for reinstatement at such time as the Supreme Court or the Presiding Disciplinary

Judge may direct. The petition shall be filed with the Presiding Disciplinary Judge, and a copy shall be furnished to the Regulation Counsel. Such petition for reinstatement shall be granted upon a showing by clear and convincing evidence that the attorney's disability has been removed and that the attorney is competent to resume the practice of law.

Upon receipt of a petition for reinstatement from disability inactive status, the Presiding Disciplinary Judge may take or direct such action as he or she deems necessary or proper to determine whether the attorney is again competent to practice law, including but not limited to the issuance of an order for an examination of the attorney by qualified medical experts designated by the Presiding Disciplinary Judge.

In addition, the Presiding Disciplinary Judge may direct that the petitioner re-establish proof of competence and learning in law, including certification by the state board of law examiners of the petitioner's successful completion of the examination for admission to practice law. If the petitioner remains on disability inactive status for five years or longer, reinstatement shall be conditioned upon certification by the state board of law examiners of the petitioner's successful completion, within the previous twelve months, of the examination for admission to practice law and upon a showing by the petitioner of such other proof of professional competence as the Supreme Court or the Presiding Disciplinary Judge may require; provided, however, that filing a petition for reinstatement within five years of the effective date of the attorney's transfer to disability inactive status tolls the five-year period until such time as the Presiding Disciplinary Judge rules on the petition.

When an attorney has been transferred to disability inactive status by an order in accordance with C.R.C.P. 251.23 and thereafter has been judicially declared to be competent, the Presiding Disciplinary Judge may dispense with any further evidence of the attorney's return to competence and may direct that the attorney be reinstated upon such terms as are deemed proper and advisable; provided, however, that if a disciplinary proceeding conducted pursuant to these rules and pending against the petitioner was deferred upon the petitioner's transfer to disability inactive status, such proceeding shall be resumed and the petitioner shall not be reinstated pending the final disposition of such proceeding.

(b) Reinstatement Proceedings. The Presiding Disciplinary Judge may, in the Presiding Disciplinary Judge's discretion, order that reinstatement proceedings identical to those provided for by C.R.C.P. 251.29(d) be conducted.

(c) Compensation of Medical Experts. The Presiding Disciplinary Judge may fix the compensation to be paid to any medical expert appointed by the Presiding Disciplinary Judge pursuant to this rule. The Supreme Court may direct that such compensation be assessed as part of the costs of a proceeding held pursuant to this Rule and that it be paid as such in accordance with law.

(d) Waiver of Doctor-Patient Privilege. For the purposes of any proceedings conducted pursuant to this Rule, the filing of a petition for reinstatement by an attorney who has been transferred to disability inactive status shall constitute a waiver of any doctor-patient privilege between the attorney and any psychiatrist, psychologist, physician, treating professional, or other medical expert who has examined or treated the attorney in connection with the disability. By order of the Supreme Court the attorney may be required to disclose the name of every psychiatrist, psychologist, physician, treating professional, or other medical expert who has examined or treated the attorney in connection with the disability, and to furnish written consent for the disclosure by such persons of any information and records pertaining to such examination or treatment requested by the Supreme Court.

Source: Amended and adopted June 25, 1998, effective January 1, 1999; entire rule amended and effective September 1, 2000.

Editor's note: This rule was previously numbered as 241.23.

ANNOTATION

Attorney on disability inactive status must demonstrate by clear and convincing evidence that her alcohol-related disability has been removed and that she is once again competent to practice law before she may be reinstated. People v. Coulter, 950 P.2d 176 (Colo. 1998).

Rule 251.31. Access to Information Concerning Proceedings Under These Rules

(a) Availability of Information. Except as otherwise provided by these rules, all records, except (i) the work product, deliberations and internal communications of the Regulation Counsel, the committee, the Presiding Disciplinary Judge, the Hearing Boards, and the Supreme Court, and (ii) the lists of clients and copies of client notices referred to in C.R.C.P. 251.28(d)(2), shall be available to the public after the committee determines that reasonable cause to believe grounds for discipline exists and the Regulation Counsel files and serves a complaint as provided in C.R.C.P. 251.14, unless the complainant or the respondent obtains a protective order.

Unless otherwise ordered by the Supreme Court or the Presiding Disciplinary Judge, nothing in these rules shall prohibit the complaining witness, the attorney, or any other witness from disclosing the existence of proceedings under these rules or from disclosing any documents or correspondence served on or provided to those persons.

(b) Confidentiality. Before the filing and service of a complaint as provided in C.R.C.P. 251.14, the proceedings are confidential within the Office of the Regulation Counsel, the committee, the Presiding Disciplinary Judge, and the Supreme Court, except that the pendency, subject matter, and status of an investigation under C.R.C.P 251.10 may be disclosed by the Regulation Counsel if:

(1) The respondent has waived confidentiality;

(2) The proceeding is based upon allegations that include either the conviction of a crime or discipline imposed by a foreign jurisdiction;

(3) The proceeding is based on allegations that have become generally known to the public;

(4) There is a need to notify another person or organization, including the fund for client protection, to protect the public, the administration of justice, or the legal profession; or

(5) A petition for immediate suspension has been filed pursuant to C.R.C.P. 251.8.

(c) Public Proceedings. When the committee determines that reasonable cause to believe that grounds for discipline exists and the Regulation Counsel files and serves a complaint as provided in C.R.C.P. 251.14, or when a petition for reinstatement or readmission is filed, the proceeding is public except for:

(1) The deliberations of the Presiding Disciplinary Judge, the Hearing Board, or the Supreme Court; and,

(2) Information with respect to which a protective order has been issued.

(d) Proceedings Alleging Disability. In disability proceedings, all orders transferring an attorney to or from disability inactive status shall be matters of public record, but otherwise, disability proceedings shall be confidential and shall not be made public, except by order of the Supreme Court, the Presiding Disciplinary Judge, or a Hearing Board.

(e) Protective Orders. To protect the interests of a complainant, witness, third party, or respondent, the Presiding Disciplinary Judge or a Hearing Board, may, upon application of any person and for good cause shown, issue a protective order prohibiting the disclosure of specific information otherwise privileged or confidential and direct that the proceedings be conducted so as to implement the order, including requiring that the hearing be conducted in such a way as to preserve the confidentiality of the information that is the subject of the application.

(f) Disclosure to Law Firms. When the Regulation Counsel obtains an order transferring the attorney to disability inactive status or immediately suspending the attorney, or is authorized to file a complaint as provided by C.R.C.P. 251.12, the attorney shall make

written disclosure to the attorney's current firm and, if different, to the attorney's law firm at the time of the act or omission giving rise to the matter, of the fact that the order has been obtained or that a disciplinary proceeding as provided for in these rules has been commenced. The disclosures shall be made within 14 days of the date of the order or of the date the Regulation Counsel notified the attorney that a disciplinary proceeding has been commenced.

(g) Pending Investigations. Except as provided by section (b) of this rule or when the attorney waives confidentiality, the Regulation Counsel shall treat as confidential proceedings pending with the Regulation Counsel or before the committee.

(h) Cases Dismissed. Except as provided by section (b) of this rule or when the attorney waives confidentiality, the Regulation Counsel shall treat as confidential proceedings that have been dismissed.

(i) Private Admonitions. Any public proceeding in which a private admonition is imposed as provided by C.R.C.P. 251.6 shall be public, as follows: the fact that private admonition is imposed shall be public information, but the private admonition itself shall not be disclosed.

(j) Production of Records Pursuant to Subpoena. The Regulation Counsel, pursuant to a valid subpoena, shall not permit access to files or records or furnish documents that are confidential as provided by these rules unless the Supreme Court orders otherwise. When counsel is permitted to disclose confidential documents contained in files or confidential records, a reasonable fee may be charged for identification of and photocopying the documents and records.

(k) Response to False or Misleading Statement. If public statements that are false or misleading are made about any disciplinary or disability case, the Regulation Counsel may disclose any information necessary to correct the false or misleading statements.

(l) Request for Nonpublic Information. A request for nonpublic information other than that authorized for disclosure under subsection (b) of this Rule shall be denied unless the request is from:

(1) An agency authorized to investigate the qualifications of persons for admission to practice law;

(2) An agency authorized to investigate the qualifications of persons for government employment;

(3) An attorney discipline enforcement agency;

(4) A criminal justice agency; or,

(5) An agency authorized to investigate the qualifications of judicial candidates. If a judicial nominating commission of the State of Colorado requests the information it shall be furnished promptly and the Regulation Counsel shall give written notice to the attorney that specified confidential information has been so disclosed.

(m) Notice to the Attorney. Except as provided in subsection (l)(5) of this Rule, if the Regulation Counsel is permitted to provide nonpublic information requested, and if the attorney has not signed a waiver permitting the requesting agency to obtain nonpublic information, the attorney shall be notified in writing at his or her last known address of that information which has been requested and by whom, together with a copy of the information proposed to be released to the requesting agency. The notice shall advise the attorney that the information shall be released at the end of 21 days following mailing of the notice unless the attorney objects to the disclosure. If the attorney timely objects to the disclosure, the information shall remain confidential unless the requesting agency obtains an order from the Supreme Court requiring its release.

(n) Release Without Notice. If an agency otherwise authorized by section (l) of this rule has not obtained a waiver from the attorney to obtain nonpublic information, and requests that the information be released without giving notice to the attorney, the requesting agency shall certify that:

(1) The request is made in furtherance of an ongoing investigation into misconduct by the attorney;

(2) The information is essential to that investigation; and

(3) Disclosure of the existence of the investigation to the attorney would seriously prejudice that investigation.

(o) Notice to National Regulatory Data Bank. The Regulation Counsel shall transmit notice of all public discipline imposed against an attorney, transfers to or from disability inactive status, and reinstatements to the National Regulatory Data Bank maintained by the American Bar Association.

(p) Duty of Officials and Employees. All officials and employees within the Office of the Regulation Counsel, the committee, the Presiding Disciplinary Judge, and the Supreme Court shall conduct themselves so as to maintain the confidentiality mandated by this rule.

(q) Evidence of Crime. Nothing in these rules except for the admission of past misconduct protected by C.R.C.P. 251.13(i) shall be construed to preclude any person from giving information or testimony to authorities authorized to investigate criminal activity.

Source: Amended and adopted June 25, 1998, effective January 1, 1999; entire rule amended and effective September 1, 2000; (a) amended and adopted October 6, 2005, effective January 1, 2006; (b) amended and effective and committee comment added and effective February 5, 2009; (f) and (m) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Editor's note: This rule was previously numbered as 241.24.

COMMITTEE COMMENT

The confidentiality rule set forth in C.R.C.P. 251.31(b) seeks to strike a balance between the protection of attorneys against publicity predicated upon unfounded accusations and the protection of clients and prospective clients and the effective administration of justice from harm caused by attorneys who are unwilling or unable to fulfill their professional obligations. C.R.C.P. 251.31(b) also recognizes that restrictions on confidentiality no longer serve their purpose when allegations that would ordinarily be confidential have become generally known through disclosure in the public record, publicity or otherwise.

The Regulation Counsel frequently receives inquiries from judges, clients or prospective clients and the media asking if an attorney is the subject of a pending disciplinary investigation. Ordinarily, this rule prohibits the Regulation Counsel from providing information about a pending investigation or even confirming that an investigation is pending. C.R.C.P. 251.31(b) sets forth exceptions when the Regulation Counsel may reveal the pendency, subject matter, and status of an investigation under C.R.C.P. 251.10.

Certain exceptions are clear. For example, when the attorney has waived confidentiality or when the proceeding against the attorney is based on a criminal conviction, discipline imposed on the attorney in another jurisdiction, or a petition for immediate suspension filed by the Regulation Counsel against the attorney under C.R.C.P. 251.8.

Other exceptions require the Regulation Counsel to exercise discretion. C.R.C.P. 251.31(b)(3) requires the Regulation Counsel to determine whether otherwise confidential allegations against an attorney have become generally known. Factors that the Regulation Counsel should consider in these circumstances include but are not limited to the nature and extent of media coverage, the nature and extent of inquiries from the media and the public, the nature and status of any related judicial proceedings, the number of people believed to have knowledge of the allegations, and the seriousness of the allegations.

Another important exception requiring the Regulation Counsel to exercise discretion is C.R.C.P. 251.31(b)(4), which allows disclosure when there is a need to notify another person or organization in order to protect the public, the administration of justice, or the legal profession. In determining whether a need to notify exists, the Regulation Counsel should consider factors including but not limited to the nature and seriousness of the conduct under investigation, the attorney's prior disciplinary history and whether the attorney has previously been disciplined for conduct similar to the alleged conduct under investigation, and the potential harm to a client or prospective client, the public or the judicial system. In those instances in which the Regulation Counsel determines that disclosure is permitted based on C.R.C.P. 251.31(b)(4) alone, the Regulation Counsel is authorized to disclose the pendency, subject matter, and status of an investigation in response to inquiry, but also to disclose this information affirmatively to those persons having a need to know the information in order to avoid potential harm.

ANNOTATION

Annotator's note. The following annotations include cases decided under former provisions similar to this rule.

Protective order issued by presiding disciplinary judge (PDJ) for "good cause" shown under section (e) of this rule does not offend the first amendment. First, section (e) furthers substantial government interest unrelated to the suppression of speech. Specifically, the government has substantial interests in preventing Attorney E from further abusing the discovery processes and in protecting the judge's privacy. Second, the protective order did not limit Attorney E's first amendment freedoms to an extent greater than necessary to protect the judge's privacy interests. The protective order prevented Attorney E, as a party to the investigative proceedings, from disseminating information obtained from FBI documents only during attorney regulation counsel's pre-complaint stage. In re Attorney E, 78 P.3d 300 (Colo. 2003).

Protective order issued by PDJ under section (e) of this rule must be modified because it unduly hinders both attorney regulation counsel's and Attorney E's ability to further their cases. Both parties to the investigative proceedings, attorney regulation counsel and Attorney E, must be able to use the documents in a limited way to prosecute and defend their respective cases even though good cause exists to protect the pertinent privacy interests. Given the implications of a privacy order that prevents both parties from making any use of the relevant documents, PDJ must modify protective order to allow limited use of FBI documents by both parties. In re Attorney E, 78 P.3d 300 (Colo. 2003).

District attorney may obtain access to grievance committee's files provided that following requirements are met: first, the district attorney's request must be made pursuant to an ongoing criminal investigation; and second, the prosecution's request must set forth the evidence or information required which must relate to the charges being investigated. People v. Pacheco, 199 Colo. 470, 618 P.2d 1102 (1980); People v. Smith, 773 P.2d 522 (Colo. 1989).

Disbarment warranted where attorney filed false pleadings and disciplinary complaints, disclosed information concerning the filing of the disciplinary complaints, offered to withdraw a disciplinary complaint filed against a judge in exchange for a favorable ruling, failed to serve copies of pleadings on opposing counsel, revealed client confidences and material considered derogatory and harmful to the client aggravated by a repeated failure to cooperate with the investigation of misconduct, disruption of disciplinary proceedings, and a record of prior discipline. People v. Bannister, 814 P.2d 801 (Colo. 1991).

Reference to confidential disciplinary proceedings in civil action constituted violation and, in conjunction with violation of other disciplinary rules, warranted suspension. People v. Smith, 830 P.2d 1003 (Colo. 1992).

Applied in People ex rel. MacFarlane v. Harthun, 195 Colo. 38, 581 P.2d 716 (1978); People v. Kendrick, 646 P.2d 337 (Colo. 1982); People v. Smith, 830 P.2d 1003 (Colo. 1992).

Rule 251.32. General Provisions

(a) Quorum. A majority of the members of the committee or a Hearing Board shall constitute a quorum of such body, and the action of a majority of those present and comprising such a quorum shall be the action of the committee or Hearing Board.

(b) Notice and Service of Process. Except as may be otherwise provided by these Rules or by order of the Supreme Court, notice shall be in writing, and the giving of notice and service of process shall be sufficient when made either personally upon the attorney or by certified mail, sent to the attorney at both the attorney's last known address as provided by the attorney pursuant to C.R.C.P. 227 or such later address as may be known to the person effecting service.

If the attorney is not licensed to practice law in this state but was specially admitted by a court of this state for a particular proceeding, notice and service shall be effected as provided in this section, and if service is by certified mail, it shall be made to the attorney's last known address.

(c) Number of Copies Filed. Unless otherwise provided in these rules, in all cases where a party files documents with the Presiding Disciplinary Judge or a Hearing Board, the committee, or the Regulation Counsel, an original and three copies must be filed. When documents are filed with the Supreme Court, an original and ten copies must be filed.

(d) Costs.

(1) Disciplinary Proceedings. In all cases where discipline is imposed by the Hearing Board, it may assess against the respondent all or any part of the costs incurred in

connection with the disciplinary proceedings. If the Supreme Court imposes discipline, the Supreme Court may also assess against the respondent all or any part of the costs of the proceedings. If the committee imposes discipline as provided by these rules, it may also assess against the respondent all or any part of the costs of the proceedings.

(2) Reinstatement and Readmission Proceedings After Discipline. An attorney who petitions for reinstatement from a suspension or readmission after disbarment must bear the cost of such proceedings, as required by C.R.C.P. 251.29(i).

(3) Disability Proceedings. The Presiding Disciplinary Judge, a Hearing Board, or the Supreme Court, in its discretion, may order the attorney to bear the cost of all or any part of the disability proceedings, including the cost of any examinations ordered.

(4) Reinstatement Proceedings After Transfer to Disability Inactive Status. The Presiding Disciplinary Judge, a Hearing Board, or the Supreme Court, in its discretion, may order an attorney who petitions for reinstatement after transfer to disability inactive status to pay the cost of all or any part of the proceedings conducted pursuant to C.R.C.P. 251.30, including the cost of any examinations ordered.

(e) Immunity. Testimony given in disciplinary proceedings or communications relating to attorney misconduct, lack of professionalism or disability made to the Supreme Court, the committee, the Regulation Counsel, the Presiding Disciplinary Judge, members of the Hearing Board, mediators acting pursuant to C.R.C.P. 251.3(c)(11), or monitors enlisted to assist with probation or diversion, as authorized by C.R.C.P. 251.13, shall be absolutely privileged and no lawsuit shall be predicated thereon. If the matter is confidential as provided in these rules, and if the person who testified or communicated does not maintain confidentiality, then the testimony or communications shall be qualifiedly privileged, such that an action may lie against the person whose testimony or communications were made in bad faith or with reckless disregard of their truth or falsity. Persons performing official duties under the provisions of this Chapter, including but not limited to the Presiding Disciplinary Judge and staff; members of the Hearing Board; the committee; the Regulation Counsel and staff; mediators appointed by the Supreme Court pursuant to C.R.C.P. 251.3(c)(11); monitors enlisted to assist with diversion as authorized by C.R.C.P. 251.13; members of the Bar working in connection with disciplinary proceedings or under the direction of the Presiding Disciplinary Judge, or the committee; and health care professionals working in connection with disciplinary proceedings shall be immune from suit for all conduct in the course of their official duties.

(f) Termination of Proceedings. No disciplinary or disability proceeding may be terminated except as provided by these Rules.

(g) Pending Litigation. All disciplinary proceedings which involve complaints with material allegations substantially similar to the material allegations of a criminal prosecution pending against the respondent may in the discretion of the committee, the Presiding Disciplinary Judge, or a Hearing Board be deferred until the conclusion of such prosecution.

Disciplinary proceedings involving complaints with material allegations which are substantially similar to those made against the respondent in pending civil litigation may in the discretion of the committee, the Presiding Disciplinary Judge, or a Hearing Board be deferred until the conclusion of such litigation. If the disciplinary proceeding is deferred pending the conclusion of civil litigation, the respondent shall make all reasonable efforts to obtain a prompt trial and final disposition of the pending litigation. If the respondent fails to take steps to assure a prompt disposition of the civil litigation, the disciplinary proceeding may be immediately resumed.

The acquittal of a respondent on criminal charges or a verdict or judgment in the respondent's favor in civil litigation involving substantially similar material allegations shall not alone justify the termination of disciplinary proceedings pending against the respondent upon the same material allegations.

(h) Protective Appointment of Counsel. When an attorney has been transferred to disability inactive status; or when an attorney has disappeared; or when an attorney has died; or when an attorney has been suspended or disbarred and there is evidence that the attorney has not complied with the provisions of C.R.C.P. 251.28, and no partner, executor, or other responsible party capable of conducting the attorney's affairs is known to exist, the

chief judge of any judicial district in which the attorney maintained his office, upon the request of the Regulation Counsel, shall appoint legal counsel to inventory the files of the lawyer in question and to take any steps necessary to protect the interests of the attorney in question and the attorney's clients. Counsel appointed pursuant to this Rule shall not disclose any information contained in the files so inventoried without the consent of the client to whom such files relate, except as necessary to carry out the order of the court that appointed the counsel to make such inventory.

(i) Statute of Limitations. A request for investigation against an attorney shall be filed within five years of the time that the complaining witness discovers or reasonably should have discovered the misconduct. There shall be no statute of limitations for misconduct alleging fraud, conversion, or conviction of a serious crime, or for an offense the discovery of which has been prevented by concealment by the attorney.

Source: Amended and adopted June 25, 1998, effective July 1, 1998; entire rule amended and effective September 1, 2000.

Editor's note: This rule was previously numbered as 241.25.

ANNOTATION

Law reviews. For note, "Standards of Discipline for Attorneys in Colorado and the Significance of the Code of Professional Responsibility", see 50 Den. L.J. 207 (1973).

Annotator's note. The following annotations include cases decided under former provisions similar to this rule.

Immunity for persons seeking attorney discipline does not violate right to access court. Attorney disbarment for prosecution of individuals seeking discipline is appropriate and does not violate civil rights of attorney. In re Smith, 989 P.2d 165 (Colo. 1999).

Constructive service is appropriate where attorney failed to provide an address and actively concealed his whereabouts. People v. Richards, 748 P.2d 341 (Colo. 1987).

Attorney who claimed costs and damages for complaint against him subject to public censure. Where attorney violated this rule by claiming costs and damages for defending grievance filed against him and violated other disciplinary rules, public censure is appropriate. People v. Dalton, 840 P.2d 351 (Colo. 1992).

Reference to confidential disciplinary proceedings in civil action constituted violation and, in conjunction with violation of other disciplinary rules, warranted suspension. People v. Smith, 830 P.2d 1003 (Colo. 1992).

The assessment of the entire amount of the complainant's expert witness fees against a respondent is appropriate even where the complainant's expert testified to matters other than the injury the respondent's misconduct caused if such testimony was relevant. In re Cimino, 3 P.3d 398 (Colo. 2000).

Applied in People v. Harfmann, 638 P.2d 745 (Colo. 1981) (decided under former C.R.C.P. 259); People v. Smith, 830 P.2d 1003 (Colo. 1992).

Rule 251.33. Expunction of Records

(a) Expunction - Self-Executing. Except for records relating to proceedings that have become public pursuant to C.R.C.P. 251.31, all records relating to proceedings conducted pursuant to these Rules, which proceedings were dismissed, shall be expunged from the files of the committee, the Presiding Disciplinary Judge, and Regulation Counsel three years after the end of the year in which the dismissal occurred.

(b) Definition. The terms "expunge" and "expunction" shall mean the destruction of all records or other evidence of any type, including, but not limited to, the request for investigation, the response, Investigator's notes, and the report of investigation.

(c) Notice to Respondent. If proceedings conducted pursuant to these Rules (or their predecessor) were commenced, the attorney in question shall be given prompt notice of the expunction.

(d) Effect of Expunction. After expunction, the proceedings shall be deemed never to have occurred. Upon either general or specific inquiry concerning the existence of proceedings which have been expunged, the committee or the Regulation Counsel shall respond by stating that no record of the proceedings exists. The attorney in question may properly respond to any general inquiry about proceedings which have been expunged by

stating that no record of the proceedings exists. The attorney in question may properly respond to any inquiry requiring reference to a specific proceeding which has been expunged by stating only that the proceeding was dismissed and that the record of the proceeding was expunged pursuant to this Rule. After a response as provided in this Rule is given to an inquirer, no further response to an inquiry into the nature or scope of the proceedings which have been expunged need be made.

(e) Retention of Records. Upon written application to the committee, for good cause and with written notice to the attorney in question and opportunity to such attorney to be heard, the Regulation Counsel may request that records which would otherwise be expunged under this Rule be retained for such additional period of time not to exceed three years as the committee deems appropriate. The Regulation Counsel may seek further extensions of the period for which retention of the records is authorized whenever a previous application has been granted.

Source: Amended and adopted June 25, 1998, effective January 1, 1999; entire rule amended and effective September 1, 2000.

Editor's note: This rule was previously numbered as 241.26.

Rule 251.34. Advisory Committee

(a) Advisory Committee. The Supreme Court Advisory Committee is hereby established. The Advisory Committee shall serve as a permanent committee of the Supreme Court.

(1) Members. The Advisory Committee shall be composed of the Chair and Vice-Chair of the Attorney Regulation Committee. Two Supreme Court justices who serve as liaison to the attorney regulation system, eight members of the Bar, and a member of the public shall also serve as members of the Advisory Committee. The membership shall include one member from the Colorado Bar Association's Ethics Committee, one Respondent Bar member of the Colorado Bar Association's Attorney Regulation Policy Committee, and one member of the Hearing Board pool. Diversity shall be a consideration in making the appointments.

The members of the Advisory Committee shall serve at the pleasure of the Supreme Court and may be dismissed from the Advisory Committee at any time by order of the Supreme Court. A member of the Advisory Committee may resign at any time.

(2) Vacancy. In the event of a vacancy on the Advisory Committee, the Supreme Court shall fill the vacancy to serve at the pleasure of the Supreme Court.

(3) Chair. The court shall appoint a member of the Advisory Committee to serve as its chair. The chair shall exercise overall supervisory control of the Advisory Committee.

(4) Reimbursement of Advisory Committee Members. The members of the Advisory Committee shall be entitled to reimbursement for reasonable travel, lodging, and other expenses incurred in the performance of their official duties.

(b) Powers and Duties of the Advisory Committee. The Advisory Committee shall be authorized and empowered to act in accordance with these Rules and to:

(1) Assist the Supreme Court in making appointments as described in these Rules;

(2) Oversee the management committee in the coordination of administrative matters within all programs of the attorney regulation system. The management committee shall be composed of the Clerk of the Supreme Court, who shall serve as its chair, the Regulation Counsel, and the Presiding Disciplinary Judge. The management committee's functions are limited to considering administrative matters;

(3) Review the productivity, effectiveness, and efficiency of the Supreme Court's attorney regulation system including that of the Presiding Disciplinary Judge and peer assistance programs and report its findings to the Supreme Court;

(4) Review the resources of the system for the purpose of making recommendations to the Supreme Court;

(5) Periodically report to the Supreme Court on the operation of the Advisory Committee;

(6) Recommend to the Supreme Court proposed changes or additions to the rules of procedure for attorney discipline and disability proceedings;

(7) Assist the Supreme Court in such matters as the court may direct; and

(8) Repealed.

(9) Select one or more health assistance programs as designated providers.

To be eligible for designation by the Advisory Committee, an attorney's health assistance program shall provide for the education of attorneys with respect to the recognition and prevention of physical, emotional, and psychological problems and provide for intervention when necessary; offer assistance to an attorney in identifying physical, emotional, or psychological problems; evaluate the extent of physical, emotional, or psychological problems and refer the attorney for appropriate treatment; monitor the status of an attorney who has been referred for treatment; provide counseling and support for the attorney referred for treatment; agree to receive referrals from the Advisory Committee or the Regulation Counsel; and agree to make their services available to all active licensed Colorado attorneys.

Nothing in this section or section 9.5 shall be construed to create any liability on the Advisory Committee or the Supreme Court for the actions of the Advisory Committee in funding assistance programs, and no civil action may be brought or maintained against the committee or the Supreme Court for an injury alleged to have been the result of the activities of any committee-selected assistance program or court approved lawyers' peer assistance program, or the result of an act or omission of an attorney participating in or referred by a committee-selected assistance program.

(9.5) Make recommendations concerning approval of lawyers' peer assistance program.

A. Any lawyers' peer assistance program that wishes to provide services to Colorado lawyers and have protection from the reporting requirements of Colo. RPC 8.3, must be approved by the Colorado Supreme Court. To request such approval, a description of the program must be submitted to the Advisory Committee who shall then review the program and make a recommendation to the Colorado Supreme Court as to approval.

B. The description shall contain the following information:

i. The type of organization, e.g. corporation, limited liability company, etc.;

ii. The mission statement for the program;

iii. The funding for the program;

iv. A list of the volunteers and/or paid employees, together with their qualifications and backgrounds, working for or together with the program; and,

v. An explanation of the type and frequency of training for the volunteers and/or paid employees.

C. Approval of a lawyer peer assistance program is for a period of two years subject to revocation at any time by the Colorado Supreme Court. In order to be reapproved, the program must file a request for renewal with the Clerk of the Colorado Supreme Court, containing the information listed in subparagraph B, and explain any changes that occurred in the program since its initial approval by the Colorado Supreme Court. The Clerk shall then forward the request for renewal to the Advisory Committee for recommendations to the Colorado Supreme Court. Unless renewed by the Colorado Supreme Court at the conclusion of the two years, the program shall lose its approved status.

(10) Adopt such practices as may from time to time become necessary to govern the internal operation of the Advisory Committee as approved by the Supreme Court.

Source: Amended and adopted June 25, 1998, effective July 1, 1998; (b)(7)-(b)(9) amended and adopted May 13, 1999, effective July 1, 1999; entire rule amended and effective September 1, 2000; (b)(9) corrected January 8, 2001, effective September 12, 2000; entire rule amended and adopted November 22, 2000, effective January 1, 2001; (b)(8) repealed and adopted and (b)(9) amended and adopted June 7, 2001, effective July 1, 2001; (b)(9) amended and adopted and (b)(9.5) added and adopted June 19, 2003, effective July 1, 2003; (a)(1) amended and adopted September 30, 2004, effective January 1, 2005.

RULE 252. Colorado Rules of Procedure Regarding Attorneys' Fund for Client Protection

Rule 252.1. Purpose and Scope

(a) The purpose of the Colorado Attorneys' Fund for Client Protection is to promote public confidence in the administration of justice and the integrity of the legal profession by mitigating losses caused by the dishonest conduct of attorneys admitted and licensed to practice law in the courts of this state occurring in the course of attorney-client or court-appointed fiduciary relationship between the attorney and the claimant.

Source: Added and adopted June 25, 1998, effective January 1, 1999.

ANNOTATION

Law reviews. For article, "The Colorado Attorneys' Fund for Client Protection", see 32 Colo. Law. 27 (November 2003).

Rule 252.2. Establishment

(a) There is established the Colorado Attorneys' Fund for Client Protection to mitigate claimants for losses caused by dishonest conduct committed by attorneys admitted to practice in this state.

(b) There is established, under the supervision of the Supreme Court of Colorado, the Colorado Attorneys' Fund for Client Protection Board of Trustees, which shall receive, hold, manage and disburse from the fund such funds as may from time to time be allocated to the fund.

(c) These Rules shall be effective for claims filed with the board on or after July 1, 1999, and the Board shall not pay claims for losses incurred as a result of dishonest conduct committed prior thereto.

Source: Added and adopted June 25, 1998, effective January 1, 1999.

Rule 252.3. Funding

(a) The Supreme Court shall provide for funding by the attorneys of the state through the attorney registration fee established in C.R.C.P. 227(A)(1)(a) and (c).

(b) An attorney whose dishonest conduct has resulted in any payment by the fund to a claimant shall make restitution to the fund including interest and the expense incurred by the fund in processing the claim and pursuing restitution. An attorney's failure to make full restitution may be cause for additional discipline or denial of an application for reinstatement or readmission.

Source: Added and adopted June 25, 1998, effective January 1, 1999.

Rule 252.4. Funds

All money or other assets of the fund shall constitute a trust and shall be held in the name of the fund, subject to the direction of the Board.

Source: Added and adopted June 25, 1998, effective January 1, 1999.

Rule 252.5. Composition and Officers of the Board

(a) The Board of Trustees shall consist of five attorneys and two public members appointed by the Supreme Court for initial terms as follows:

(1) Two attorneys for one year;

(2) One public member for two years;

(3) Two attorneys for two years;
(4) One public member for three years; and
(5) One attorney for three years.
Subsequent appointments shall be for a term of three years. Members of the Board shall be eligible to serve no more than two consecutive terms.

(b) Trustees shall serve without compensation but shall be reimbursed for their actual and necessary expenses incurred in the discharge of their duties.

(c) Vacancies shall be filled by appointment by the Supreme Court for any unexpired terms.

(d) The Board shall select a chairperson, secretary, treasurer and such other officers as the Board deems appropriate.

(e) The treasurer and any other officer designated to endorse and execute checks and other financial instruments of the fund shall be bonded in such manner and amount as the Board shall determine.

Source: Added and adopted June 25, 1998, effective January 1, 1999.

Rule 252.6. Board Meetings

(a) The Board shall meet as frequently as necessary to conduct the business of the fund and to process claims in a timely manner.

(b) The chairperson shall call a meeting at any reasonable time or upon the request of at least two trustees.

(c) A quorum for any meeting of the Board shall be four trustees.

(d) Minutes of meetings shall be taken and permanently maintained by the secretary.

Source: Added and adopted June 25, 1998, effective January 1, 1999.

Rule 252.7. Duties and Responsibilities of the Board

(a) The Board shall have the following duties and responsibilities:

(1) To receive, and in its sole discretion evaluate, investigate, determine and pay claims;

(2) To promulgate rules of procedure not inconsistent with these rules;

(3) In its discretion, if warranted and prudent, to fix a maximum amount of payment per claim payable from the fund and/or of the aggregate amount which may be paid because of the dishonest conduct of any one attorney;

(4) To solicit and receive funds from donations and other sources in addition to annual attorney registration fees;

(5) To invest prudently such portions of the funds as may not be needed currently to pay losses;

(6) To provide a full report annually to the Supreme Court and to make other reports as necessary;

(7) To publicize its activities to the public and the Bar;

(8) To retain and compensate consultants, actuaries, agents, legal counsel and other persons as necessary;

(9) To pursue claims for restitution to which the Fund is entitled;

(10) To engage in studies and programs for client protection and prevention of dishonest conduct by attorneys; and

(11) To perform all other acts necessary or proper for the fulfillment of the purposes and effective administration of the fund.

(b) Regulation Counsel shall assist the Board in the effective and efficient performance of its functions, including but not limited to investigation of claims.

Source: Added and adopted June 25, 1998, effective January 1, 1999.

Rule 252.8. Conflict of Interest

(a) A Trustee who has or has had an attorney-client relationship or a financial relationship with a claimant or attorney who is the subject of a claim shall not participate in the investigation or adjudication of a claim involving that claimant or attorney.

(b) A Trustee with a past or present relationship, other than as provided in section (a), with a claimant or the attorney who is the subject of the claim, shall either voluntarily abstain from participating or disclose such relationship to the Board and, if the Board deems appropriate, that Trustee shall not participate in any proceeding relating to such claim.

Source: Added and adopted June 25, 1998, effective January 1, 1999.

Rule 252.9. Immunity

The Trustees, employees and agents of the Board shall be absolutely immune from civil liability for all acts performed in the course of their official duties. Absolute immunity shall also extend to claimants and attorneys who assist claimants for all communications to the fund.

Source: Added and adopted June 25, 1998, effective January 1, 1999.

Rule 252.10. Eligible Claims

(a) The loss must be caused by the dishonest conduct of the attorney and shall have arisen out of and by reason of an attorney-client relationship or a court-appointed fiduciary relationship between the attorney and the claimant.

(b) The claim shall have been filed no later than three years after the claimant knew or should have known of the dishonest conduct of the attorney.

(c) As used in these rules, "dishonest conduct" means one or more wrongful acts committed by an attorney in the nature of theft or embezzlement of money or the wrongful taking or conversion of money, property or other things of value, including but not limited to:

(1) Refusal to refund unearned fees received in advance as required by Rule 1.16 of the Colorado Rules of Professional Conduct; and

(2) The borrowing of money from a client without intention to repay it, or with disregard of the attorney's inability or reasonably anticipated inability to repay it.

(d) Except as provided by section (e) of this rule, the following losses shall not be eligible:

(1) Losses incurred by spouses, children, parents, grandparents, siblings, partners, associates and employees of attorney(s) causing the losses;

(2) Losses covered by any bond, surety agreement, or insurance contract to the extent covered thereby, including any loss to which any bonding agent, surety or insurer is subrogated, to the extent of that subrogated interest;

(3) Losses incurred by any financial institution which are recoverable under a "banker's blanket bond" or similar commonly available insurance or surety contract;

(4) Losses incurred by any business entity controlled by the attorney;

(5) Losses incurred by any governmental entity or agency;

(6) Losses arising from the activities of an attorney not having an office or residence in Colorado where those activities do not have substantial contacts with Colorado; and,

(7) Interest on the loss or any type of consequential damages or punitive damages or costs.

(e) In cases of extreme hardship or special and unusual circumstances, the Board may, in its discretion, recognize a claim which would otherwise be excluded under these rules.

(f) In cases where it appears that there will be unjust enrichment or multiple recovery or the claimant unreasonably or knowingly contributed to the loss, the Board may, in its discretion, deny the claim.

Source: Added and adopted June 25, 1998, effective January 1, 1999.

Rule 252.11. Procedures for Filing Claims

(a) The Board shall prepare and approve a form for claiming reimbursement and shall designate the place and manner for filing a claim.

(b) The claimant must agree to cooperate with the Board in reference to the claim and in reference to civil actions which may be brought in the name of the Board pursuant to a subrogation and assignment clause which shall also be contained within the claim;

(c) The claimant shall have the responsibility to complete the claim form and provide satisfactory evidence to support the claim.

Source: Added and adopted June 25, 1998, effective January 1, 1999.

Rule 252.12. Procedures for Processing Claims

(a) Whenever it appears that a claim is not eligible for reimbursement pursuant to these rules, the claimant shall be advised of the reasons why the claim may not be eligible for reimbursement, and that, unless additional facts to support eligibility are submitted to the Fund, the claim file shall be closed.

(b) A certified copy of an order disciplining an attorney for the same dishonest act or conduct alleged in a claim, or a final judgment imposing civil or criminal liability therefor, shall be conclusive evidence that the attorney committed such dishonest act or conduct.

(c) Regulation Counsel shall be promptly notified of the claim and requested to furnish a report of its investigation, if any, on the matter to the Board. The Regulation Counsel shall allow the Fund's representatives access to its records during an investigation of a claim. The Board shall evaluate whether the investigation is complete and determine whether the Board should conduct additional investigation or await the conclusion of any disciplinary investigation or proceeding involving the same act or conduct that is alleged in the claim.

(d) The Board may conduct its own investigation when it deems it appropriate and may seek and obtain the assistance of the Regulation Counsel, the Attorney Regulation Committee, the Board of Law Examiners, the Board of Continuing Legal Education, and the Attorney Registration Office, irrespective of any confidentiality requirements of those offices, subject to rule 252.15.

(e) The Board or an individual trustee or counsel designated to act on behalf of the trustees, upon determining that any person has knowledge or is in possession or custody of books, papers, documents or other objects relevant to the disposition of a claim, may issue a subpoena requiring such person to appear and testify or to produce such books, papers, documents or other objects before the Board or counsel designated to act on behalf of the trustees, at the time and place specified therein. Subpoenas shall be subject to the provisions of C.R.C.P. 45.

(f) If any person, without adequate excuse, shall fail to obey a subpoena, the Board or an individual trustee or counsel designated to act on their behalf, may file with the Supreme Court a verified statement setting forth the facts establishing such disobedience, and the Court may then, in its discretion, institute contempt proceedings. If such person is found guilty of contempt, the Court may compel payment of the costs of the contempt proceedings to be taxed by the Court.

(g) If, by the completion of the investigation, the attorney or the attorney's representative has not been notified of the claim and given an opportunity to respond to the claim, a copy of the claim shall be served upon the attorney, or the attorney's representative. The attorney or representative shall have 21 days in which to respond.

(h) The Board may request that testimony be presented to complete the record. Upon request, the claimant or attorney, or their representatives, will be given an opportunity to be heard.

(i) The Board may make a finding of dishonest conduct for purposes of adjudicating a claim. Such a determination is not a finding of dishonest conduct for purposes of professional discipline or other purposes.

(j) When the record is complete, the claim shall be determined on the basis of all available evidence, and notice shall be given to the claimant and the attorney of the

Board's determination and the reasons therefor. The approval or denial of a claim shall require the affirmative votes of at least four trustees. Payment of a claim may be made in a lump sum or in installments in the discretion of the Board.

(k) Any proceeding upon a claim need not be conducted according to technical rules relating to evidence, procedure and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in court proceedings.

(l) The Board shall determine the order and manner of payment and pay all approved claims, but unless the Board directs otherwise, no claim should be approved during the pendency of a disciplinary proceeding involving the same act or conduct that is alleged in the claim if the attorney disputes the pertinent allegations.

(m) Both the claimant and the attorney shall be advised of the status of the Board's consideration of the claim and shall be informed of the final determination.

(n) The claimant may request in writing reconsideration within 35 days of the denial or determination of the amount of a claim. If the claimant fails to make a request or the request is denied, the decision of the Board is final.

Source: Added and adopted June 25, 1998, effective January 1, 1999; (g) and (n) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Rule 252.13. Reimbursement from Fund is a Matter of Grace

No person shall have the legal right to payment from the fund whether as claimant, third-party beneficiary, or otherwise. The decisions and actions of the Board of Trustees are not reviewable on any ground in any court or other tribunal.

Source: Added and adopted June 25, 1998, effective January 1, 1999.

Rule 252.14. Restitution and Subrogation

(a) An attorney whose dishonest conduct results in payment to a claimant shall be liable to the Fund for restitution; and the Board may bring such action as it deems advisable to enforce such obligation, including costs of such action.

(b) As a condition of payment, a claimant shall be required to provide the fund with a transfer of the claimant's rights up to the amount paid by the Fund against the attorney, the attorney's legal representative, estate or assigns; and of the claimant's rights against any third party or entity who may be liable for the claimant's loss.

(c) Upon commencement of an action by the Board as subrogee or assignee of a claim, it shall advise the claimant, who may then join in such action to recover the claimant's unpaid losses.

(d) In the event that the claimant commences an action to recover unpaid losses against the attorney or another entity who may be liable for the claimant's loss, the claimant shall be required to notify the Board of such action.

(e) The claimant shall be required to agree to cooperate in all efforts that the Board undertakes to achieve restitution for the Fund.

Source: Added and adopted June 25, 1998, effective January 1, 1999.

ANNOTATION

Ratification of unauthorized action. Claimant's acceptance of moneys from the fund does not constitute ratification of his attorney's unauthorized settlement with a third party if claimant was not aware of the consequences of accepting the fund moneys. Siener v. Zeff, 194 P.3d 467 (Colo. App. 2008).

Rule 252.15. Confidentiality

(a) The Board and its agents shall keep claims, proceedings and reports involving claims for reimbursement confidential until the Board authorizes reimbursement to the claimant, except as provided below. After payment of the reimbursement, the Board shall publicize the nature of the claim, the amount of reimbursement, and the name of the attorney. The name and the address of the claimant shall not be publicized by the Board unless specific permission has been granted by the claimant.

(b) This rule shall not be construed to deny access to relevant information by the Regulation Counsel or other professional discipline agencies or other law enforcement authorities as the Board shall authorize, or the release of statistical information which does not disclose the identity of the attorney or the claimant.

Source: Added and adopted June 25, 1998, effective January 1, 1999.

Rule 252.16. Compensation for Representing Claimants

No attorney shall accept any payment for prosecuting a claim to the Fund on behalf of a claimant, unless such payment has been approved by the Board.

Source: Added and adopted June 25, 1998, effective January 1, 1999.

Rule 254. Colorado Lawyer Assistance Program

(1) Colorado Lawyer Assistance Program. The Colorado Supreme Court hereby establishes an independent Colorado Lawyer Assistance Program ("COLAP"). The goal of such program is:

(a) To protect the interests of clients, litigants and the general public from harm caused by impaired attorneys or judges;

(b) To assist impaired members of the legal profession to begin and continue recovery; and

(c) To educate the bench, bar and law schools to the causes of and remedies for impairments affecting members of the legal profession. Such program and its director shall be under the supervision of the Supreme Court Advisory Committee ("Advisory Committee") as set forth in C.R.C.P. 251.34(b)(3).

(2) COLAP Services. The Attorney Assistance Program shall provide the following services:

(a) Immediate and continuing assistance to members of the legal profession who suffer from physical or mental disabilities that result from disease, disorder, trauma or age and that impair their ability to practice;

(b) Planning and presentation of educational programs to increase the awareness and understanding of members of the legal profession to recognize problems in themselves and in their colleagues; to identify the problems correctly; to reduce stigma; and, to convey an understanding of appropriate ways of interacting with affected individuals;

(c) Investigation, planning and participation in interventions with members of the legal profession in need of assistance;

(d) Aftercare services upon request, by order, or under contract that may include the following: assistance in structuring aftercare and discharge planning; assistance for entry into appropriate aftercare and professional peer support meetings; and assistance in obtaining a primary care physician or local peer counselor; and

(e) Monitoring services that may include the following: alcohol and/or drug screening programs; tracking aftercare, peer support and twelve step meeting attendance; providing documentation of compliance; and providing such reports concerning compliance by those participating in a monitoring program as may be required by the terms of that program.

(3) Director. The Advisory Committee shall recruit, retain, and supervise a COLAP Director. The Director shall serve at the pleasure of the Advisory Committee as an at-will employee. The Advisory Committee shall set the Director's annual salary subject to periodic review. The Director shall have the same employee benefits as the employees of

the Colorado Judicial Department. The Director shall coordinate the annual budget of COLAP with the Advisory Committee. A portion of the annual attorney registration fee shall be used to establish and administer COLAP.

(4) Qualifications. The director shall have sufficient experience and training to enable the director to identify and assist impaired members of the legal profession.

(5) Powers and Duties. The COLAP Director shall act in accordance with these Rules and shall:

(a) Provide initial response to help line calls.

(b) Help Attorneys, judges, law firms, courts and others to identify and intervene with impaired members of the legal profession.

(c) Help members of the legal profession to secure expert counseling and treatment for chemical dependency and other illnesses, maintaining current information on available treatment services, both those that are available without charge as well as paid services.

(d) Establish and maintain regular contact with other bar associations, agencies and committees that serve either as sources of referral or resources in providing help.

(e) Establish and oversee monitoring services with respect to recovery of members of the legal profession for whom monitoring is appropriate.

(f) Plan and deliver educational programs for the legal community with respect to all sources of potential impairment as well as treatment and preventative measures.

(h) Perform such other duties as the Supreme Court or Advisory Committee may direct.

(6) Confidentiality.

(a) Information and actions taken by COLAP shall be privileged and held in strictest confidence and shall not be disclosed or required to be disclosed to any person or entity outside of COLAP, unless such disclosure is authorized by the member of the legal profession to whom it relates. Such information and actions shall be excluded as evidence in any complaint, investigation or proceeding before the Supreme Court Attorney Regulation Committee, the Presiding Disciplinary Judge of the Supreme Court, or the Colorado Supreme Court.

(b) COLAP employees, and volunteers recruited under this rule shall be deemed to be participating in a lawyer's peer assistance program approved by the Colorado Supreme Court as provided in Colo. RPC 8.3(c).

(7) Immunity.

(a) Any person reporting information to COLAP employees or agents including volunteers recruited under rule 254 shall be entitled to the immunities and presumptions under C.R.C.P. 251.32(e).

(b) COLAP members, employees and agents including volunteers recruited under rule 254 shall be entitled to the immunities and presumptions under C.R.C.P. 251.32(e).

(c) COLAP members, employees and agents including volunteers recruited under rule are relieved of the duty of disclosure of information to authorities as imposed by Rule 8.3(a).

Source: Entire rule added and effective June 16, 2011.

Rule 260. Mandatory Continuing Legal and Judicial Education

PREAMBLE: Statement of Purpose

As society becomes more complex, the delivery of legal services likewise becomes more complex. The public rightly expects that practicing attorneys, in their practice of law, and judges, in the performance of their duties, will continue their legal and judicial education throughout the period of their service to society. It is the purpose of these rules to make mandatory a minimum amount of continuing legal education for practicing attorneys and judges in order to foster and promote competence and professionalism in the practice of law and the administration of justice.

Source: Entire rule amended and adopted December 14, 2000, effective January 1, 2001.

ANNOTATION

Law reviews. For article, "Reduced Malpractice and Augmented Competence: A Proposal", see 12 Colo. Law. 1444 (1983). For article, "Mandatory Continuing Legal Education Update", see 17 Colo. Law. 2351 (1988).

Rule 260.1. Definitions

(1) The "Board" is the Board of Continuing Legal and Judicial Education.

(2) "Continuing legal education" is any legal, judicial or other educational activity accredited by the Board.

(3) An attorney in "inactive status" is one who has elected such status pursuant to Rule 227A.

(4) "Registered attorney" is an attorney who has paid the registration fee required by Rule 227A for the current year and who is not on inactive status or suspended by the Supreme Court from the practice of law.

(5) "Judge" is a judge who is subject to the jurisdiction of the Commission on Judicial Qualifications or the Denver County Court Judicial Qualifications Commission.

(6) "These rules" refer to rules numbered 260.1 through 260.7 of the Rules of Civil Procedure.

(7) A "unit" of continuing legal education is a measurement factor combining time and quality assigned by the Board to all or part of a particular continuing legal educational activity.

ANNOTATION

Constitutionality. A state supreme court may constitutionally require attorneys to meet continuing legal education requirements, so long as such requirements have a rational connection with the attorney's fitness or capacity to practice law, which the requirements in Colorado have. Verner v. Colo., 716 F.2d 1352 (10th Cir. 1983), cert. denied, 466 U.S. 960, 104 S. Ct. 2175, 80 L. Ed. 2d 558 (1984).

Rule 260.2. CLE Requirements

(1) Every registered attorney and every judge shall complete 45 units of continuing legal education during each applicable three-year compliance period as provided in these rules.

(2) At least 7 of the 45 units will be devoted to continuing legal education specifically addressed to legal or judicial ethics. This requirement shall be effective for all three-year compliance periods beginning on or after January 1, 1992.

(3) All registered attorneys admitted after January 1, 1979, shall become subject to the minimal educational requirements set forth in these rules on the date of their initial admission to the bar of the State of Colorado. Their first compliance period shall begin on that date and end on December 31 of the third full calendar year following the year of admission.

(4) This subsection 4 is repealed and replaced by 201.14(3).

(5) Upon being reinstated pursuant to Paragraphs (3) or (8) of Rule 227A, any registered attorney who has been suspended under Paragraph (2) of Rule 227A, shall become subject to the minimum educational requirements set forth in these rules on the date of reinstatement. The first compliance period shall begin on that date and end on December 31 of the third full calendar year following the year of reinstatement, provided the date of reinstatement is more than one year after the date of suspension or transfer to inactive status. Otherwise, the compliance period shall be the same as it would have been absent the suspension or transfer.

(6) Units of continuing legal education completed after the adoption of this rule by the Supreme Court and prior to January 1, 1979, may be used to meet the minimum educational requirement for the first applicable compliance period. Units of continuing legal education completed in excess of the required units of continuing legal education in any applicable compliance period may not be used to meet the minimum educational requirements in any succeeding compliance period.

Source: (2) amended June 20, 1991, effective January 1, 1992; entire rule amended October 13, 1994, effective January 1, 1995; (4) amended and adopted effective April 23, 1998; (4) repealed and adopted March 21, 2003, effective July 1, 2003.

ANNOTATION

Law reviews. For article, "Mandatory Continuing Legal Education: A Study of its Effects", see 13 Colo. Law. 1789 (1984).

Deprivation of due process claim requires only minimal scrutiny. A person's "right" or "privilege" in the practice of law, has never been among those held to be "fundamental", so only minimal scrutiny under the rational basis test is required to evaluate claims of deprivation of such a "right" without due process. Verner v. Colo., 533 F. Supp. 1109 (D. Colo. 1982), aff'd, 716 F.2d 1352 (10th Cir. 1983), cert. denied, 466 U.S. 960, 104 S. Ct. 2175, 80 L. Ed. 2d 558 (1984).

Rule does not violate prohibition against involuntary servitude. The requirement that attorneys attend education classes does not violate the thirteenth amendment prohibition against involuntary servitude. Verner v. Colo., 533 F. Supp. 1109 (D. Colo. 1982), aff'd, 716 F.2d 1352 (10th Cir. 1983), cert. denied, 466 U.S. 960, 104 S. Ct. 2175, 80 L. Ed. 2d 558 (1984).

Rule does not violate first amendment. This rule does not violate any alleged first amendment right "not to be forced to hear speeches or assemblies". Verner v. Colo., 533 F. Supp. 1109 (D. Colo. 1982), aff'd, 716 F.2d 1352 (10th Cir. 1983), cert. denied, 466 U.S. 960, 104 S. Ct. 2175, 80 L. Ed. 2d 558 (1984).

Strict requirements may be set. If states can set strict legal proficiency related requirements for admission to the bar, it follows that they may also set strict proficiency related requirements for continuing legal practice. Verner v. Colo., 533 F. Supp. 1109 (D. Colo. 1982), aff'd, 716 F.2d 1352 (10th Cir. 1983), cert. denied, 466 U.S. 960, 104 S. Ct. 2175, 80 L. Ed. 2d 558 (1984).

Rule 260.3. Board of Continuing Legal and Judicial Education

(1) There is established a Board of Continuing Legal and Judicial Education which shall consist of nine members appointed by the Supreme Court. Six of the members shall be registered attorneys, at least one of whom shall also be a judge, and three of the members shall be nonattorneys. At least one of the registered attorneys shall be under the age of 35 when he or she is appointed. Members shall serve three-year terms; except that of the members initially appointed, three shall serve for one year, three shall serve for two years, and three shall serve for three years. The Supreme Court shall appoint one of the members to serve as chairperson at its pleasure. In the event of a vacancy, a successor shall be appointed for the unexpired term of the member whose office is vacated. Membership on the Board may be terminated as to any member by the Supreme Court at its pleasure. The members shall be entitled to reimbursement for reasonable travel, lodging and other expenses incurred in the performance of official duties.

(2) The Board shall employ an Executive Director and such other staff as may be necessary to assist it in performing its functions and shall pay all expenses reasonably and necessarily incurred by it under a budget approved by the Supreme Court.

(3) The Board shall administer the program of mandatory continuing legal education established by these rules. It may formulate rules and regulations and prepare forms not inconsistent with these rules pertaining to its functions and modify or amend the same from time to time. All such rules, regulations and forms and any modifications or amendments thereto shall be submitted to the Supreme Court and shall be made known to all registered attorneys and judges. Those rules, regulations and forms shall automatically become effective on the 28th day following submission unless they shall be suspended by the Supreme Court prior to that date.

Source: (3) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

ANNOTATION

Board members have immunity from damage liability. Individual members of the Board of Continuing Legal and Judicial Education have absolute quasi-judicial immunities from damage liability. Verner v. Colo., 533 F. Supp. 1109 (D. Colo. 1982), aff'd, 716 F.2d 1352 (10th Cir. 1983), cert. denied, 466 U.S. 960, 104 S. Ct. 2175, 80 L. Ed. 2d 558 (1984).

Rule 260.4. Accreditation

(1) Continuing legal education must be educational activity which has as its primary objective the increase of professional competence of registered attorneys and judges. The activity must be an organized activity dealing with subject matter directly related to the practice of law or the performance of judicial duties. The Board shall accredit a broad variety of educational activities which meet these requirements.

(2) Formal classroom instruction or educational seminars which meet the requirements of Paragraph (1) above lend themselves very well to the fulfillment of the educational requirement imposed by these rules and will be readily accredited by the Board. However, it is not intended that compliance with these rules will impose any undue hardship upon any registered attorney or judge by virtue of the fact that he or she may find it difficult because of age or other reasons to attend such activities. Consequently, in addition to accrediting classroom activities and seminars at centralized locations, the Board shall attempt to promote and accredit such educational activities as video tape and audio tape presentations; preparation of articles, papers, books and other such written materials; self-administered courses and testing; and other meritorious learning experiences. The Board shall to the extent possible make all educational activities reasonably available throughout Colorado. In case of incapacity because of poor health, the Board may defer the requirements set forth in these rules for individual attorneys. Deferral does not constitute a waiver.

(3) The educational activity required by these rules will be in addition to teaching on a regular basis in which particular registered attorneys or judges may engage. Pursuant to paragraph (6) below, the Board will determine whether a registered attorney's or judge's teaching qualifies for accreditation.

(4) The Board shall assign an appropriate number of units of credit to each educational activity it shall accredit. Generally, a unit of credit shall be the equivalent of attending 50 minutes of a formal classroom lecture with accompanying textual material.

(5) The Board may accredit as a sponsoring agency any organization which offers continuing legal education activities. All of the activities sponsored by such agency which conform to the requirements of these rules and such additional rules and regulations as the Board may adopt from time to time shall be accredited. Accreditation extended by the Board to any sponsoring agency shall be reviewed by the Board at least annually.

(6) The Board shall develop criteria for the accreditation of individual educational activities and shall in appropriate cases accredit qualifying activities of such nature. Although such accreditation will generally be given before the occurrence of the educational activity, the Board may in appropriate cases extend accreditation to qualified activities which have already occurred.

(7) The Board shall make available a list of all educational activities accredited by it, together with the units of credit assigned to each activity, which may be undertaken by registered attorneys or judges.

(8) In furtherance of the purposes and objectives of this Rule to promote competence and professionalism in the practice of law and the administration of justice, the Board shall consider, in accrediting programs and educational activities, the contribution the program will make to the competent and professional practice of law by lawyers in this state or to the competent and professional administration of justice. To this end, the Board may review course content, presentation, advertising, and promotion to ascertain that the

highest standards of competence and professionalism are being promoted. The Board may withhold accreditation for any program that does not meet these standards, or the contents or promotion of which would be scandalous or unprofessional.

Source: Entire rule amended and adopted December 14, 2000, effective January 1, 2001.

ANNOTATION

Constitutionality. Under any of the descriptions of "rationality" used by the United States supreme court, the requirements of this rule are rational and do not violate substantive due process guarantees. Verner v. Colo., 533 F. Supp. 1109 (D. Colo. 1982), aff'd, 716 F.2d 1352 (10th Cir. 1983), cert. denied, 466 U.S. 960, 104 S. Ct. 2175, 80 L. Ed. 2d 558 (1984).

Rule 260.5. Exemptions

Any registered attorney shall be exempt from the minimum educational requirements set forth in these rules for the years following the year of the attorney's 65th birthday.

ANNOTATION

A state may constitutionally exempt senior citizen attorneys from this rule's requirements upon a showing of hardship. Verner v. Colo., 533 F. Supp. 1109 (D. Colo. 1982), aff'd, 716 F.2d 1352 (10th Cir. 1983), cert. denied, 466 U.S. 960, 104 S. Ct. 2175, 80 L. Ed. 2d 558 (1984).

Rule 260.6. Compliance

(1) The mandatory continuing legal educational requirement imposed by these rules shall take effect on January 1, 1979. To aid administrative implementation of the requirement, the Board shall divide all registered attorneys into three groups of approximately equal numbers. The first group shall be required to complete 15 units of continuing legal education during the first year, and thereafter all registered attorneys in the first group shall complete 45 units of continuing legal education during each subsequent three-year compliance period. The second group shall be required to complete 30 units of continuing legal education during the first two years, and thereafter all registered attorneys in the second group shall complete 45 units of continuing legal education during each subsequent three-year compliance period. The third group shall be required to complete 45 units of continuing legal education during the first three years, and thereafter all registered attorneys and judges in the third group shall complete 45 units of continuing legal education during each subsequent three-year compliance period. All registered attorneys admitted to the bar within the two calendar years preceding January 1, 1979 and all judges shall be placed in the third group.

(2) Commencing with the date set forth in Paragraph (1) above, the Board shall send to each registered attorney and judge an Affidavit for the reporting of compliance with these rules. It shall be in such form as will allow the reporting of progress towards fulfilling the units required during each applicable compliance period, as such units are earned.

(3) At the time of payment of the registration fee required by Rule 227A or Rule 227B, each registered attorney and each judge shall submit an Affidavit showing the units of continuing legal education completed since the date such registered attorney or judge became subject to these rules or the date an Affidavit was last filed, whichever shall be later.

(4) No later than January 31st following the end of each applicable compliance period, each registered attorney and each judge shall submit a final Affidavit showing the total units of continuing legal education completed during such period, if the Board's records do not show that the attorney or judge has completed the requirements for that compliance

period.

(5) In the event a registered attorney or judge shall fail to complete the required units at the end of each applicable compliance period, the final Affidavit may be accompanied by a specific plan for making up the deficiency of units necessary within 119 days (17 weeks) after the date of final Affidavit. When filed, the plan shall be accompanied by a make-up plan filing fee, the amount of which shall be determined by the Board annually and which shall be used to cover the costs of processing the plan. Such plan shall be deemed accepted by the Board unless within 14 days after the receipt of such final affidavit the Board notifies the affiant to the contrary. Full completion of the affiant's plan shall be reported by Affidavit to the Board not later than 14 days following such 119-day period. Failure of the affiant to complete the plan within such 119-day period shall invoke the sanctions set forth in Paragraph (6).

(a) Section 5 does not apply to the required course on professionalism mandated by C.R.C.P. 201.14.

(6) In the event that any registered attorney or judge shall fail to comply with these rules or Rule 201.14 in any respect, the Board shall promptly notify such registered attorney or judge of the nature of the noncompliance by a statement of noncompliance. The statement shall advise the registered attorney or judge that within 14 days either the noncompliance must be corrected or a request for a hearing before the Board must be made, and that upon failure to do either, the statement of noncompliance shall be filed with the Supreme Court.

(7) If the noncompliance is not corrected within 14 days, or if a hearing is not requested within 14 days, the Board shall promptly forward the statement of noncompliance to the Supreme Court which may impose the sanctions set forth in Paragraph (10).

(8) If a hearing before the Board is requested, such hearing shall be held within 35 days after the request by the full Board or one or more of the members of the Board as it shall designate, provided that the presiding member at the hearing must be a registered attorney or judge. Notice of the time and place of the hearing shall be given to the registered attorney or judge at least 14 days prior thereto. The registered attorney or judge may be represented by counsel. Witnesses shall be sworn; and, if requested by the registered attorney or judge, a complete electronic record shall be made of all proceedings had and testimony taken. The presiding member shall have authority to rule on all motions, objections and other matters presented in connection with the hearing. The hearing shall be conducted in conformity with the Colorado Rules of Civil Procedure, and the practice in the trial of civil cases, except the registered attorney or judge involved may not be required to testify over his or her objection. The chairman of the Board shall have the power to compel, by subpoena issued out of the Supreme Court, the attendance of witnesses and the production of books, papers, correspondence, memoranda and other records deemed necessary as evidence in the hearing.

(9) At the conclusion of the hearing, the member or members of the Board who conducted the hearing shall make findings of fact and shall determine whether the registered attorney or judge involved has complied with the requirements of these rules and, if it determines there was noncompliance, whether there was reasonable cause for noncompliance. A copy of such findings and determination shall be sent to the registered attorney or judge involved. If it is determined that compliance has occurred, the matter shall be dismissed; and the Board's records shall be made to reflect such compliance. If it is determined that compliance has not occurred, the Board shall proceed as follows:

(a) If the Board determines that there was reasonable cause for noncompliance, the registered attorney or judge shall be allowed 14 days within which to file with the Board a specific plan for correcting the noncompliance within 119 days (17 weeks). Such plan shall be deemed accepted by the Board unless within 14 days after its receipt the Board notifies the registered attorney or judge to the contrary. Full completion of the plan shall be reported by Affidavit to the Board not later than 14 days following such 119-day period. If the registered attorney or judge shall fail to file an acceptable plan, or shall fail to complete and certify completion of the plan within such 119-day period, the Board shall proceed as set forth in Paragraph (b) as though it had determined that there was not reasonable cause for noncompliance.

(b) If the Board determines that there was not reasonable cause for noncompliance, a record of the matter, which must include a copy of the findings and determination, shall be promptly filed with the Supreme Court. If requested by the Board, registered attorney or judge, the record shall include a transcript of the hearing prepared at the expense of the requesting party.

(10) Upon receipt of a statement of noncompliance upon which a hearing was not requested or upon receipt of the record of a Board hearing, the Supreme Court shall enter such order as it shall deem appropriate, which may include an order of summary suspension from the practice of law until the further order of the Court in the case of registered attorneys or referral of the matter to the Commission on Judicial Qualifications or the Denver County Court Judicial Qualifications Commission in the case of judges.

(11) Any registered attorney who has been suspended pursuant to Paragraph (2) of Rule 227A, or who has elected to transfer to inactive status pursuant to Paragraph (7) of Rule 227A, shall be relieved thereby from the requirements of these rules. Upon being reinstated pursuant to Paragraphs (3) or (7) of Rule 227A, the compliance period for such registered attorney shall commence on the date of reinstatement and end on December 31 of the third full calendar year following the year of reinstatement, provided the date of reinstatement is more than one year after the date of suspension or transfer to inactive status, or such lesser period as the Board may determine. Otherwise, the compliance period shall be the same as it would have been absent the suspension or transfer. No registered attorney or judge shall be permitted to transfer from active status to inactive status and vice versa or to become suspended and then reinstated to circumvent the requirements of these rules.

(12) All notices given pursuant to these rules shall be sent by certified mail, return receipt requested, to the registered address of the registered attorney or judge maintained by the Clerk of the Supreme Court pursuant to Rule 227A or Rule 227B.

(13) Any attorney who has been suspended for noncompliance pursuant to Rule 260.6(10) may be reinstated by order of the Court upon a showing that the attorney's current continuing legal education deficiency has been made up. The attorney shall file with the Board three (3) copies of a petition seeking reinstatement, addressed to the Supreme Court. The petition shall state with particularity the accredited programs of continuing legal education which the attorney has already completed, including dates of their completion, by which activity the attorney earned sufficient units of credit to make up the deficiency which was the cause of the attorney's suspension. The petition shall be accompanied by a reinstatement filing fee, the amount of which shall be determined by the Board annually and which shall be used to cover the costs associated with noncompliance. The Board shall file a properly completed petition, accompanied by the Board's recommendation, with the Clerk of the Supreme Court within 14 days after receipt.

Source: Entire rule amended and effective December 4, 2003; IP(5), (6), (7), (8), (9)(a), and (13) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

ANNOTATION

Constitutionality. A state supreme court may constitutionally require attorneys to meet continuing legal education requirements, so long as such requirements have a rational connection with the attorney's fitness or capacity to practice law, which the requirements in Colorado have. Verner v. Colo., 716 F.2d 1352 (10th Cir. 1983), cert. denied, 466 U.S. 960, 104 S. Ct. 2175, 80 L. Ed. 2d 558 (1984).

This rule does not violate procedural due process. Verner v. Colo., 533 F. Supp. 1109 (D. Colo. 1982), aff'd, 716 F.2d 1352 (10th Cir. 1983), cert. denied, 466 U.S. 960, 104 S. Ct. 2175, 80 L. Ed. 2d 558 (1984).

This rule does not violate federal separation of powers doctrine. The claim that this rule violates the separation of powers principle embodied in the United States constitution fails, since the principle of separation of powers is not enforceable against the states as a matter of federal constitutional law. Verner v. Colo., 533 F. Supp. 1109 (D. Colo. 1982), aff'd, 716 F.2d 1352 (10th Cir. 1983), cert. denied, 466 U.S. 960, 104 S. Ct. 2175, 80 L. Ed. 2d 558 (1984).

The rule does not violate sixth amendment. This rule does not violate sixth amendment rights by not providing for a jury trial and not permitting consideration of "mitigating fac-

tors". Verner v. Colo., 533 F. Supp. 1109 (D. Colo. 1982), aff'd, 716 F.2d 1352 (10th Cir. 1983), cert. denied, 466 U.S. 960, 104 S. Ct. 2175, 80 L. Ed. 2d 558 (1984).

Suspension not "cruel and unusual punishment". The claim that suspension from practice for violation of this rule constitutes "cruel and unusual punishment" is without merit, since the eighth amendment does not apply where loss of a license is the full extent of possible punishment. Verner v. Colo., 533 F. Supp. 1109 (D. Colo. 1982), aff'd 716 F.2d 1352 (10th Cir. 1983), cert. denied, 466 U.S. 960, 104 S. Ct. 2175, 80 L. Ed. 2d 558 (1984).

Jurisdiction of federal courts limited. Federal district courts only have jurisdiction to consider challenges to the constitutionality of a state disciplinary rule. All claims that are addressed to particular conduct during the disciplinary proceedings are dismissed for want of jurisdiction. Verner v. Colo., 533 F. Supp. 1109 (D. Colo. 1982),aff'd, 716 F.2d 1352 (10th Cir. 1983), cert. denied, 466 U.S. 960, 104 S. Ct. 2175, 80 L. Ed. 2d 558 (1984).

Rule 260.7. Confidentiality

The files, records and proceedings of the Board, as they relate to the compliance or noncompliance of any registered attorney or judge with the requirements of these rules, shall be confidential and shall not be disclosed except upon written request or consent of the registered attorney or judge affected or as directed by the Supreme Court.

ANNOTATION

Disciplinary rules are not designed to be a basis for civil liability, and they do not create a private cause of action. Weiszmann v. Kirkland and Ellis, 732 F. Supp. 1540 (D. Colo. 1990).

Rule 260.8. Direct Representation and Mentoring in Pro Bono Civil Legal Matters

(1) A lawyer may be awarded a maximum of nine (9) units of general credit during each three-year compliance period for providing uncompensated pro bono legal representation to an indigent or near-indigent client or clients in a civil legal matter, or mentoring another lawyer or a law student providing such representation.

(2) To be eligible for units of general credit, the civil pro bono legal matter in which a lawyer provides representation must have been assigned to the lawyer by: a court; a bar association or Access to Justice Committee-sponsored program; an organized non-profit entity, such as Colorado Legal Services, Metro Volunteer Lawyers, or Colorado Lawyers Committee whose purpose is or includes the provision of pro bono representation to indigent or near-indigent persons in civil legal matters; or a law school. Prior to assigning the matter, the assigning court, program, entity, or law school shall determine that the client is financially eligible for pro bono legal representation because (a) the client qualifies for participation in programs funded by the Legal Services Corporation, or (b) the client's income and financial resources are slightly above the guidelines utilized by such programs, but the client nevertheless cannot afford counsel.

(3) Subject to the reporting and review requirements specified herein, (a) a lawyer providing uncompensated, pro bono legal representation shall receive one (1) unit of general credit for every five (5) billable-equivalent hours of representation provided to the indigent client; (b) a lawyer who acts as a mentor to another lawyer as specified in this Rule shall be awarded one (1) unit of general credit per completed matter; and (c) a lawyer who acts as a mentor to a law student shall be awarded two (2) units of general credit per completed matter. A lawyer will not be eligible to receive more than nine (9) units of general credit during any three-year compliance period via any combination of pro bono representation and mentoring.

(4) A lawyer wishing to receive general credit units under this Rule shall submit to the assigning court, program, or law school a completed Form 8. As to mentoring, the lawyer shall submit Form 8 only once, when the matter is fully completed. As to pro bono representation, if the representation will be concluded during a single three-year compliance period, then the lawyer shall complete and submit Form 8 only once, when the representation is fully completed. If the representation will continue into another three-year

compliance period, then the applying lawyer may submit an interim Form 8 seeking such credit as the lawyer may be eligible to receive during the three-year compliance period that is coming to an end. Upon receipt of an interim or final Form 8, the assigning court, program, entity, or law school shall in turn report to the Board the number of general CLE units that it recommends be awarded to the reporting lawyer under the provisions of this Rule. It shall recommend an award of the full number of units for which the lawyer is eligible under the provisions of this Rule, unless it determines after review that such an award is not appropriate due to the lawyer's lack of diligence or competence, in which case it shall recommend awarding less than the full number of units or no units. An outcome in the matter adverse to the client's objectives or interests shall not result in any presumption that the lawyer's representation or mentoring was not diligent or competent. The Board shall have final authority to issue or decline to issue units of credit to the lawyer providing representation or mentoring, subject to the other provisions of these Rules and Regulations, including without limitation the hearing provisions of Regulation 108.

(5) A lawyer who acts as a mentor to another lawyer providing representation shall be available to the lawyer providing representation for information and advice on all aspects of the legal matter, but will not be required to file or otherwise enter an appearance on behalf of the indigent client in any court. Mentors shall not be members of the same firm or in association with the lawyer providing representation to the indigent client.

(6) A lawyer who acts as a mentor to a law student who is eligible to practice law under C.R.S. §§ 12-5-116 to -116.5 shall be assigned to the law student at the time of the assignment of the legal matter with the consent of the mentor, the law student, and the law school. The matter shall be assigned to the law student by a court, a program or entity as described in Rule 260.8(2), or an organized student law office program administered by his or her law school, after such court, program, entity, or student law office determines that the client is eligible for pro bono representation in accordance Rule 260.8(2). The mentor shall be available to the law student for information and advice on all aspects of the matter, and shall directly and actively supervise the law student while allowing the law student to provide representation to the client. The mentor shall file or enter an appearance along with the law student in any legal matter pursued or defended for the client in any court. Mentors may be acting as full-time or adjunct professors at the law student's law school at the same time they serve as mentors, so long as it is not a primary, paid responsibility of that professor to administer the student law office and supervise its law-student participants.

Source: Entire rule added and adopted November 10, 2004, effective January 1, 2005.

APPENDIX TO CHAPTERS 18 TO 20

The Colorado Rules of Professional Conduct

Adopted by the

SUPREME COURT OF COLORADO

May 7, 1992,

Effective January 1, 1993

Editor's note: Effective January 1, 1993, the Colorado Rules of Professional Conduct replaced the Code of Professional Responsibility.

ANALYSIS BY RULE

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

LAW FIRMS AND ASSOCIATIONS

PUBLIC SERVICE

INFORMATION ABOUT LEGAL SERVICES

MAINTAINING THE INTEGRITY OF THE PROFESSION

APPENDIX TO CHAPTERS 18 TO 20

COLORADO RULES OF PROFESSIONAL CONDUCT

PREAMBLE AND SCOPE

PREAMBLE: A LAWYER'S RESPONSIBILITIES

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

[3] In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., Rules 1.12 and 2.4. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See Rule 8.4.

[4] In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

[7] Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

[8] A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law. Zealousness does not, under any circumstances, justify conduct that is unprofessional, discourteous or uncivil toward any person involved in the legal system.

[10] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

[11] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

[12] The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

[13] Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

SCOPE

[14] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constructive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add

obligations to the Rules but provide guidance for practicing in compliance with the Rules.

[15] The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. The Comments are sometimes used to alert lawyers to their responsibilities under such other law.

[16] Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

[17] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

[18] Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.

[19] Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

[20] Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self- assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, in appropriate cases, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.

[21] The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.

Rule 1.0. Terminology

(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(c) "Firm" or "law firm" denotes a partnership, professional company, or other entity or a sole proprietorship through which a lawyer or lawyers render legal services; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

(d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(g) "Partner" denotes a member of a partnership, an owner of a professional company, or a member of an association authorized to practice law.

(1) "Professional company" has the meaning ascribed to the term in C.R.C.P. 265.

(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(k) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(l) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(m) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Source: Amended October 17, 1997, effective January 1, 1997; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008; (c) and (g) amended and effective February 26, 2009.

COMMENT

Confirmed in Writing

[1] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

Firm

[2] Whether two or more lawyers constitute a firm within paragraph (c) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.

Fraud

[5] When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See

Rules 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (n) and (b). Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see paragraph (n).

Knowingly, Known or Knows

[7A] In considering the prior Colorado Rules of Professional Conduct, the Colorado Supreme Court has stated, "with one important exception [involving knowing misappropriation of property] we have considered a reckless state of mind, constituting scienter, as equivalent to 'knowing' for disciplinary purposes." *In the Matter of Egbune*, 971 P.2d 1065, 1069 (Colo.1999). See also *People v. Rader*, 822 P.2d 950 (Colo. 1992); *People v. Small*, 962 P.2d 258, 260 (Colo. 1998). For purposes of applying the ABA *Standards for Imposing Lawyer Sanctions*, and in determining whether conduct is fraudulent, the Court will continue to apply the *Egbune* line of cases. However, where a Rule of Professional Conduct specifically requires the mental state of "knowledge," recklessness will not be sufficient to establish a violation of that Rule and to that extent, the *Egbune* line of cases will not be followed.

Screened

[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.10(e), 1.11, 1.12 or 1.18.

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

ANNOTATION

Law reviews. For article, "Private Screening", see 38 Colo. Law. 59 (June 2009).

CLIENT-LAWYER RELATIONSHIP

Law reviews: For article, "Colorado's New Rules of Professional Conduct: A More Comprehensive and Useful Guide for Lawyers", see 21 Colo. Law. 2101 (1992); for article, "Colorado's Rules of Professional Conduct: Implications for Criminal Lawyers", see 21 Colo. Law. 2559 (1992); for article, "So You Want to Be a 'Temp': Ethics and Temporary Attorney Relationships", see 24 Colo. Law. 805 (1995); for article, "The New Colorado Rules of Professional Conduct: A Survey of the Most Important Changes", see 36 Colo. Law. 71 (August 2007); for article, "Contract Lawyering: Benefits and Obstacles", see 37 Colo. Law. 61 (January 2008); for article, "Temporal and Substantive Choice of Law Under the Colorado Rules of Professional Conduct", see 39 Colo. Law. 35 (April 2010).

Rule 1.1. Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

Legal knowledge and skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

ANNOTATION

Law reviews. For article, "Representing the Debtor: Counsel Beware!", see 23 Colo. Law. 539 (1994). For article, "Enforcing Civility: The Rules of Professional Conduct in Deposition Settings", see 33 Colo. Law. 75 (March 2004). For article, "The Duty of Loyalty and Preparations to Compete", see 34 Colo. Law. 67 (November 2005).

Annotator's note. Rule 1.1 is similar to Rule 1.1 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

Disbarment was appropriate discipline for attorney who borrowed or otherwise obtained money from elderly and vulnerable client where attorney failed (a) to disclose that the likelihood of repayment was remote and the inadequacy of security purportedly given to secure loans; (b) to provide client with adequate legal documentation to ensure repayment; and (c) to obtain client's consent to possible conflicts of interest. People v. Schindelar, 845 P.2d 1146 (Colo. 1993).

One-year and one-day suspension warranted where respondent failed to serve a cross-claim, failed to respond to several motions, failed to keep client informed, advanced defense that was not warranted by the facts and existing law, and misrepresented to client the basis for the judgment in favor of the opposing party. People v. Genchi, 849 P.2d 28 (Colo. 1993).

Attorney conduct violating this rule in conjunction with other rules sufficient to jus-

tify suspension when violation did not arise from neglect or willingness to take advantage of client's vulnerability and is mitigated by her inexperience in the practice of law, her lack of any prior disciplinary record, the fact that she had already been held in contempt and punished by the district court, and the fact that there is no suggestion of selfish motivation. Attorney's failure to appreciate the serious nature of conduct and the jurisdiction of the hearing board to discipline her is a serious matter meriting a period of suspension and a redetermination of her fitness before being permitted to practice law again. In re Roose, 69 P.3d 43 (Colo.), cert. denied, 540 U.S. 1053, 124 S. Ct. 815, 157 L. Ed. 2d 705 (2003).

Attorney's conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify six-month suspension, stayed upon completion of two-year probationary period. Attorney neglected to provide competent representation by failing to take action to secure survivor benefits for client. In re Fisher, 202 P.3d 1186 (Colo. 2009) (decided under rules in effect prior to 2007 repeal and readoption).

Forty-five-day suspension warranted where respondent neglected child custody matter and had a prior public censure, a prior admonishment, and prior suspensions, but where the respondent did not demonstrate a dishonest or selfish motive and exhibited a cooperative attitude and expressions of remorse. People v. Dowhan, 951 P.2d 905 (Colo. 1998).

Attorney's neglect resulting in an untimely filing of an inadequate certificate of review and dismissal of his client's case, combined with fact that certificate contained false statements of material fact that attorney later repeated to an investigative counsel with the office of disciplinary counsel warranted a 45-day suspension, despite mitigating factors. People v. Porter, 980 P.2d 536 (Colo. 1999).

Neglecting to file response to motion for summary judgment and to return client files upon request was sufficient to result in one-year and one-day suspension. People v. Honaker, 847 P.2d 640 (Colo. 1993).

Thirty-day suspension warranted where attorney, with previous history of discipline and experience in practicing law, neglected a civil rights suit by failing to provide an accounting with respect to fees charged and by failing to return unearned fees. People v. Fritsche, 849 P.2d 31 (Colo. 1993).

Stipulated agreement and recommendation of suspension for 30 days based upon conditional admission of misconduct were warranted for attorney who committed unfair insurance claim settlement practices and tortious conduct in handling insurance investigation of fire claim that he was not competent to handle. People v. McClung, 953 P.2d 1282 (Colo. 1998).

Attorney's inaction over a period of more than two years and other disciplinary violations warrant suspension for 30 days where there are mitigating factors. People v. LaSalle, 848 P.2d 348 (Colo. 1993).

Thirty-day suspension was appropriate discipline where attorney advised client to take action in violation of child custody order but failed to warn her of criminal consequences of such action. People v. Aron, 962 P.2d 261 (Colo. 1998).

Public censure warranted where respondent negligently filed an involuntary bankruptcy petition that was ill-advised and without factual or legal basis. Mitigating factors included the fact that respondent's mental state was one of negligence rather than knowing misconduct, respondent had not been disciplined before, and respondent cooperated in the discipline action. People v. Moskowitz, 944 P.2d 76 (Colo. 1997).

Public censure appropriate where harm suffered by attorney's client was speculative, attorney retracted his misrepresentations and admitted to his client before the institution of disciplinary proceedings that he had done nothing on the client's appeal, attorney had no prior discipline, he made full and free disclosure of his misconduct to the grievance committee, and he expressed remorse for his misconduct. People v. Nelson, 848 P.2d 351 (Colo. 1993).

Public censure appropriate where attorney failed to review district attorney's file and the transcript of the preliminary hearing before trial. People v. Bonner, 927 P.2d 836 (Colo. 1996).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Doherty, 908 P.2d 1120 (Colo. 1996); People v. Doherty, 945 P.2d 1380 (Colo. 1997); People v. Kolko, 962 P.2d 979 (Colo. 1998).

Conduct violating this rule sufficient to justify public censure. People v. Smith, 847 P.2d 1154 (Colo. 1993).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Hohertz, 926 P.2d 560 (Colo. 1996); People v. Dieters, 935 P.2d 1 (Colo. 1997); People v. Primavera, 942 P.2d 496 (Colo. 1997); In re Tolley, 975 P.2d 1115 (Colo. 1999); People v. Maynard, 238 P.3d 672 (Colo. O.P.D.J. 2009).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Walsh, 880 P.2d 766 (Colo. 1994); People v. Roybal, 949 P.2d 993 (Colo. 1997).

Cases Decided Under Former DR 6-101.

I. General Consideration.
II. Disciplinary Actions.
A. Public Censure.
B. Suspension.
C. Disbarment.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Criminal Procedure", which discusses recent Tenth Circuit decisions dealing with effective assistance of counsel, see 61 Den. L.J. 303 (1984). For article, "Third-Party Malpractice Claims Against Real Estate Lawyers", see 13 Colo. Law. 996 (1984).

License to practice law assures public that the lawyer who holds the license will perform basic legal tasks honestly and without undue delay, in accordance with the highest standards of professional conduct. People v. Witt, 200 Colo. 522, 616 P.2d 139 (1980); People v. Dixon, 621 P.2d 322 (Colo. 1981).

Attorney has burden of proving his own incompetence. Attorney who is appointed to represent criminal defendant and who believes he is incompetent to handle case has burden of proving his incompetence to the court and if attorney carries the burden, the trial court must decide whether attorney is capable of becoming competent on his own or whether appointment of co-counsel is necessary until attorney becomes competent. Stern v. County Court, 773 P.2d 1074 (Colo. 1989).

Claim of ineffective assistance of counsel by court-appointed attorney is premature before representation has occurred and, therefore, attorney was not entitled to withdraw from case. Stern v. County Court, 773 P.2d 1074 (Colo. 1989).

Public expects appropriate discipline for misconduct. The public has a right to expect that one who engages in professional misconduct will be disciplined appropriately. People v. Witt, 200 Colo. 522, 616 P.2d 139 (1980); People v. Dixon, 621 P.2d 322 (Colo. 1981).

An attorney's personal problems cannot excuse his negligence or professional misconduct, for discipline is required not only to punish the attorney but also to protect the public. People v. Morgan, 194 Colo. 260, 574 P.2d 79 (1977); People v. Belina, 765 P.2d 121 (Colo. 1988).

The right to effective assistance of counsel is not a right to acquittal. Morse v. People, 180 Colo. 49, 501 P.2d 1328 (1972).

When cross-examination is permitted by defense counsel on previous felony convictions that the defendant has suffered without a prior foundation which establishes that defendant had counsel at the time he was convicted, counsel's representation is competent when the defendant brought his prior convictions to the jury's attention and made no claim that he was not represented by counsel. Steward v. People, 179 Colo. 31, 498 P.2d 933 (1972).

Agreeing to have depositions read at trial, rather than to have forceful live testimony, is a trial strategy decision for counsel. Morse v. People, 180 Colo. 49, 501 P.2d 1328 (1972).

Clients' business simply must be processed in apt time. People v. Bailey, 180 Colo. 211, 503 P.2d 1023 (1972).

Lawyer owes obligation to client to act with diligence in handling his client's legal work and in his representation of his client in court. People v. Bugg, 200 Colo. 512, 616 P.2d 133 (1980); People v. Pooley, 774 P.2d 239 (Colo. 1989).

An attorney violates his obligations to his client in not filing suit until almost four years after retained, in not proceeding with the lawsuit during the period thereafter, in not procuring the client's permission to transfer the case to another attorney, and in not supervising its handling by that attorney, all of which actions constitute gross negligence and unprofessional conduct. People v. Zelinger, 179 Colo. 379, 504 P.2d 668 (1972).

A lawyer's failure to prepare a will for at least eight months after being employed to do so, especially where client is aged person, is grossly negligent and shows total lack of responsibility. People v. James, 180 Colo. 133, 502 P.2d 1105 (1972).

Attorney's only preparation for hearing in dissolution of marriage action occurring in car on way to courthouse constituted handling a legal matter without adequate preparation in violation of this rule. People v. Felker, 770 P.2d 402 (Colo. 1989).

Attorney violated this rule and C.R.P.C. 8.4(d) when he prepared and filed child support worksheets that failed to properly reflect the new stipulation concerning custody. People v. Davies, 926 P.2d 572 (Colo. 1996).

Suspension for one year and one day was warranted for attorney who violated this rule and C.R.P.C. 8.4(d) by preparing and filing child support worksheets that failed to properly reflect the new stipulation concerning custody and where aggravating factors included a previous disciplinary history and failure to appear in the grievance proceedings. People v. Davies, 926 P.2d 572 (Colo. 1996).

Attorney violated this rule by taking no action on client's tort claim and by failing to file client's workers' compensation claim until July, 1985, although retained in 1984 to do so. People v. Felker, 770 P.2d 402 (Colo. 1989).

Attorney neglected legal matter entrusted to her by taking no action on client's claim which resulted in claim being barred by the statute of limitations. People v. Felker, 770 P.2d 402 (Colo. 1989).

Hindsight cannot replace a decision which

counsel makes in the heat of trial. Morse v. People, 180 Colo. 49, 501 P.2d 1328 (1972).

There was insufficient evidence to establish incompetence of defense counsel. Morse v. People, 180 Colo. 49, 501 P.2d 1328 (1972).

Conduct found to violate disciplinary rules. People v. Bugg, 635 P.2d 881 (Colo. 1981); People v. Razatos, 636 P.2d 666 (Colo. 1981), appeal dismissed, 455 U.S. 930, 102 S. Ct. 1415, 71 L. Ed. 2d 639 (1982); People v. Goss, 646 P.2d 334 (Colo. 1982); People v. Ross, 810 P.2d 659 (Colo. 1991).

Applied in People v. Leader, 193 Colo. 402, 567 P.2d 800 (1977); People v. Good, 195 Colo. 177, 576 P.2d 1020 (1978); People v. McMichael, 196 Colo. 128, 586 P.2d 1 (1978); People v. Susman, 196 Colo. 458, 587 P.2d 782 (1978); People v. Cameron, 197 Colo. 330, 595 P.2d 677 (1979); People v. Pacheco, 198 Colo. 455, 608 P.2d 333 (1979); People v. Pacheco, 199 Colo. 108, 608 P.2d 334 (1979); People ex rel. Silverman v. Anderson, 200 Colo. 76, 612 P.2d 94 (1980); People v. Barbour, 199 Colo. 126, 612 P.2d 1082 (1980); People v. Hilgers, 200 Colo. 211, 612 P.2d 1134 (1980); People v. Haddock, 200 Colo. 218, 613 P.2d 335 (1980); People v. Lanza, 200 Colo. 241, 613 P.2d 337 (1980); People v. Meldahl, 200 Colo. 332, 615 P.2d 29 (1980); People v. Dixon, 200 Colo. 520, 616 P.2d 103 (1980); People ex rel. Cortez v. Calvert, 200 Colo. 157, 617 P.2d 797 (1980); People v. Hurst, 200 Colo. 537, 618 P.2d 1113 (1980); People v. Gottsegen, 623 P.2d 878 (Colo. 1981); People v. Dutton, 629 P.2d 103 (Colo. 1981); People v. Wright, 638 P.2d 251 (Colo. 1981); People v. Hebeler, 638 P.2d 254 (Colo. 1981); People v. Archuleta, 638 P.2d 255 (Colo. 1981); People v. Gellenthien, 638 P.2d 295 (Colo. 1981); People v. Barbour, 639 P.2d 1065 (Colo. 1982); People v. Whitcomb, 676 P.2d 11 (Colo. 1983); People v. Bollinger, 681 P.2d 950 (Colo. 1984); People v. Underhill, 683 P.2d 349 (Colo. 1984); People v. Simon, 698 P.2d 228 (Colo. 1985); People v. Blanck, 700 P.2d 560 (Colo. 1985); People v. Gerdes, 782 P.2d 2 (Colo. 1989).

II. DISCIPLINARY ACTIONS.

A. Public Censure.

When a lawyer is negligent in handling estates, a public reprimand is warranted for his dereliction of duty. People v. Bailey, 180 Colo. 211, 503 P.2d 1023 (1972).

Attorney was negligent in closing two different estates in an untimely manner. Public censure is an appropriate sanction when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client. People v. Gebauer, 821 P.2d 782 (Colo. 1991).

Undertaking to provide services to clients in areas in which one lacks experience, which would ordinarily result in a reprimand, warrants a 30-day suspension when coupled with continued neglect after private censure. People v. Frank, 752 P.2d 539 (Colo. 1988).

Delay in handling and closing decedents' estates and failure to properly prepare inheritance tax returns, following prior letters of admonition, justify public censure. People v. Clark, 681 P.2d 482 (Colo. 1984).

An attorney's neglect and delay in handling an adoption proceeding, considered with other circumstances, justified public censure. People v. Moore, 681 P.2d 480 (Colo. 1984).

Neglect of a legal matter ordinarily warranting a letter of admonition by way of reprimand requires the imposition of public censure when such conduct is repeated after three letters of admonition. People v. Goodwin, 782 P.2d 1 (Colo. 1989).

Evidence sufficient to warrant public reprimand for dereliction of duty. People v. Atencio, 177 Colo. 439, 494 P.2d 837 (1972); People v. Zelinger, 179 Colo. 379, 504 P.2d 668 (1972).

Failure to obtain an order for service by publication, failing to return client phone calls, and failure to set a case for trial justify public censure. People v. Barr, 805 P.2d 440 (Colo. 1991).

Public censure for failure to promptly distribute proceeds of a settlement is warranted since respondent's negligence did little or no actual or potential injury to client. People v. Genchi, 824 P.2d 815 (Colo. 1992).

Public censure appropriate where attorney delayed hiring experts for case, neglected to familiarize himself and comply with the criminal discovery rules, inadequately prepared for trial, and proceeded to trial without knowing whether his own experts' testimony would support his client's defense. People v. Silvola, 888 P.2d 244 (Colo. 1995).

Public censure was appropriate where attorney's failure to appear at three hearings and to timely return a stipulation violated DR 1-102(A)(5) and, in aggravation, there was a pattern of misconduct. People v. Cabral, 888 P.2d 245 (Colo. 1995).

Public censure justified where attorney failed to attend to bankruptcy proceeding and scheduled meetings, failed to timely file pleadings and responses, and allowed his paralegal to engage in unauthorized practice of law. People v. Fry, 875 P.2d 222 (Colo. 1994).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Ashley, 796 P.2d 962 (Colo. 1990); People v. Nichols, 796 P.2d 966 (Colo. 1990); People v. Taylor, 799 P.2d 930 (Colo. 1990); People v. Smith, 819 P.2d 497 (Colo. 1991); People v. Odom, 829 P.2d 855 (Colo. 1992); People v. Sadler, 831

P.2d 887 (Colo. 1992); People v. Fry, 875 P.2d 222 (Colo. 1994); People v. O'Donnell, 955 P.2d 53 (Colo. 1998).

Conduct violating this rule sufficient to justify public censure. People v. Driscoll, 716 P.2d 1086 (Colo. 1986); People v. Mayer, 716 P.2d 1094 (Colo. 1986); People v. Carpenter, 731 P.2d 726 (Colo. 1987); People v. Wilson, 745 P.2d 248 (Colo. 1987); People v. Smith, 757 P.2d 628 (Colo. 1988); People v. Dowhan, 759 P.2d 4 (Colo. 1988); People v. Smith, 769 P.2d 1078 (Colo. 1989); People v. Baird, 772 P.2d 110 (Colo. 1989); People v. Fieman, 788 P.2d 830 (Colo. 1990); People v. Good, 790 P.2d 331 (Colo. 1990); People v. Brinn, 801 P.2d 1195 (Colo. 1990); People v. Moffitt, 801 P.2d 1197 (Colo. 1990); People v. Richardson, 820 P.2d 1120 (Colo 1991); People v. Odom, 829 P.2d 855 (Colo. 1992).

B. Suspension.

The failure for more than five years to record a deed and to return it and the abstract constitutes gross professional negligence and carelessness warranting a suspension of one year from the practice of law. People v. James, 176 Colo. 299, 490 P.2d 291 (1971).

Where an attorney misrepresents to a client that he has filed a case, fails for two years to take action on behalf of another client, and, knowing that a hearing had been set on charges against him, deliberately leaves the jurisdiction of the court without making any arrangements with the grievance committee and without arranging for representation, his conduct warrants suspension from the bar. People v. Kane, 177 Colo. 378, 494 P.2d 96 (1972).

Where counsel appears to be totally oblivious to obligations to render the services for which he is paid, this crass irresponsibility or callous indifference in the handling of a client's affairs is inexcusable under any circumstances and warrants indefinite suspension from the bar. People v. Van Nocker, 176 Colo. 354, 490 P.2d 697 (1971).

Attorney suspended for three years for repeated neglect and delay in handling legal matters, failure to comply with the directions contained in a letter of admonition, and failure to answer letter of complaint from the grievance committee constitute a violation of this rule, and, with other offenses of the code of professional responsibility. People v. Hebenstreit, 764 P.2d 51 (Colo. 1988).

Suspension of lawyer for three years, which is the longest possible period for suspension, is appropriate where there was extensive pattern of client neglect and intentional deception in client matters over a period of years. Anything less would be too lenient. People v. Hellewell, 811 P.2d 386 (Colo. 1991).

Suspension for three years is appropriate where lawyer failed to respond to motions or appear at hearing, resulting in dismissal of clients' bankruptcy proceeding, thereby increasing clients' debts tenfold. The hearing board further found that the attorney engaged in bad faith obstruction of the disciplinary proceedings and refused to acknowledge the wrongful nature of his conduct or the vulnerability of his clients. People v. Farrant, 883 P.2d 1 (Colo. 1994).

Suspension for one year and one day warranted for attorney who "represented" client for a period of 19 months without that person's knowledge or consent, even asserting a counterclaim on his behalf without talking to him; who did not communicate with him in any manner for an extended period of time and then did not withdraw within a reasonable time after being unable to contact him; and who failed to answer discovery requests, resulting in the entries of default and then a default judgment against him. People v. Silvola, 915 P.2d 1281 (Colo. 1996).

Disbarment not warranted where there was mitigating evidence concerning attorney's mental and physical disabilities. Instead, the board imposed a three-year suspension with a condition for reinstatement that professional medical evidence be presented that the disabilities do not interfere with the attorney's ability to practice law. People v. Stewart, 892 P.2d 875 (Colo. 1995).

Suspension for three years, the longest period available, was appropriate in case where violation of this rule and others would otherwise have justified disbarment but mitigating factors included personal and emotional problems, interim rehabilitation, and remorse. People v. McCaffrey, 925 P.2d 269 (Colo. 1996).

Suspension for three years, rather than disbarment, was appropriate where violation of this rule and others caused serious harm to attorney's clients, but mitigating factors were present, including no previous discipline in 14 years of practice, personal and emotional problems, and cooperation and demonstrated remorse in proceedings. People v. Henderson, 967 P.2d 1038 (Colo. 1998).

Eighteen-month suspension warranted where attorney failed to notify client of an actual conflict of interest and subsequently neglected a matter, but did so without dishonest or selfish motive. People v. Watson, 833 P.2d 50 (Colo. 1992).

Failure to appear after accepting retainer justifies suspension. Where, after accepting a retainer for the defense of an action, an attorney failed to appear or advise his client of the fact that he was not going to appear and thereby prejudiced his client's case, the attorney's conduct violated the code of professional responsibility and C.R.C.P. 241.6. People v. Southern, 638 P.2d 787 (Colo. 1982).

Failure to respond to repeated inquiries

from client and client's parents, failure to monitor client's case in the court system, including failure to respond to calls from the court clerk, and failure to return client's urgent calls after client was arrested and jailed constitutes a pattern of neglect and warrants 30 day suspension. People v. O'Leary, 752 P.2d 530 (Colo. 1988).

Suspension is fitting sanction when lawyer knowingly fails to perform services for a client and thereby causes injury to such client. People v. Masson, 782 P.2d 335 (Colo. 1988).

Initiation of unnecessary proceeding and legal incompetence warrant suspension. Where lawyer initiates unnecessary probate proceeding, as well as fails to meet minimum standards of legal competence for corporate and mining law problems which he has undertaken, his professional misconduct warrants suspension from the bar. People ex rel. Goldberg v. Gordon, 199 Colo. 296, 607 P.2d 995 (1980).

Failure to designate record on appeal, causing nine-month delay in criminal appeal, considered with other violations, justifies suspension. People v. May, 745 P.2d 218 (Colo. 1987).

Suspension is appropriate discipline given number and severity of instances of misconduct, including pattern of neglect over clients' affairs over lengthy period and in variety of circumstance and misrepresentation in dissolution case to client who wished to remarry concerning the filing of a dissolution petition. Considering misconduct in light of proper mitigating factors, suspension was appropriate. People v. Griffin, 764 P.2d 1166 (Colo. 1988).

There is evidence to warrant indefinite suspension. People v. Stewart, 178 Colo. 352, 497 P.2d 1003 (1972).

More severe sanction of 90-day suspension rather than public censure appropriate discipline for attorney who neglected client matter, caused potential injury to client, and engaged in conduct prejudicial to the administration of justice when aggravated by a history of five prior instances of disciplinary offenses for neglect, pattern of misconduct, refusal to acknowledge wrongful nature of conduct, vulnerability of victim, and substantial experience in the practice of law. People v. Dolan, 813 P.2d 733 (Colo. 1991).

Pattern of inaction, including failure to perform adequate research on statute of limitations problem, violated sections (A)(2) and (A)(3) and other disciplinary rules, justifying six-month suspension. People v. Barber, 799 P.2d 936 (Colo. 1990).

Failing to resolve an inability to proceed on behalf of a client, neglecting to respond to communications from the grievance committee, failing to fulfill commitments made to the investigator for the disciplinary counsel, and misrepresenting to such investigator the status of the case under investigation is conduct warranting suspension. People v. Chappell, 783 P.2d 838 (Colo. 1989).

Failing to obtain substitute counsel after accepting a retainer while under suspension constitutes neglect of a legal matter. People v. Redman, 819 P.2d 495 (Colo. 1991).

Failure to file bankruptcy petition warrants suspension from the practice of law for a period of 90 days. The respondent's misconduct was compounded by his prolonged refusal to respond to his client's inquiries and his failure to inform his client of domicile issues bearing on her desire to obtain a discharge in bankruptcy in Colorado. People v. Cain, 791 P.2d 1133 (Colo. 1990).

Delay in filing bankruptcy petition and failing to file complaint or return retainer warrants six-month suspension. People v. Archuleta, 898 P.2d 1064 (Colo. 1995).

Suspension for one year and one day warranted where attorney misrepresented to client that a trial had been scheduled, that continuances and new trial settings had been made, that a settlement had been reached, and where the attorney's previous, similar discipline, was a significant aggravating factor. People v. Smith, 888 P.2d 248 (Colo. 1995).

Suspension for one year and one day warranted for attorney who "represented" client for a period of 19 months without that person's knowledge or consent, even asserting a counterclaim on his behalf without talking to him; who did not communicate with him in any manner for an extended period of time and then did not withdraw within a reasonable time after being unable to contact him; and who failed to answer discovery requests, resulting in the entries of default and then a default judgment against him. People v. Silvola, 915 P.2d 1281 (Colo. 1996).

Failure to communicate with clients, court, and opposing counsel, misrepresentation of the status of the proceedings to client, failure to investigate clients' case, failure to attend one hearing and being late for another hearing, and refusing client an accounting and a refund of the unused portion of attorney fee, justifies three-year suspension. People v. Wilson, 814 P.2d 791 (Colo. 1991).

Ninety-day suspension warranted where attorney neglected client's legal matter, failed to pay for court reporting services, and showed complete disregard of grievance proceedings. People v. Whitaker, 814 P.2d 812 (Colo. 1991).

Suspension for 90 days is warranted for attorney's continued practice of law during a period of suspension in view of prior record and substantial experience in practice of law even if attorney incorrectly believed that he had been reinstated. People v. Dieters, 883 P.2d 1050 (Colo. 1994).

Suspension of one year and one day warranted for attorney whose misconduct in-

cluded neglect of legal matter, failure to seek lawful objectives of client, intentional failure to carry out employment contract resulting in intentional prejudice or damage to client, and who also pled guilty to class 5 felony of failure to pay employee income tax withheld. People v. Franks, 866 P.2d 1375 (Colo. 1994).

Absent mitigating or aggravating factors, suspension appropriate when a lawyer knowingly fails to perform services for a client or engages in a pattern of neglect and causes injury or potential injury to a client. People v. Glaess, 884 P.2d 722 (Colo. 1994).

It was appropriate to require an attorney to petition for reinstatement under C.R.C.P. 241.22 (b) to (d), even though his period of suspension for violating section (A)(3) did not exceed one year, where the extraordinary number of previous matters in which the attorney was cited for neglect showed the need for a demonstration that he had been rehabilitated. People v. C De Baca, 862 P.2d 273 (Colo. 1993).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Moya, 793 P.2d 1154 (Colo. 1990); People v. Creasey, 793 P.2d 1159 (Colo. 1990); People v. Schmad, 793 P.2d 1162 (Colo. 1990); People v. Baptie, 796 P.2d 978 (Colo. 1990); People v. Garrett, 802 P.2d 1082 (Colo. 1990); People v. Rhodes, 803 P.2d 514 (Colo. 1991); People v. Flores, 804 P.2d 192 (Colo. 1991); People v. Crimaldi, 804 P.2d 863 (Colo. 1991), 854 P.2d 782 (Colo. 1993); People v. Dunsmoor, 807 P.2d 561 (Colo. 1991); People v. Hall, 810 P.2d 1069 (Colo. 1991); People v. Koeberle, 810 P.2d 1072 (Colo. 1991); People v. Gaimara, 810 P.2d 1076 (Colo. 1991); People v. Dash, 811 P.2d 36 (Colo. 1991); People v. Honaker, 814 P.2d 785 (Colo. 1991); People v. Heilbrunn, 814 P.2d 819 (Colo. 1991); People v. Anderson, 817 P.2d 1035 (Colo. 1991); People v. Redman, 819 P.2d 495 (Colo. 1991); People v. Smith, 828 P.2d 249 (Colo. 1992); People v. Hyland, 830 P.2d 1000 (Colo. 1992); People v. Smith, 830 P.2d 1003 (Colo. 1992); People v. Raubolt, 831 P.2d 462 (Colo. 1992); People v. Regan, 831 P.2d 893 (Colo. 1992); People v. Southern, 832 P.2d 946 (Colo. 1992); People v. Denton, 839 P.2d 6 (Colo. 1992); People v. Hindorff, 860 P.2d 526 (Colo. 1993); People v. Stevens, 866 P.2d 1378 (Colo. 1994); People v. Butler, 875 P.2d 219 (Colo. 1994); People v. Cole, 880 P.2d 158 (Colo. 1994); People v. Smith, 880 P.2d 763 (Colo. 1994); People v. Kardokus, 881 P.2d 1202 (Colo. 1994); People v. Johnson, 881 P.2d 1205 (Colo. 1994); People v. Pittam, 889 P.2d 678 (Colo. 1995); People v. Swan, 893 P.2d 769 (Colo. 1995); People v. Banman, 901 P.2d 469 (Colo. 1995); People v. Crews, 901 P.2d 472 (Colo. 1995); People v. Dickinson, 903 P.2d 1132 (Colo. 1995); People v. Davis, 911 P.2d 45 (Colo. 1996); People v. Calvert, 915 P.2d 1310 (Colo. 1996).

Conduct violating this rule sufficient to justify suspension. People v. Yaklich, 646 P.2d 938 (Colo. 1982); People v. Pilgrim, 698 P.2d 1322 (Colo. 1985); People v. Convery, 704 P.2d 296 (Colo. 1985); People v. Foster, 716 P.2d 1069 (Colo. 1986); People v. Barnett, 716 P.2d 1076 (Colo. 1986); People v. Fleming, 716 P.2d 1090 (Colo. 1986); People v. Larson, 716 P.2d 1093 (Colo. 1986); People v. McDowell, 718 P.2d 541 (Colo. 1986); People v. Yost, 729 P.2d 348 (Colo. 1986); People v. Holmes, 731 P.2d 677 (Colo. 1987); People v. Turner, 746 P.2d 49 (Colo. 1987); People v. Yost, 752 P.2d 542 (Colo. 1988); People v. Convery, 758 P.2d 1338 (Colo. 1988); People v. Lustig, 758 P.2d 1342 (Colo. 1988); People v. Goens, 770 P.2d 1218 (Colo. 1989); People v. Dolan, 771 P.2d 505 (Colo. 1989); People v. Flores, 772 P.2d 610 (Colo. App. 1989); People v. Emeson, 775 P.2d 1166 (Colo. 1989); People v. Hodge, 782 P.2d 25 (Colo. 1989); People v. Fahrney, 782 P.2d 743 (Colo. 1989); People v. Gregory, 788 P.2d 823 (Colo. 1990); People v. Bergmann, 790 P.2d 840 (Colo. 1990); People v. Hensley-Martin, 795 P.2d 262 (Colo. 1990); People v. Stayton, 798 P.2d 903 (Colo. 1990); People v. Grossenbach, 803 P.2d 961 (Colo. 1990); People v. Creasey, 811 P.2d 40 (Colo. 1991); People v. Rhodes, 814 P.2d 787 (Colo. 1991); People v. Williams, 824 P.2d 813 (Colo. 1992); People v. Watson, 833 P.2d 50 (Colo. 1992); People v. Farrant, 883 P.2d 1 (Colo. 1994); People v. Singer, 897 P.2d 798 (Colo. 1995); People v. Williams, 915 P.2d 669 (Colo. 1996).

C. Disbarment.

Attorney disbarred for continued pattern of conduct involving neglect and misrepresentation and for failure to cooperate in investigation by grievance committee. People v. Young, 673 P.2d 1003 (Colo. 1984); People v. Johnston, 759 P.2d 10 (Colo. 1988).

Failure to file bankruptcy petition for eight months justifies disbarment. When a lawyer, after being paid for his services, neglects to file a bankruptcy petition for his client for a period of approximately eight months, during which time the client is sued and his wages attached on several occasions, the lawyer's gross neglect and failure to carry out a contract of employment justify disbarment. People v. McMichael, 199 Colo. 433, 609 P.2d 633 (1980).

Failure to timely file estate tax returns on behalf of personal representative of estate, failure to be adequately prepared for argument at scheduled hearing, failure to file timely notice of alibi, and failure to notify opposing counsel constitutes continuing pattern of neglect causing risk of serious injury to clients and justifies

disbarment. People v. Stewart, 752 P.2d 528 (Colo. 1987).

Failing to commence any action on behalf of a client, exploiting a client's friendship and trust to extort funds for one's personal use, and failing to cooperate with the grievance committee in its investigation of complaints with respect to such matters is conduct warranting disbarment. People v. McMahill, 782 P.2d 336 (Colo. 1989).

Where an attorney demonstrates an extreme indifference to the welfare of his clients and the status of their cases and an extreme insensitivity to his professional duties in the face of adverse judgments due to neglect, client complaints, and repeated disciplinary proceedings, disbarment is the appropriate sanction. People v. Wyman, 782 P.2d 339 (Colo. 1989).

Conduct which causes a client serious or potentially serious injury and demonstrates a complete lack of concern for a client's interests and welfare warrants disbarment. People v. Lyons, 762 P.2d 143 (Colo. 1988).

Continuing to practice law while suspended is conduct justifying disbarment. People v. James, 731 P.2d 698 (Colo. 1987).

Facts sufficient to justify disbarment of attorney for failure to comply with registration requirements of C.R.C.P. 227, misappropriation of funds, and improper withdrawal from employment. People v. Scudder, 197 Colo. 99, 590 P.2d 493 (1979).

Total disregard of obligation to protect a client's rights and interests over an extended period of time in conjunction with the violation of a number of disciplinary rules and an extended prior record of discipline requires most severe sanction of disbarment. People v. O'Leary, 783 P.2d 843 (Colo. 1989).

Attorney's continued practice of law while under an order of suspension, with no efforts to wind up the legal practice, and the failure to take action to protect the legal interests of the attorney's clients, warrants disbarment. People v. Wilson, 832 P.2d 943 (Colo. 1992).

Disbarment was the proper remedy where the attorney was afforded multiple opportunities including two suspensions and court ordered rehabilitation and where attorney's conduct demonstrated (a) neglect of legal matters entrusted to him; (b) misrepresentation to the client and the grievance committee; and (c) a pattern of neglect followed by the respondent that had the potential of causing serious injury to his clients. People v. Susman, 787 P.2d 1119 (Colo. 1990).

Disbarment proper remedy for lawyer who, shortly after admission to bar and continuing for two years, embarked on a course of conduct resulting in ten separate instances of professional misconduct, some of which presented the potential for serious harm to clients and to the administration of justice. People v. Murray, 887 P.2d 1016 (Colo. 1994).

A lawyer's continued practice of law while under an order of suspension, with no efforts to wind up the legal practice, and failure to take action to protect the legal interests of the lawyer's clients, warrants disbarment. People v. Wilson, 832 P.2d 943 (Colo. 1992).

Pattern of misconduct involving failure to render services, multiple offenses, and conversion of clients' property sufficient to warrant disbarrment. People v. Vermillion, 814 P.2d 795 (Colo. 1991).

Disbarment appropriate where attorney converted client funds, neglected a legal matter entrusted to him, and had a history of discipline. People v. Grossenbach, 814 P.2d 810 (Colo. 1991).

Disbarment appropriate when attorney neglected numerous legal matters and engaged in other conduct prejudicial to client and the administration of justice. People v. Theodore, 926 P.2d 1237 (Colo. 1996).

Failure to respond to discovery and motions, failure to attend case management hearing, and failure to inform client of progress of a civil case is grounds for disbarment. People v. Hebenstreit, 823 P.2d 125 (Colo. 1992).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Ashley, 817 P.2d 965 (Colo. 1991); People v. Rouse, 817 P.2d 967 (Colo. 1991); People v. Margolin, 820 P.2d 347 (Colo. 1991); People v. Koransky, 824 P.2d 819 (Colo. 1992); People v. Bradley, 825 P.2d 475 (Colo. 1992); People v. Southern, 832 P.2d 946 (Colo. 1992); People v. McGrath, 833 P.2d 731 (Colo. 1992); People v. Singer, 955 P.2d 1005 (Colo. 1998).

Conduct violating this rule sufficient to justify disbarment. People v. Kendrick, 646 P.2d 337 (Colo. 1982); People v. Dwyer, 652 P.2d 1074 (Colo. 1982); People v. Craig, 653 P.2d 1115 (Colo. 1982); People v. Golden, 654 P.2d 853 (Colo. 1982); People v. Coca, 716 P.2d 1073 (Colo. 1986); People v. Quick, 716 P.2d 1082 (Colo. 1986); People v. Quintana, 752 P.2d 1059 (Colo. 1988); People v. Lovett, 753 P.2d 205 (Colo. 1988); People v. Brooks, 753 P.2d 208 (Colo. 1988); People v. Turner, 758 P.2d 1335 (Colo. 1988); People v. Danker, 759 P.2d 14 (Colo. 1988); People v. Score, 760 P.2d 1111 (Colo. 1988); People v. Kengle, 772 P.2d 605 (Colo. 1989); People v. Murphy, 778 P.2d 658 (Colo. 1989); People v. Frank, 782 P.2d 769 (Colo. 1989); People v. Johnston, 782 P.2d 1195 (Colo. 1989); People v. Dulaney, 785 P.2d 1302 (Colo. 1990); People v. Franks, 791 P.2d 1 (Colo. 1990); People v. Gregory, 797 P.2d 42 (Colo. 1990); People v. Mullison, 829 P.2d 382 (Colo. 1992); People v. Hyland, 830 P.2d 1000 (Colo. 1992).

Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope or objectives, or both, of the representation if the limitation is reasonable under the circumstances and the client gives informed consent. A lawyer may provide limited representation to pro se parties as permitted by C.R.C.P. 11(b) and C.R.C.P. 311(b).

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Source: (a), (c), and comment amended and adopted June 17, 1999, effective July 1, 1999; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreement with the

client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

Criminal, Fraudulent and Prohibited Transactions

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

ANNOTATION

Law reviews. For formal opinion of the Colorado Bar Association on Ethical Duties of Attorney Selected by Insurer to Represent Its Insured, see 22 Colo. Law. 497 (1993). For article, "Discrete Task Representation a/k/a Unbundled Legal Services", see 29 Colo. Law. 5 (January 2000). For article, "Limited Representation in Criminal Defense Cases", see 29 Colo. Law. 77 (October 2000). For article, "Ethical Considerations and Client Identity", see 30 Colo. Law. 51 (April 2001). For article, "Settlement Ethics", see 30 Colo. Law. 53 (December 2001). For comment, "Increasing Access to Justice: Expanding the Role of Nonlawyers in the Delivery of Legal Services to Low-Income Coloradans", see 72 U. Colo. L. Rev. 459 (2001). For article, "Ethical Guidelines for Settlement Negotiations", see 34 Colo. Law. 11 (February 2005). For article, "Ethical Concerns When Dealing With the Elder Client", see 34

Colo. Law. 27 (October 2005). For article, "The Duty of Loyalty and Preparations to Compete", see 34 Colo. Law. 67 (November 2005).

Annotator's note. Rule 1.2 is similar to Rule 1.2 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

Even though section (c) of this rule allows unbundling of legal services, an attorney remains obligated to comply with C.R.C.P. 11(b). In re Merriam, 250 Bankr. 724 (Bankr. D. Colo. 2000).

Having a litigant appear to be pro se when in truth an attorney is authoring pleadings and necessarily guiding the course of the litigation with an unseen hand is disingenuous and far below the level of candor that must be met by members of the bar. Such conduct is contrary to paragraph (d) of this rule. Johnson v. Bd. of County Comm'rs of Fremont, 868 F. Supp. 1226 (D. Colo. 1994).

Any provision in an agreement to provide legal services that would deprive a client of the right to control settlement is unenforceable as against public policy, including a provision that purports to prohibit the client from unreasonably refusing to settle. A client's right to reject settlement is absolute and unqualified; parties to litigation have the right to control their own cases. Jones v. Feiger, Collison & Killmer, 903 P.2d 27 (Colo. App. 1994), rev'd on other grounds, 926 P.2d 1244 (Colo. 1996).

The decision to enter a guilty plea or withdraw a guilty plea is one of the few fundamental choices that must be decided by the defendant alone. People v. Davis, 2012 COA 1, __ P.3d __.

Aiding client to violate custody order sufficient to justify disbarment. People v. Chappell, 927 P.2d 829 (Colo. 1996).

Suspension for three years, the longest period available, was appropriate in case where violation of this rule and others would otherwise have justified disbarment but mitigating factors included personal and emotional problems, interim rehabilitation, and remorse. People v. McCaffrey, 925 P.2d 269 (Colo. 1996).

Suspension for one year and one day appropriate when attorney neglected to file response to motion for summary judgment and to return client files upon request. People v. Honaker, 847 P.2d 640 (Colo. 1993).

Public censure appropriate where harm suffered by attorney's client was speculative, attorney retracted his misrepresentations and admitted to his client before the institution of disciplinary proceedings that he had done nothing on the client's appeal, attorney had no prior discipline, he made full and free disclosure of his misconduct to the grievance committee, and he expressed remorse for his misconduct. People v. Nelson, 848 P.2d 351 (Colo. 1993).

If prosecution witness advises the prosecutor that he or she knows or recognizes one of the jurors, the prosecutor has an affirmative duty immediately to notify the court and opposing counsel of the witness' statement. People v. Drake, 841 P.2d 364 (Colo. App. 1992).

When a lawyer accepts fees from clients and then abandons those clients while keeping their money and causing serious harm, disbarment is appropriate. People v. Steinman, 930 P.2d 596 (Colo. 1997).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Steinman, 930 P.2d 596 (Colo. 1997); In re Bilderback, 971 P.2d 1061 (Colo. 1999).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Sousa, 943 P.2d 448 (Colo. 1997).

Cases Decided Under Former DR 2-110.

Law reviews. For article, "Coping with the Paper Avalanche: A Survey on the Disposition of Client Files", see 16 Colo. Law. 1787 (1987).

Suspension for one year and one day warranted for attorney who "represented" client for a period of 19 months without that person's knowledge or consent, even asserting a counterclaim on his behalf without talking to him; who did not communicate with him in any manner for an extended period of time and then did not withdraw within a reasonable time after being unable to contact him; and who failed to answer discovery requests, resulting in the entries of default and then a default judgment against him. People v. Silvola, 915 P.2d 1281 (Colo. 1996).

Attorney who undertakes to conduct action impliedly agrees that he will pursue it to some conclusion; and he is not free to abandon it without reasonable cause. Sobol v. District Court, 619 P.2d 765 (Colo. 1980); Anderson, Calder & Lembke v. District Court, 629 P.2d 603 (Colo. 1981).

Even where cause may exist, attorney's withdrawal must be undertaken in proper manner, duly protective of his client's rights and liabilities. Sobol v. District Court, 619 P.2d 765 (Colo. 1980).

Attorney's withdrawal from employment was improper where attorney gave clients insufficient notice of her intention to withdraw, failed to return the file of one client, and took no steps to avoid foreseeable injury to the clients' interests. People v. Felker, 770 P.2d 402 (Colo. 1989).

Trial dates accepted shall be honored before withdrawal from employment. When public defender or a busy defense lawyer finds that his representation of one client is inimical

to his representation of another client and he must make an election as to the client he will represent, he has a heavy duty to the court to see that he honors dates that he has agreed to for the trial of a case. Watson v. District Court, 199 Colo. 76, 604 P.2d 1165 (1980).

Attorney's withdrawal is within trial court's discretion. The question of whether an attorney should be permitted to withdraw his general appearance on behalf of a litigant in a civil case is, under ordinary circumstances, within the discretion of the trial court; and its decision will not be reversed unless this discretion has been demonstrably abused. Sobol v. District Court, 619 P.2d 765 (Colo. 1980).

Motions for withdrawal of counsel are addressed to the discretion of the court and will not be reversed unless clear error or abuse is shown. Anderson, Calder & Lembke v. District Court, 629 P.2d 603 (Colo. 1981).

A decision as to whether counsel should be permitted to withdraw must lie within the sound discretion of the trial judge. As long as the trial court has a reasonable basis for believing that the lawyer-client relation has not deteriorated to the point where counsel is unable to give effective aid in the fair presentation of a defense, the court is justified in refusing to appoint new counsel. People v. Schultheis, 638 P.2d 8 (Colo. 1981).

The question of whether a lawyer may withdraw during course of trial due to the client's conduct is within the trial court's discretion and court must balance need for orderly administration of justice with facts underlying request for withdrawal. People v. Rubanowitz, 688 P.2d 231 (Colo. 1984).

The trial court's decision will not be disturbed on review absent abuse. The decision of the trial court to deny a motion to withdraw will not be disturbed on review absent a clear abuse of discretion. People v. Schultheis, 638 P.2d 8 (Colo. 1981).

Disagreement concerning counsel's refusal to call witnesses is insufficient grounds. A disagreement between defense counsel and the accused concerning counsel's refusal to call certain witnesses is not sufficient to require the trial judge to grant the motion to withdraw and replace defense counsel. People v. Schultheis, 638 P.2d 8 (Colo. 1981).

Filing of a grievance because of disagreement as to trial tactics is insufficient grounds. Mere filing of grievance concerning counsel's refusal to file certain motions and refusal to file a civil action is not sufficient to require trial judge to grant the motion to withdraw and replace defense counsel. People v. Martinez, 722 P.2d 445 (Colo. App. 1986).

Counsel should request permission to withdraw where client insists on presenting perjured testimony. When a serious disagreement arises between the defense counsel and the accused, and counsel is unable to dissuade his client from insisting that fabricated testimony be presented by a witness, counsel should request permission to withdraw from the case in accordance with the procedures set forth in this opinion. If the motion to withdraw is denied, however, he must continue to serve as defense counsel. People v. Schultheis, 638 P.2d 8 (Colo. 1981).

When confronted with a client who insists upon presenting perjured testimony as to an alibi, counsel may only state, in the motion to withdraw, that he has an irreconcilable conflict with his client. People v. Schultheis, 638 P.2d 8 (Colo. 1981).

Failure and refusal to refund unearned portions of fees collected from two clients constituted violations of C.R.C.P. 241(B), DR 9-102, and this rule. People v. Gellenthien, 621 P.2d 328 (Colo. 1981).

Failure to withdraw for over a year after being discharged by client, accompanied by protracted failure to return client's file, justifies suspension. People v. Hodge, 752 P.2d 533 (Colo. 1988).

Conduct violating this rule in conjunction with other disciplinary rules sufficient to justify public censure. People v. Vsetecka, 893 P.2d 1309 (Colo. 1995).

Failing to return the file of a client while at the same time neglecting to make further filings in such client's case during a period of suspension for similar acts of misconduct warrants further suspension from the practice of law. People v. Hodge, 782 P.2d 25 (Colo. 1989).

Suspended attorney must demonstrate rehabilitation. The actions of a suspended attorney who took part in a complex real estate transaction and engaged in the practice of law by representing, counseling, advising, and assisting a former client warrant suspension until he demonstrates by clear and convincing evidence that (1) he has been rehabilitated; (2) he has complied with and will continue to comply with all applicable disciplinary orders and rules; and (3) he is competent and fit to practice law. People v. Belfor, 200 Colo. 44, 611 P.2d 979 (1980).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Moya, 793 P.2d 1154 (Colo. 1990); People v. Creasey, 793 P.2d 1159 (Colo. 1990); People v. Wilson, 814 P.2d 791 (Colo. 1991); People v. Whitaker, 814 P.2d 812 (Colo. 1991); People v. Heilbrunn, 814 P.2d 819 (Colo. 1991); People v. Anderson, 817 P.2d 1035 (Colo. 1991); People v. Hyland, 830 P.2d 1000 (Colo. 1992); People v. Raubolt, 831 P.2d 462 (Colo. 1992); People v. Southern, 832 P.2d 946 (Colo. 1992); People v. Regan, 871 P.2d 1184 (Colo. 1994); People v. Cole, 880 P.2d 158 (Colo. 1994).

Conduct violating this rule sufficient to justify suspension. People v. Geller, 753 P.2d 235 (Colo. 1988).

Facts sufficient to justify disbarment of attorney for failure to comply with registration requirements of C.R.C.P. 227, misappropriation of funds, and improper withdrawal from employment. People v. Scudder, 197 Colo. 99, 590 P.2d 493 (1979).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Southern, 832 P.2d 946 (Colo. 1992); People v. McGrath, 833 P.2d 731 (Colo. 1992); People v. Fritsche, 897 P.2d 805 (Colo. 1995).

Conduct violating this rule sufficient to justify disbarment. People v. Dwyer, 652 P.2d 1074 (Colo. 1982); People v. Kengle, 772 P.2d 605 (Colo. 1989); People v. Franks, 791 P.2d 1 (Colo. 1990); People v. Vermillion, 814 P.2d 795 (Colo. 1991); People v. Mullison, 829 P.2d 382 (Colo. 1992); People v. McGrath, 833 P.2d 731 (Colo. 1992).

Applied in People ex rel. MacFarlane v. Harthun, 195 Colo. 38, 581 P.2d 716 (1978); People v. Pacheco, 198 Colo. 455, 608 P.2d 333 (1979); People v. Pacheco, 199 Colo. 108, 608 P.2d 334 (1979); People v. Johnson, 199 Colo. 248, 612 P.2d 1097 (1980); People v. Lanza, 200 Colo. 241, 613 P.2d 337 (1980); People v. Meldahl, 200 Colo. 332, 615 P.2d 29 (1980); People v. Archuleta, 638 P.2d 255 (Colo. 1981).

Cases Decided Under Former DR 7-101.

Law reviews. For article, "The Ethical Aspects of Compromise, Settlement and Arbitration", see 25 Rocky Mt. L. Rev. 454 (1953). For article, "Incriminating Evidence: What to Do With a Hot Potato", see 11 Colo. Law. 880 (1982). For article, "Third-Party Malpractice Claims against Real Estate Lawyers", see 13 Colo. Law. 996 (1984). For article, "The Role of Parents' Counsel in Dependency and Neglect Proceedings — Part I", see 14 Colo. Law. 568 (1985). For article, "The Ethical Duty to Consider Alternatives to Litigation", see 19 Colo. Law. 249 (1990).

Lawyers are required by the obligations of their office to act with diligence in the affairs of their clients and in judicial proceedings. People v. Heyer, 176 Colo. 188, 489 P.2d 1042 (1971).

Failure to take any action on behalf of his client after he was retained and entrusted with work and after making representations to his client which were false, an attorney violates the code of professional responsibility and C.R.C.P. 241.6. People v. Southern, 638 P.2d 787 (Colo. 1982).

Trial court may explore adequacy of trial counsel's representations regarding grounds for withdrawal, but in the course of this inquiry, the court may not compel the attorney to disclose any confidential communications. People v. Schultheis, 44 Colo. App. 452, 618 P.2d 710 (1980), rev'd on other grounds, 638 P.2d 8 (Colo. 1981).

Attorney may not breach his duty of maintaining his client's confidences even when he knows his client has previously perjured himself. People v. Schultheis, 44 Colo. App. 452, 618 P.2d 710 (1980), rev'd on other grounds, 638 P.2d 8 (Colo. 1981).

Attorney shall not use testimony that he knows is perjured. People v. Schultheis, 44 Colo. App. 452, 618 P.2d 710 (1980), rev'd on other grounds, 638 P.2d 8 (Colo. 1981).

Defense counsel may waive right to confront witnesses. The right to confront witnesses is a fundamental right and waiver of such a right is not to be lightly found, but this decision is properly the responsibility of defense counsel, and therefore, the decision of defense counsel to allow the prosecution to use depositions of witnesses in court is an effective waiver. Morse v. People, 180 Colo. 49, 501 P.2d 1328 (1972).

Matters of trial conduct and strategy are the responsibility of defense counsel. Morse v. People, 180 Colo. 49, 501 P.2d 1328 (1972).

Defendant cannot complain when it falls short of accomplishing an acquittal. It is not error to deny a motion for a new trial based on incompetence of trial counsel where the incompetence claimed arises out of defense counsel's failure to call certain witnesses that the defendant suggested, because defense counsel is responsible for trial strategy, and the defendant will not be heard to complain when trial strategy falls short of accomplishing an acquittal. People v. Moreno, 181 Colo. 106, 507 P.2d 857 (1973).

If every decision in a contested trial had to be made by the accused, he would be denied effective assistance and the judgment of his trial counsel; the defendant's attorney is the expert at trial, not the defendant. Morse v. People, 180 Colo. 49, 501 P.2d 1328 (1972).

Continued and chronic neglect over a period of two years must be considered willful and supports finding of intentional prejudice or damage to clients. People v. Barber, 799 P.2d 936 (Colo. 1990).

Trial court did not abuse its discretion by imposing sanctions on attorney who, at direction of clients, failed to advise opposing party of clients' bankruptcy and automatic stay in advance of trial. Under such circumstances the attorney was faced with an irreconcilable conflict between his duty to his clients and his professional obligations to opposing counsel and would have been justified in requesting permission to withdraw. Parker v. Davis, 888 P.2d 324 (Colo. App. 1994).

Inappropriate personal relationship with a client may prejudice or damage client under

this rule. People v. Gibbons, 685 P.2d 168 (Colo. 1984).

Where an attorney requests, on the day of trial, dismissal of federal court proceedings because of lack of jurisdictional amount while representing plaintiff, fails to appear in court when scheduled, shows gross indifference and disregard toward the court, the jurors, and opposing counsel, and fails to keep appointments with the grievance committee assigned to investigate charges against him, a public reprimand for dereliction of duty is called for. People v. Heyer, 176 Colo. 188, 489 P.2d 1042 (1971).

Public censure was appropriate where attorney's failure to appear at three hearings and to timely return a stipulation violated DR 1-102(A)(5) and, in aggravation, there was a pattern of misconduct. People v. Cabral, 888 P.2d 245 (Colo. 1995).

Conduct of attorney warranted public censure under paragraph (A)(1). People v. Stayton, 798 P.2d 903 (Colo. 1990); People v. Smith, 819 P.2d 497 (Colo. 1991).

Conduct of attorney warranted public reprimand under paragraph (A)(2). People v. Atencio, 177 Colo. 439, 494 P.2d 837 (1972).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Ashley, 796 P.2d 962 (Colo. 1990); People v. Fitzgibbons, 909 P.2d 1098 (Colo. 1996).

Conduct violating this rule sufficient to justify public censure. People v. Mayer, 716 P.2d 1094 (Colo. 1986); People v. Wilson, 745 P.2d 248 (Colo. 1987); People v. Wyman, 769 P.2d 1076 (Colo. 1989); People v. Baird, 772 P.2d 110 (Colo. 1989); People v. Fieman, 788 P.2d 830 (Colo. 1990); People v. Good, 790 P.2d 331 (Colo. 1990).

Where an attorney misrepresents to a client that he has filed a case, fails for two years to take action on behalf of another client, and, knowing that a hearing had been set on charges against him, deliberately leaves the jurisdiction of the court without making any arrangements with the grievance committee and without arranging for representation, his conduct warrants suspension from the bar. People v. Kane, 177 Colo. 378, 494 P.2d 96 (1972).

Suspension is fitting sanction when lawyer knowingly fails to perform services for a client and thereby causes injury to such client. People v. Masson, 782 P.2d 335 (Colo. 1989).

Failing to resolve an inability to proceed on behalf of a client, neglecting to respond to communications from the grievance committee, failing to fulfill commitments made to the investigator for the disciplinary counsel, and misrepresenting to such investigator the status of the case under investigation is conduct warranting suspension. People v. Chappell, 783 P.2d 838 (Colo. 1989).

Suspension of lawyer for three years which is the longest possible period for suspension, is appropriate where there was extensive pattern of client neglect and intentional deception in client matters over a period of years. Anything less would be too lenient. People v. Hellewell, 811 P.2d 386 (Colo. 1991).

Failure to communicate with clients, court, and opposing counsel, misrepresentation of the status of the proceedings to the client, and failure to investigate clients' case justifies three-year suspension. People v. Wilson, 814 P.2d 791 (Colo. 1991).

Knowing failure to prosecute client's claim or to obtain client's informed consent to abandon the claim and neglecting to pursue settlement negotiations damaged client and constitutes intentional failure to carry out contract of employment sufficient to justify suspension. People v. Honaker, 814 P.2d 785 (Colo. 1991).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to warrant suspension. People v. Creasey, 793 P.2d 1159 (Colo. 1990); People v. Schmad, 793 P.2d 1162 (Colo. 1990); People v. Wilbur, 796 P.2d 976 (Colo. 1990); People v. Baptie, 796 P.2d 978 (Colo. 1990); People v. Taylor, 799 P.2d 930 (Colo. 1990); People v. Garrett, 802 P.2d 1082 (Colo. 1990); People v. Rhodes, 803 P.2d 514 (Colo. 1991); People v. Flores, 804 P.2d 192 (Colo. 1991); People v. Dunsmoor, 807 P.2d 561 (Colo. 1991); People v. Hall, 810 P.2d 1069 (Colo. 1991); People v. Koeberle, 810 P.2d 1072 (Colo. 1991); People v. Dash, 811 P.2d 36 (Colo. 1991); People v. Creasey, 811 P.2d 40 (Colo. 1991); People v. Whitaker, 814 P.2d 812 (Colo. 1991); People v. Hansen, 814 P.2d 816 (Colo. 1991); People v. Hyland, 830 P.2d 1000 (Colo. 1992); People v. Raubolt, 831 P.2d 462 (Colo. 1992); People v. Regan, 831 P.2d 893 (Colo. 1992); People v. Denton, 839 P.2d 6 (Colo. 1992); People v. Hindorff, 860 P.2d 526 (Colo. 1993); People v. Cole, 880 P.2d 158 (Colo. 1994); People v. Smith, 880 P.2d 763 (Colo. 1994); People v. Schaefer, 938 P.2d 147 (Colo. 1997).

Conduct violating this rule sufficient to justify suspension. People v. Yaklich, 646 P.2d 938 (Colo. 1982); People v. Brackett, 667 P.2d 1357 (Colo. 1983); People v. Pilgrim, 698 P.2d 1322 (Colo. 1985); People v. Convery, 704 P.2d 296 (Colo. 1985); People v. Foster, 716 P.2d 1069 (Colo. 1986); People v. Coca, 716 P.2d 1073 (Colo. 1986); People v. Barnett, 716 P.2d 1076 (Colo. 1986); People v. Fleming, 716 P.2d 1090 (Colo. 1986); People v. Larson, 716 P.2d 1093 (Colo. 1986); People v. Richards, 748 P.2d 341 (Colo. 1987); People v. Convery, 758 P.2d 1338 (Colo. 1988); People v. Griffin, 764 P.2d 1166 (Colo. 1988); People v. Goens, 770 P.2d 1218 (Colo. 1989); People v. Flores, 772 P.2d 610 (Colo. 1989); People v. Pooley, 774 P.2d 239 (Colo. 1989); People v. Fahrney, 782 P.2d

743 (Colo. 1989); People v. Gregory, 788 P.2d 823 (Colo. 1990); People v. Bergmann, 790 P.2d 840 (Colo. 1990).

Failure to file bankruptcy petition for eight months justifies disbarment. When a lawyer, after being paid for his services, neglects to file a bankruptcy petition for his client for a period of approximately eight months, during which time the client is sued and his wages attached on several occasions, the lawyer's gross neglect and failure to carry out a contract of employment justify disbarment. People v. McMichael, 199 Colo. 433, 609 P.2d 633 (1980).

Converting estate or trust funds for one's personal use, overcharging for services rendered, neglecting to return inquiries relating to client matters, failing to make candid disclosures to grievance committee, and attempting to conceal wrongdoing during disciplinary proceedings warrants the severe sanction of disbarment. People v. Gerdes, 782 P.2d 2 (Colo. 1989).

Disbarment was the proper remedy where attorney's conduct demonstrated (a) neglect of legal matters entrusted to him; (b) misrepresentation to the client and the grievance committee; and (c) a pattern of neglect followed by the respondent that had the potential of causing serious injury to his clients, and the attorney was afforded multiple opportunities including two suspensions and court ordered rehabilitation. People v. Susman, 787 P.2d 1119 (Colo. 1990).

Converting trust funds to one's own use in the amount of $13,100 and refusing to make payments on a promissory note taken as restitution was conduct intentionally prejudicial to the client sufficient to justify disbarment. People v. Whitcomb, 819 P.2d 493 (Colo. 1991).

Converting trust funds, along with other misconduct, sufficient to justify disbarment. Where attorney withdraws $62,550 from trust without beneficiaries' knowledge or permission, fails to repay a $5,000 loan from the trustee, prepares fictional quarterly trust reports, disburses principal to beneficiaries in lieu of interest and lies regarding the amount of principal remaining in the trust, there is conduct sufficiently prejudicial to the client to justify disbarment. People v. Tanquary, 831 P.2d 889 (Colo. 1992).

When attorney converted client's funds, named himself trustee, misrepresented to banks that the funds were his own, engaged in self-dealing, and maintained custody of the client's investment accounts, disbarment was warranted. There were no mitigating factors. People v. Warner, 8873 P.2d 724 (Colo. 1994).

Misrepresenting the status of a dissolution of marriage action with knowledge of impending remarriage and then forging the purported decree of dissolution is conduct involving moral turpitude deserving of disbarment. People v. Belina, 782 P.2d 26 (Colo. 1989).

Conduct which causes a client serious or potentially serious injury and demonstrates a complete lack of concern for a client's interests and welfare warrants disbarment. People v. Lyons, 762 P.2d 143 (Colo. 1988).

Where an attorney demonstrates an extreme indifference to the welfare of his clients and the status of their cases and an extreme insensitivity to his professional duties in the face of adverse judgments due to neglect, client complaints, and repeated disciplinary proceedings, disbarment is the appropriate sanction. People v. Wyman, 782 P.2d 339 (Colo. 1989).

Facts sufficient to justify disbarment of attorney for failure to comply with registration requirements of C.R.C.P. 227, misappropriation of funds, and improper withdrawal from employment. People v. Scudder, 197 Colo. 99, 590 P.2d 493 (1979).

Failure to respond to discovery and motions, failure to attend case management hearing, and failure to inform client of progress of a civil case is grounds for disbarment. People v. Hebenstreit, 823 P.2d 125 (Colo. 1992).

Disbarment is appropriate sanction where attorney knowingly converts client property and causes injury or potential injury to a client. People v. Bowman, 887 P.2d 18 (Colo. 1994).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Nichols, 796 P.2d 966 (Colo. 1990); People v. Ashley, 817 P.2d 965 (Colo. 1991); People v. Rouse, 817 P.2d 967 (Colo. 1991); People v. Crimaldi, 804 P.2d 863 (Colo. 1991); People v. Bergmann, 807 P.2d 568 (Colo. 1991); People v. Rhodes, 814 P.2d 787 (Colo. 1991); People v. Heilbrunn, 814 P.2d 819 (Colo. 1991); People v. Whitcomb, 819 P.2d 493 (Colo. 1991); People v. Koransky, 824 P.2d 819 (Colo. 1992); People v. Bradley, 825 P.2d 475 (Colo. 1992); People v. Southern, 832 P.2d 946 (Colo. 1992); People v. Schindelar, 845 P.2d 1146 (Colo. 1993); People v. Schaefer, 944 P.2d 78 (Colo. 1997); People v. Skaalerud, 963 P.2d 341 (Colo. 1998).

Conduct violating this rule sufficient to justify disbarment. People v. Kendrick, 646 P.2d 337 (Colo. 1982); People v. Dwyer, 652 P.2d 1074 (Colo. 1982); People v. Golden, 654 P.2d 853 (Colo. 1982); People v. Bealmear, 655 P.2d 402 (Colo. 1982); People v. Buckles, 673 P.2d 1008 (Colo. 1984); People v. Gibbons, 685 P.2d 168 (Colo. 1984); People v. Quick, 716 P.2d 1082 (Colo. 1986); People v. James, 731 P.2d 698 (Colo. 1987); People v. Carpenter, 731 P.2d 726 (Colo. 1987); People v. Coca, 732 P.2d 640 (Colo. 1987); People v. Stewart, 752 P.2d 528 (Colo. 1987); People v. Quintana, 752 P.2d 1059 (Colo. 1988); People v. Lovett, 753 P.2d

205 (Colo. 1988); People v. Brooks, 753 P.2d 208 (Colo. 1988); People v. Turner, 758 P.2d 1335 (Colo. 1988); People v. Danker, 759 P.2d 14 (Colo. 1988); People v. Costello, 781 P.2d 85 (Colo. 1989); People v. Frank, 782 P.2d 769 (Colo. 1989); People v. Johnston, 782 P.2d 1195 (Colo. 1989).

Conduct violating this rule sufficient to justify disbarment. People v. Dulaney, 785 P.2d 1302 (Colo. 1990); People v. Franks, 791 P.2d 1 (Colo. 1990); People v. Gregory, 797 P.2d 43 (Colo. 1990); People v. Vermillion, 814 P.2d 795 (Colo. 1991).

Conduct found to violate disciplinary rules. People v. Bugg, 635 P.2d 881 (Colo. 1981); People v. Razatos, 636 P.2d 666 (Colo. 1981), appeal dismissed, 455 U.S. 930, 102 S. Ct. 1415, 71 L. Ed. 2d 639 (1982); People v. Ross, 810 P.2d 659 (Colo. 1991).

Applied in People ex rel. MacFarlane v. Harthun, 195 Colo. 38, 581 P.2d 716 (1978); People v. McMichael, 196 Colo. 128, 586 P.2d 1 (1978); People v. Harthun, 197 Colo. 1, 593 P.2d 324 (1979); People v. Pacheco, 199 Colo. 108, 608 P.2d 334 (1979); People v. Belfor, 200 Colo. 44, 611 P.2d 979 (1980); People ex rel. Silverman, v. Anderson, 200 Colo. 76, 612 P.2d 94 (1980); People v. Barbour, 199 Colo. 126, 612 P.2d 1082 (1980); People v. Meldahl, 200 Colo. 332, 615 P.2d 29 (1980); People v. Dixon, 200 Colo. 520, 616 P.2d 103 (1980); People v. Gottsegen, 623 P.2d 878 (Colo. 1981); People v. Dutton, 629 P.2d 103 (Colo. 1981); People v. Hebeler, 638 P.2d 254 (Colo. 1981); People v. Archuleta, 638 P.2d 255 (Colo. 1981); People v. Gellenthien, 638 P.2d 295 (Colo. 1981); People v. Barbour, 639 P.2d 1065 (Colo. 1982); People v. Castro, 657 P.2d 932 (Colo. 1982); People v. Emmert, 676 P.2d 672 (Colo. 1983); People v. Simon, 698 P.2d 228 (Colo. 1985).

Cases Decided Under Former DR 7-102.

Law reviews. For article, "The Perjurious Defendant: A Proposed Solution to the Defense Lawyer's Conflicting Ethical Obligations to the Court and to His Client", see 59 Den. L.J. 75 (1981). For article, "Incriminating Evidence: What to do With a Hot Potato", see 11 Colo. Law. 880 (1982). For article, "Ethics, Tax Fraud and the General Practitioner", see 11 Colo. Law. 939 (1982). For article, "The Search for Truth Continued: More Disclosure, Less Privilege", see 54 U. Colo. L. Rev. 51 (1982). For article, "The Search for Truth Continued, The Privilege Retained: A Response to Judge Frankel", see 54 U. Colo. L. Rev. 67 (1982). For casenote, "Caldwell v. District Court: Colorado Looks at the Crime and Fraud Exception to the Attorney-Client Privilege", see 55 U. Colo. L. Rev. 319 (1984). For article, "Defending the Federal Drug or Racketeering Charge", see 16 Colo. Law. 605 (1987). For article, "A Proposal on Opinion Letters in Colorado Real Estate Mortgage Loan Transactions Parts I and II", see 18 Colo. Law. 2283 (1989) and 19 Colo. Law. 1 (1990). For comment, "Attorney-Client Confidences: Punishing the Innocent", see 61 U. Colo. L. Rev. 185 (1990).

Attorney-client relationship required. Rule requires the existence of an attorney-client relationship as an essential element of the proscribed professional misconduct. People v. Morley, 725 P.2d 510 (Colo. 1986).

A client is a person who employs or retains an attorney for advice or assistance on a matter relating to legal business. People v. Morley, 725 P.2d 510 (Colo. 1986).

The relationship of an attorney and client can be inferred from the conduct of the parties. People v. Morley, 725 P.2d 510 (Colo. 1986).

The relationship is sufficiently established when it is shown that the client seeks and receives the advice of the lawyer on the legal consequences of the client's past or contemplated actions. People v. Morley, 725 P.2d 510 (Colo. 1986).

Attorney shall not use testimony that he knows is perjured. People v. Schultheis, 44 Colo. App. 452, 618 P.2d 710 (1980), rev'd on other grounds, 638 P.2d 8 (Colo. 1981).

If he does so, he commits subornation of perjury. A lawyer who presents a witness knowing that the witness intends to commit perjury thereby engages in the subornation of perjury. People v. Schultheis, 638 P.2d 8 (Colo. 1981).

Trial court may explore adequacy of trial counsel's representations regarding grounds for withdrawal, but in the course of this inquiry, the court may not compel the attorney to disclose any confidential communications. People v. Schultheis, 44 Colo. App. 452, 618 P.2d 710 (1980), rev'd on other grounds, 638 P.2d 8 (Colo. 1981).

Attorney may not breach his duty of maintaining his client's confidences even when he knows his client has previously perjured himself. People v. Schultheis, 44 Colo. App. 452, 618 P.2d 710 (1980), rev'd on other grounds, 638 P.2d 8 (Colo. 1981).

Unauthorized recordation of telephone conversation establishes unethical conduct. Telephone conversation, which attorney initiated and recorded without the permission of other party to conversation, established unethical conduct on attorney's part. People v. Wallin, 621 P.2d 330 (Colo. 1981).

Planned course of conduct which is unresponsive to civil discovery constitutes intent to deceive, and such conduct is prejudicial to the administration of justice. People v. Haase, 781 P.2d 80 (Colo. 1989).

In fulfilling the duty under Canon 7 of the Code of Professional Responsibility to zealously represent a client, a lawyer may advance a claim or defense not recognized under exist-

ing law if it can be supported by a good faith argument for an extension, modification, or reversal of existing law. Sullivan v. Lutz, 827 P.2d 626 (Colo. App. 1992).

Unsuccessful appeal is not necessarily frivolous. Because a lawyer may present a supportable argument which is extremely unlikely to prevail on appeal, it cannot be said that an unsuccessful appeal is necessarily frivolous. Mission Denver Co. v. Pierson, 674 P.2d 363 (Colo. 1984).

An attorney should not pursue frivolous appeals. An attorney's decision not to pursue a frivolous appeal complies with his ethical responsibilities to his client. Hodges v. Barry, 701 P.2d 1240 (Colo. 1985).

Failure to inform arbitrators of errors in expert witness' testimony constituted violation of DR 7-102 warranting public censure because attorney did not disclose that expert had informed attorney of mistakes in writing, and ttorney made closing arguments based on uncorrected expert conclusions. People v. Bertagnolli, 861 P.2d 717 (Colo. 1993).

Actions taken by attorney contrary to court order violate this rule and justify suspension. People v. Awenius, 653 P.2d 740 (Colo. 1982).

False testimony and counselling such conduct warrant disbarment. When a lawyer counsels his client to testify falsely at a hearing on a bankruptcy petition and the client does so, and the lawyer gives a false answer to a question asked of him by the bankruptcy judge, his misconduct warrants disbarment. People v. McMichael, 199 Colo. 433, 609 P.2d 633 (1980).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Smith, 830 P.2d 1003 (Colo. 1992).

Conduct violating this rule sufficient to justify suspension. People v. Belfor, 197 Colo. 223, 591 P.2d 585 (1979); People v. Barnthouse, 775 P.2d 545 (Colo. 1989), cert. denied, 493 U.S. 1026, 110 S. Ct. 734, 107 L. Ed. 2d 752 (1990); People v. Bergmann, 790 P.2d 840 (Colo. 1990).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Hansen, 814 P.2d 816 (Colo. 1991); People v. Calt, 817 P.2d 969 (Colo. 1991); People v. Whitcomb, 819 P.2d 493 (Colo. 1991); People v. Smith, 830 P.2d 1003 (Colo. 1992); People v. Southern, 832 P.2d 946 (Colo. 1992); People v. Marmon, 903 P.2d 651 (Colo. 1995).

Conduct violating this rule sufficient to justify disbarment. People v. Kendrick, 646 P.2d 337 (Colo. 1982); People v. Dwyer, 652 P.2d 1074 (Colo. 1982); People v. Morley, 725 P.2d 510 (Colo. 1986); People v. Turner, 758 P.2d 1335 (Colo. 1988); People v. Franks, 791 P.2d 1 (Colo. 1990); People v. Mullison, 829 P.2d 382 (Colo. 1992); People v. Sims, 913 P.2d 526 (Colo. 1996).

Conduct held to violate this rule. People v. Goss, 646 P.2d 334 (Colo. 1982).

Applied in People v. Good, 195 Colo. 177, 576 P.2d 1020 (1978); People v. Meldahl, 200 Colo. 332, 615 P.2d 29 (1980); People v. Rotenberg, 635 P.2d 220 (Colo. 1981); Law Offices of Bernard D. Morley, P.C. v. MacFarlane, 647 P.2d 1215 (Colo. 1982); People v. Simon, 698 P.2d 228 (Colo. 1985); People v. Hebenstreit, 764 P.2d 51 (Colo. 1988).

Cases Decided Under Former DR 9-101.

Law reviews. For article, "The Conflicted Attorney", see 11 Colo. Law. 2589 (1982). For article, "Access and Friendship with Local Decision-makers — May a Lawyer Exploit", see 16 Colo. Law. 482 (1987). For article, "Coping with the Paper Avalanche: A Survey on the Disposition of Client Files", see 16 Colo. Law. 1787 (1987).

Since employment in a public defender's office is not the type of public employment contemplated in paragraph (B) of this rule, no conflict of interest can be perceived in the representation of a defendant by a deputy public defender and the subsequent representation by the same attorney in a private capacity of the defendant in the same case. Coles, Manter & Watson v. Denver Dist. Court, 177 Colo. 210, 493 P.2d 374 (1972).

Disqualification of former district attorney and his firm was appropriate. Disqualification of former district attorney and his firm from representing client in case in which former district attorney had done investigation under this canon was clearly appropriate. Osburn v. District Court, 619 P.2d 41 (Colo. 1980).

Disqualification of district attorney's office required where two former district attorneys are witnesses on contested issues in case. Pease v. District Court, 708 P.2d 800 (Colo. 1985).

Where a lawyer knows or should know that he is dealing improperly with a client's property and causes potential injury to the client, a suspension from the practice of law, at the very least, is an appropriate sanction. People v. McGrath, 780 P.2d 492 (Colo. 1989).

Where there is no evidence of a specific identifiable impropriety, there is no basis for disqualification under this canon. Food Brokers, Inc. v. Great Western Sugar, 680 P.2d 857 (Colo. App. 1984).

Factors for determining "an appearance of impropriety" discussed in Cleary v. District Court, 704 P.2d 866 (Colo. 1985).

"Substantial responsibility" requirement

of paragraph (B) of this rule applied in Cleary v. District Court, 704 P.2d 866 (Colo. 1985); People v. Anaya, 732 P.2d 1241 (Colo. App. 1986), rev'd on other grounds, 764 P.2d 779 (Colo. 1988).

Conduct violating this rule sufficient to justify disbarment. People v. Dulaney, 785 P.2d 1302 (Colo. 1990).

Rule 1.3. Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's work load must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Rule 28 of the American Bar Association Model Rules for Lawyer Disciplinary Enforcement (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer); C.R.C.P. 251.32(h).

ANNOTATION

Law reviews. For article, "The Duty of Loyalty and Preparations to Compete", see 34 Colo. Law. 67 (November 2005). For article, "The New Rules of Professional Conduct: Significant Changes for In-House Counsel", see 36 Colo. Law. 71 (November 2007). For article, "Ethics in Family Law and the New Rules of Professional Conduct", see 37 Colo. Law. 47 (October 2008).

Annotator's note. Rule 1.3 is similar to Rule

1.3 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

Public censure appropriate where harm suffered by attorney's client was speculative, attorney retracted his misrepresentations and admitted to his client before the institution of disciplinary proceedings that he had done nothing on the client's appeal, attorney had no prior discipline, he made full and free disclosure of his misconduct to the grievance committee, and he expressed remorse for his misconduct. People v. Nelson, 848 P.2d 351 (Colo. 1993).

Public censure appropriate where attorney failed to review district attorney's file and the transcript of the preliminary hearing before trial. People v. Bonner, 927 P.2d 836 (Colo. 1996).

More severe sanction of public censure rather than private censure warranted where attorney continued to rely on methods of communication which had previously failed even after it became evident that the settlement agreement would be withdrawn and the client's interests would be harmed. People v. Podoll, 855 P.2d 1389 (Colo. 1993).

Public censure instead of private censure was appropriate where attorney failed to respond to discovery requests and motions for summary judgment and the findings of the board did not support the applicability of ABA Standard 9.32(i) as a mitigating factor since there was no medical evidence that attorney was affected by chemical dependency or that alcohol contributed to or caused the misconduct. People v. Brady, 923 P.2d 887 (Colo. 1996).

Public censure and monitoring conditions for one year, rather than private censure, were appropriate where attorney had a history of private sanctions indicating a pattern of misconduct. The attorney had also had a six-month suspension entered against him during the same time period in which the acts giving rise to censure occurred. Had the acts occurred following the suspension, public censure would be too lenient. People v. Field, 967 P.2d 1035 (Colo. 1998).

Aggravating and mitigating factors. The following factors are considered aggravating when deciding the appropriate level of discipline: (1) Prior discipline, (2) a pattern of misconduct, and (3) bad faith obstruction of the disciplinary process through total non-cooperation with the disciplinary authorities. Failure to appear before the disciplinary board will cause one to lose the ability to present evidence of mitigating factors. People v. Stevenson, 980 P.2d 504 (Colo. 1999).

Attorney's restitution agreement was neither an aggravating nor mitigating factor since the attorney did not propose or attempt any form of restitution until after a request for investigation had been filed with the office of disciplinary counsel. People v. Brady, 923 P.2d 887 (Colo. 1996).

Attorney's argument that public discipline is not appropriate because it would stigmatize a recovering alcoholic was rejected since overriding concern in discipline proceedings is to protect the public through the enforcement of professional standards of conduct. People v. Brady, 923 P.2d 887 (Colo. 1996).

Public censure appropriate where attorney allowed the statute of limitations to run before filing a complaint on the client's personal injury claim. People v. Hockley, 968 P.2d 109 (Colo. 1998).

Public censure appropriate where neglect extended over a long period of time, respondent had no prior history of discipline, and the actual harm caused by the misconduct was slight. People v. Berkley, 858 P.2d 699 (Colo. 1993).

Public censure appropriate for failure to submit settlement papers to client and to take any further action in the matter, in addition to other conduct violating rules. People v. Berkley, 858 P.2d 699 (Colo. 1993).

Public censure appropriate where attorney neglected and made misrepresentations in two separate legal matters. People v. Eagan, 902 P.2d 841 (Colo. 1995).

Public censure with additional conditions imposed on lawyer who neglected client's matter and then misinformed client of its status. People v. Kram, 966 P.2d 1065 (Colo. 1998).

Public censure warranted where, although respondent did not notify his clients and opposing counsel of his suspension, he did notify the court early in proceedings, did not go forward with court proceedings while on suspension and no actual harm was demonstrated to any of his clients. People v. Dover, 944 P.2d 80 (Colo. 1997).

Forty-five-day suspension warranted where respondent neglected child custody matter and had a prior public censure, a prior admonishment, and prior suspensions, but where the respondent did not demonstrate a dishonest or selfish motive and exhibited a cooperative attitude and expressions of remorse. People v. Dowhan, 951 P.2d 905 (Colo. 1998).

Attorney's inaction over a period of more than two years and other disciplinary violations warrant suspension for 30 days where there are mitigating factors. People v. LaSalle, 848 P.2d 348 (Colo. 1993).

Neglecting to file response to motion for summary judgment and to return client files upon request was sufficient to result in one-year and one-day suspension. People v. Honaker, 847 P.2d 640 (Colo. 1993).

Suspension for one year and one day appropriate when attorney neglected to file response to motion for summary judgment and to return client files upon request. People v. Honaker, 847 P.2d 640 (Colo. 1993).

Suspension for one year and one day appropriate when lawyer neglects matters of multiple clients and charges unreasonable fees. People v. Reedy, 966 P.2d 1057 (Colo. 1998).

Suspension for three years, the longest period available, was appropriate in case where violation of this rule and others would otherwise have justified disbarment but mitigating factors included personal and emotional problems, interim rehabilitation, and remorse. People v. McCaffrey, 925 P.2d 269 (Colo. 1996).

Suspension for three years was appropriate in case involving violation of this rule and others, together with attorney's breach of his duty as client's trustee to protect his client, who was a particularly vulnerable victim that was recuperating from a serious head injury. People v. DeRose, 945 P.2d 412 (Colo. 1997).

Suspension for three years, rather than disbarment, was appropriate where violation of this rule and others caused serious harm to attorney's clients, but mitigating factors were present, including no previous discipline in 14 years of practice, personal and emotional problems, and cooperation and demonstrated remorse in proceedings. People v. Henderson, 967 P.2d 1038 (Colo. 1998).

Three-year suspension warranted for attorney who effectively abandoned and failed to communicate with clients. People v. Shock, 970 P.2d 966 (Colo. 1999).

Conduct warranted one-year extension of attorney's suspension. People v. Silvola, 933 P.2d 1308 (Colo. 1997).

Disbarment appropriate remedy for attorney who neglected client's legal matter, failed to return retainer after being requested to do so, abandoned law practice, evaded process, and failed to respond to request of grievance committee. People v. Williams, 845 P.2d 1150 (Colo. 1993).

Attorney who failed to make sufficient efforts to ensure that his client received timely payments from the trust for which he was the trustee violated this rule. People v. DeRose, 945 P.2d 412 (Colo. 1997).

When a lawyer accepts fees from clients and then abandons those clients while keeping their money and causing serious harm, disbarment is appropriate. People v. Steinman, 930 P.2d 596 (Colo. 1997).

Attorney's failure to take prompt measures to secure client's rights to share of former spouse's retirement benefits constitutes neglect of a legal matter in violation of this rule. In re Fisher, 202 P.3d 1186 (Colo. 2009) (decided under rules in effect prior to 2007 repeal and readoption).

Attorney's conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify six-month suspension, stayed upon completion of two-year probationary period. In re Fisher, 202 P.3d 1186 (Colo. 2009) (decided under rules in effect prior to 2007 repeal and readoption).

Previously disbarred attorney who violated this rule would be forced to pay restitution to clients as a condition of readmission. People v. Vigil, 945 P.2d 1385 (Colo. 1997).

Conduct violating this rule in conjunction with other disciplinary rules sufficient to justify disbarment where the attorney continued to practice law while on suspension, repeatedly neglecting his clients and failing to take reasonable steps to protect clients' interests. People v. Fager, 938 P.2d 138 (Colo. 1997).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Titoni, 893 P.2d 1322 (Colo. 1995); People v. Doherty, 908 P.2d 1120 (Colo. 1996); People v. Woodrum, 911 P.2d 640 (Colo. 1996); People v. Murray, 912 P.2d 554 (Colo. 1996); People v. Barbieri, 935 P.2d 12 (Colo. 1997); People v. Williams, 936 P.2d 1289 (Colo. 1997); People v. Buckingham, 938 P.2d 1157 (Colo. 1997); People v. Todd, 938 P.2d 1160 (Colo. 1997); People v. Doherty, 945 P.2d 1380 (Colo. 1997); People v. Yates, 952 P.2d 340 (Colo. 1998); People v. Barr, 957 P.2d 1379 (Colo. 1998); People v. Kolko, 962 P.2d 979 (Colo. 1998).

Conduct violating this rule sufficient to justify public censure. People v. Smith, 847 P.2d 1154 (Colo. 1993); People v. Podoll, 855 P.2d 1389 (Colo. 1993); People v. Essling, 893 P.2d 1308 (Colo. 1995); People v. Belsches, 918 P.2d 559 (Colo. 1996); People v. Gonzalez, 933 P.2d 1306 (Colo. 1997); People v. Mohar, 935 P.2d 19 (Colo. 1997); People v. White, 951 P.2d 483 (Colo. 1998).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Farrant, 852 P.2d 452 (Colo. 1993); People v. Barr, 855 P.2d 1386 (Colo. 1993); People v. Crews, 901 P.2d 472 (Colo. 1995); People v. Kuntz, 908 P.2d 1110 (Colo. 1996); People v. Fager, 925 P.2d 280 (Colo. 1996); People v. Hohertz, 926 P.2d 560 (Colo. 1996); People v. Paulson, 930 P.2d 582 (Colo. 1997); People v. Bates, 930 P.2d 600 (Colo. 1997); People v. Reynolds, 933 P.2d 1295 (Colo. 1997); People v. White, 935 P.2d 20 (Colo. 1997); People v. Scott, 936 P.2d 573 (Colo. 1997); People v. Harding, 937 P.2d 393 (Colo. 1997); People v. Primavera, 942 P.2d 496 (Colo. 1997); People v. Field, 944 P.2d 1252 (Colo. 1997); People v. Wotan, 944 P.2d 1257 (Colo. 1997); People v. Johnson, 946 P.2d 469 (Colo. 1997); People v. Wright, 947 P.2d 941 (Colo. 1997); People v. de Baca, 948 P.2d 1 (Colo. 1997); People v. Babinski, 951 P.2d 1240

(Colo. 1998); People v. Rishel, 956 P.2d 542 (Colo. 1998); In re Corbin, 973 P.2d 1273 (Colo. 1999); In re Bobbitt, 980 P.2d 538 (Colo. 1999); In re Demaray, 8 P.3d 427 (Colo. 1999); People v. Maynard, 219 P.3d 430 (Colo. O.P.D.J. 2008).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Walsh, 880 P.2d 766 (Colo. 1994); People v. Marsh, 908 P.2d 1115 (Colo. 1996); People v. Jenks, 910 P.2d 688 (Colo. 1996); People v. Jamrozek, 921 P.2d 725 (Colo. 1996); People v. Steinman, 930 P.2d 596 (Colo. 1997); People v. Townshend, 933 P.2d 1327 (Colo. 1997); People v. Madigan, 938 P.2d 1162 (Colo. 1997); People v. Swan, 938 P.2d 1164 (Colo. 1997); People v. Sousa, 943 P.2d 448 (Colo. 1997); People v. Schaefer, 944 P.2d 78 (Colo. 1997); People v. Clyne, 945 P.2d 1386 (Colo. 1997); People v. Crist, 948 P.2d 1020 (Colo. 1997); People v. Roybal, 949 P.2d 993 (Colo. 1997); People v. Holmes, 951 P.2d 477 (Colo. 1998); People v. Holmes, 955 P.2d 1012 (Colo. 1998); People v. Hindman, 958 P.2d 463 (Colo. 1998); People v. Valley, 960 P.2d 141 (Colo. 1998); People v. Skaalerud, 963 P.2d 341 (Colo. 1998); People v. Gonzalez, 967 P.2d 156 (Colo. 1998); In re Bilderback, 971 P.2d 1061 (Colo. 1999); In re Hugen, 973 P.2d 1267 (Colo. 1999); In re Tolley, 975 P.2d 1115 (Colo. 1999); In re Stevenson, 979 P.2d 1043 (Colo. 1999); People v. Rasure, 212 P.3d 973 (Colo. O.P.D.J. 2009); People v. Sweetman, 218 P.3d 1123 (Colo. O.P.D.J. 2008).

Rule 1.4. Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Source: Comment amended April 20, 2000, effective July 1, 2000; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations—depending on both the importance of the action under consideration and the feasibility of consulting with the client—this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the

lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

Explanation of Fees and Expenses

[7A] Information provided to the client under Rule 1.4(a) should include information concerning fees charged, costs, expenses, and disbursements with regard to the client's matter. Additionally, the lawyer should promptly respond to the client's reasonable requests concerning such matters. It is strongly recommended that all these communications be in writing. As to the basis or rate of the fee, see Rule 1.5(b).

ANNOTATION

Law reviews. For article, "The Evolving Doctrine of Informed Consent in Colorado", see 23 Colo. Law. 591 (1994). For article, "Confirm Attorney Fees in Writing: Court Changes Colo. RPC 1.4, 1.5", see 29 Colo. Law. 27 (June 2000). For article, "Ethical Concerns When Dealing With the Elder Client", see 34 Colo. Law. 27 (October 2005). For article, "The Duty of Loyalty and Preparations to Compete", see 34 Colo. Law. 67 (November 2005). For article, "Ethics in Family Law and the New Rules of Professional Conduct", see 37 Colo. Law. 47 (October 2008). For article, "Attorney-Client Communications in Colorado", see 38 Colo. Law. 59 (April 2009). For article, "Informed Consent Under the Rules of Professional Conduct", see 40 Colo. Law. 109 (July 2011).

Annotator's note. Rule 1.4 is similar to Rule 1.4 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

Public censure appropriate where harm suffered by attorney's client was speculative, attorney retracted his misrepresentations and admitted to his client before the institution of disciplinary proceedings that he had done nothing on the client's appeal, attorney had no prior discipline, he made full and free disclosure of his misconduct to the grievance committee, and he expressed remorse for his misconduct. People v. Nelson, 848 P.2d 351 (Colo. 1993).

Public censure instead of private censure was appropriate where attorney failed to respond to discovery requests and motions for summary judgment and the findings of the board did not support the applicability of ABA Standard 9.32(i) as a mitigating factor since there was no medical evidence that attorney was affected by chemical dependency or that

alcohol contributed to or caused the misconduct. People v. Brady, 923 P.2d 887 (Colo. 1996).

Aggravating and mitigating factors. The following factors are considered aggravating when deciding the appropriate level of discipline: (1) Prior discipline, (2) a pattern of misconduct, and (3) bad faith obstruction of the disciplinary process through total non-cooperation with the disciplinary authorities. Failure to appear before the disciplinary board will cause one to lose the ability to present evidence of mitigating factors. People v. Stevenson, 980 P.2d 504 (Colo. 1999).

Attorney's restitution agreement was neither an aggravating nor mitigating factor since the attorney did not propose or attempt any form of restitution until after a request for investigation had been filed with the office of disciplinary counsel. People v. Brady, 923 P.2d 887 (Colo. 1996).

Attorney's argument that public discipline is not appropriate because it would stigmatize a recovering alcoholic was rejected since overriding concern in discipline proceedings is to protect the public through the enforcement of professional standards of conduct. People v. Brady, 923 P.2d 887 (Colo. 1996).

Neglecting to file response to motion for summary judgment and to return client files upon request was sufficient to result in one-year and one-day suspension. People v. Honaker, 847 P.2d 640 (Colo. 1993).

Ninety-day suspension justified where attorney's failure to respond to discovery requests resulted in default and entry of judgment against client for $816,613. People v. Clark, 927 P.2d 838 (Colo. 1996).

Attorney's inaction over a period of more than two years and other disciplinary violations warrant suspension for 30 days where there are mitigating factors. People v. LaSalle, 848 P.2d 348 (Colo. 1993).

Suspension for one year and one day appropriate when attorney neglected to return client files upon request. People v. Honaker, 847 P.2d 640 (Colo. 1993).

Suspension for three years, rather than disbarment, was appropriate where violation of this rule and others caused serious harm to attorney's clients, but mitigating factors were present, including no previous discipline in 14 years of practice, personal and emotional problems, and cooperation and demonstrated remorse in proceedings. People v. Henderson, 967 P.2d 1038 (Colo. 1998).

Three-year suspension warranted for attorney who effectively abandoned and failed to communicate with clients. People v. Shock, 970 P.2d 966 (Colo. 1999).

Previously disbarred attorney who violated this rule would be forced to pay restitution to clients as a condition of readmission. People v. Vigil, 945 P.2d 1385 (Colo. 1997).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Titoni, 893 P.2d 1322 (Colo. 1995); People v. Doherty, 908 P.2d 1120 (Colo. 1996); People v. Woodrum, 911 P.2d 640 (Colo. 1996); People v. Barbieri, 935 P.2d 12 (Colo. 1997); People v. Williams, 936 P.2d 1289 (Colo. 1997); People v. Buckingham, 938 P.2d 1157 (Colo. 1997); People v. Todd, 938 P.2d 1160 (Colo. 1997); People v. Doherty, 945 P.2d 1380 (Colo. 1997); People v. Barr, 957 P.2d 1379 (Colo. 1998).

Conduct violating rule sufficient to justify public censure. People v. Smith, 847 P.2d 1154 (Colo. 1993); People v. Damkar, 908 P.2d 1113 (Colo. 1996); People v. Marsh, 908 P.2d 1115 (Colo. 1996); People v. Jenks, 910 P.2d 688 (Colo. 1996); People v. Pooley, 917 P.2d 712 (Colo. 1996); People v. Belsches, 918 P.2d 559 (Colo. 1996).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Crews, 901 P.2d 472 (Colo. 1995); People v. Kuntz, 908 P.2d 1110 (Colo. 1996); People v. Murray, 912 P.2d 554 (Colo. 1996); People v. Hohertz, 926 P.2d 560 (Colo. 1996); People v. Paulson, 930 P.2d 582 (Colo. 1997); People v. Bates, 930 P.2d 600 (Colo. 1997); People v. Reynolds, 933 P.2d 1295 (Colo. 1997); People v. Townshend, 933 P.2d 1327 (Colo. 1997); People v. Scott, 936 P.2d 573 (Colo. 1997); People v. Sather, 936 P.2d 576 (Colo. 1997); People v. Harding, 937 P.2d 393 (Colo. 1997); People v. Primavera, 942 P.2d 496 (Colo. 1997); People v. Field, 944 P.2d 1252 (Colo. 1997); People v. Johnson, 946 P.2d 469 (Colo. 1997); People v. Wright, 947 P.2d 941 (Colo. 1997); People v. Rishel, 956 P.2d 542 (Colo. 1998); In re Corbin, 973 P.2d 1273 (Colo. 1999); In re Bobbitt, 980 P.2d 538 (Colo. 1999); In re Demaray, 8 P.3d 427 (Colo. 1999).

Conduct violating this rule, in conjunction with other disciplinary rules, sufficient to justify disbarment where the attorney continued to practice law while on suspension, repeatedly neglecting his clients and failing to take reasonable steps to protect clients' interests. People v. Fager, 938 P.2d 138 (Colo. 1997).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Jamrozek, 921 P.2d 725 (Colo. 1996); People v. Steinman, 930 P.2d 596 (Colo. 1997); People v. Wallace, 936 P.2d 1282 (Colo. 1997); People v. Mannix, 936 P.2d 1285 (Colo. 1997); People v. Madigan, 938 P.2d 1162 (Colo. 1997); People v. Swan, 938 P.2d 1164 (Colo. 1997); People v. Clyne, 945 P.2d 1386 (Colo. 1997); People v. Crist, 948 P.2d 1020 (Colo. 1997); People v. Roybal, 949 P.2d 993 (Colo. 1997); People v. Holmes, 951 P.2d 477 (Colo. 1998); People v. Holmes, 955

P.2d 1012 (Colo. 1998); People v. Hindman, 958 P.2d 463 (Colo. 1998); People v. Valley, 960 P.2d 141 (Colo. 1998); People v. Skaalerud, 963 P.2d 341 (Colo. 1998); In re Bilderback, 971 P.2d 1061 (Colo. 1999); In re Hugen, 973 P.2d 1267 (Colo. 1999); In re Tolley, 975 P.2d 1115 (Colo. 1999); In re Stevenson, 979 P.2d 1043 (Colo. 1999); In re Haines, 177 P.3d 1239 (Colo. 2008); People v. Rasure, 212 P.3d 973 (Colo. O.P.D.J. 2009); People v. Sweetman, 218 P.3d 1123 (Colo. O.P.D.J. 2008).

Conduct violating rule sufficient to justify disbarment. People v. Robnett, 859 P.2d 872 (Colo. 1993).

Cases Decided Under Former DR 9-102.

Law reviews. For series of articles, "Interest on Lawyer Trust Accounts Program: A Primer for Lawyers", see 12 Colo. Law 577 (1983). For article, "Ethical Problem Areas for Probate Lawyers", see 19 Colo. Law. 1069 (1990).

Paragraphs (A) and (B)(3) require as a minimum standard of conduct that a lawyer segregate his clients' funds from his own and keep them in identifiable bank trust accounts. People v. Harthun, 197 Colo. 1, 593 P.2d 324 (1979); People v. Schubert, 799 P.2d 388 (Colo. 1990).

Most severe punishment is required when a lawyer disregards his professional obligations and converts his clients' funds to his own use. People v. Kluver, 199 Colo. 511, 611 P.2d 971 (1980); People v. Dohe, 800 P.2d 71 (Colo. 1990); People v. Whitcomb, 819 P.2d 493 (Colo. 1991).

Misuse of funds by a lawyer strikes at the heart of the legal profession by destroying public confidence in lawyers. The most severe punishment is required when a lawyer disregards his professional obligations and converts his clients' funds to his own use. People v. Buckles, 673 P.2d 1008 (Colo. 1984); People v. Wolfe, 748 P.2d 789 (Colo. 1987).

Conversion of client funds is conduct warranting disbarment because it destroys the trust essential to the attorney-client relationship, severely damages the public's perception of attorneys, and erodes public confidence in our legal system. People v. Radosevich, 783 P.2d 841 (Colo. 1989).

Disbarment is the presumed sanction for misappropriation of funds barring significant mitigating circumstances. People v. Young, 864 P.2d 563 (Colo. 1993); People v. Varallo, 913 P.2d 1 (Colo. 1996); People v. Coyne, 913 P.2d 12 (Colo. 1996).

Failure and refusal to refund unearned portions of fees collected from two clients constituted violations of C.R.C.P. 241(B) (now C.R.C.P. 241.6), DR 2-110, and this rule. People v. Gellenthien, 621 P.2d 328 (Colo. 1981).

Attorney obligated to forward client's file upon request. Failure to forward client's file a year after a request is made constitutes conduct violative of disciplinary rules. People v. Belina, 765 P.2d 121 (Colo. 1988).

Failing to provide a client with an accounting of charges applied against a retainer after the client's request therefor, in conjunction with other instances of neglect, is conduct warranting public censure. People v. Goodwin, 782 P.2d 1 (Colo. 1989).

Failure to make proper accounting to client with respect to trust funds and failure to promptly deliver to the client funds to which she is entitled warrants public censure. People v. Robnett, 737 P.2d 1389 (Colo. 1987).

Failure to deposit funds in trust account, to notify client of receipt of funds and provide accounting, and to forward file promptly to new attorney constitute a violation of this rule and, with other offenses, warrants public censure. People v. Swan, 764 P.2d 54 (Colo. 1988).

Violation of duty to account for and promptly return client property upon request over a three-year period warrants public censure. People v. Shunneson, 814 P.2d 800 (Colo. 1991).

Public censure for failure to promptly distribute proceeds of a settlement is warranted since respondent's negligence did little or no actual or potential injury to client. People v. Genchi, 824 P.2d 815 (Colo. 1992).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Ashley, 796 P.2d 962 (Colo. 1990); People v. Sadler, 831 P.2d 887 (Colo. 1992).

Converting estate or trust funds for one's personal use, overcharging for services rendered, neglecting to return inquiries relating to client matters, failing to make candid disclosures to grievance committee, and attempting to conceal wrongdoing during disciplinary proceedings warrants the severe sanction of disbarment. People v. Gerdes, 782 P.2d 2 (Colo. 1989).

Conduct violating this rule sufficient to justify public censure. People v. Bollinger, 648 P.2d 620 (Colo. 1982); People v. Wright, 698 P.2d 1317 (Colo. 1985); People v. Mayer, 716 P.2d 1094 (Colo. 1986); People v. Schaiberger, 731 P.2d 728 (Colo. 1987); People v. Barr, 748 P.2d 1302 (Colo. 1988); People v. Danker, 759 P.2d 14 (Colo. 1988).

Two-year unjustified retention of one client's file, coupled with failure to withdraw at request of said client and refusal to forward a second client's file to subsequent counsel, resulting in both clients sustaining injuries, justifies suspension for the period of a year and a day. People v. Hodge, 752 P.2d 533 (Colo. 1988).

Failure to account for money collected on behalf of client, despite numerous client requests for accounting, and failure to adhere to

terms of agreement with client regarding representation, coupled with prior, ongoing suspension, warrants additional six-month suspension. People v. Yost, 752 P.2d 542 (Colo. 1988).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Moya, 793 P.2d 1154 (Colo. 1990); People v. Creasey, 793 P.2d 1159 (Colo. 1990); People v. Schubert, 799 P.2d 388 (Colo. 1990); People v. Garrett, 802 P.2d 1082 (Colo. 1990); People v. Lamberson, 802 P.2d 1098 (Colo. 1990); People v. Crimaldi, 804 P.2d 863 (Colo. 1991); People v. Dunsmoor, 807 P.2d 561 (Colo. 1991); People v. Dash, 811 P.2d 36 (Colo. 1991); People v. Creasey, 811 P.2d 40 (Colo. 1991); People v. Wilson, 814 P.2d 791 (Colo. 1991); People v. Heilbrunn, 814 P.2d 819 (Colo. 1991); People v. Smith, 828 P.2d 249 (Colo. 1992); People v. Driscoll, 830 P.2d 1019 (Colo. 1992); People v. Regan, 831 P.2d 893 (Colo. 1992); People v. Denton, 839 P.2d 6 (Colo. 1992). People v. Smith, 880 P.2d 763 (Colo. 1994); People v. Banman, 901 P.2d 469 (Colo. 1995); People v. Crews, 901 P.2d 472 (Colo. 1995); People v. Dickinson, 903 P.2d 1132 (Colo. 1995); People v. Davis, 911 P.2d 45 (Colo. 1996).

Conduct violating this rule sufficient to justify suspension. People v. Vernon, 660 P.2d 879 (Colo. 1982); People v. Pilgrim, 698 P.2d 1322 (Colo. 1985); People v. Foster, 716 P.2d 1069 (Colo. 1986); People v. Coca, 716 P.2d 1073 (Colo. 1986); People v. Calvert, 721 P.2d 1189 (Colo. 1986); People v. Holmes, 731 P.2d 677 (Colo. 1987); People v. Geller, 753 P.2d 235 (Colo. 1988); People v. Griffin, 764 P.2d 1166 (Colo. 1988); People v. Goldberg, 770 P.2d 408 (Colo. 1989); People v. Goens, 770 P.2d 1218 (Colo. 1989); People v. Kaemingk, 770 P.2d 1247, (Colo. 1989); People v. McGrath, 780 P.2d 492 (Colo. 1989).

Derelictions in fiduciary duties by an attorney which go beyond mere negligence warrant disbarment. People v. Roads, 180 Colo. 192, 503 P.2d 1024 (1972).

Attorney failed to deliver property of a client in violation of this rule by ignoring requests for client's files made by the client, the client's attorney, and the grievance committee. People v. Felker, 770 P.2d 402 (Colo. 1989).

Refusal to provide accounting for money and jewelry delivered to him and refusal to itemize the services performed and the costs incurred warrant disbarment. People v. Lanza, 660 P.2d 881 (Colo. 1983).

Commingling and appropriation of funds warrants disbarment. When a lawyer collects $3000 on behalf of a client in connection with a sale of real estate and commingles it with his other trust funds and unlawfully converts it to his own use, his flagrant disregard of his professional obligation warrants disbarment. People v. McMichael, 199 Colo. 433, 609 P.2d 633 (1980).

Where a practicing attorney breached fiduciary duties to his client in misrepresenting his dealings and in handling of funds given to him in trust, his conduct warranted disbarment, and, before he may seek readmittance to the state bar association, he must first demonstrate to the grievance committee that rehabilitation has occurred and that he is entitled to a new start. People ex rel. Buckley v. Beck, 199 Colo. 482, 610 P.2d 1069 (1980).

Commingling a client's funds with those of the lawyer is a serious violation of the Code of Professional Responsibility, even in the absence of an actual loss to the client, because the act of commingling subjects the client's funds to the claims of the lawyer's creditors. People v. McGrath, 780 P.2d 492 (Colo. 1989).

Misappropriation of funds, failure to account, and deceit and fraud in handling the affairs of a client necessitate that an attorney be disbarred. People v. Bealmear, 655 P.2d 402 (Colo. 1982); People v. Costello, 781 P.2d 85 (Colo. 1989).

Conduct which causes a client serious or potentially serious injury and demonstrates a complete lack of concern for a client's interests and welfare warrants disbarment. People v. Lyons, 762 P.2d 143 (Colo. 1988).

Alcoholism not excuse. Efforts at alcoholism rehabilitation do not excuse conduct which includes dishonesty and fraud, failing to preserve identity of client funds, and failing to properly pay or deliver client funds, and which otherwise warrants disbarment. People v. Shafer, 765 P.2d 1025 (Colo. 1988).

Total disregard of obligation to protect a client's rights and interests over an extended period of time in conjunction with the violation of a number of disciplinary rules and an extended prior record of discipline requires most severe sanction of disbarment. People v. O'Leary, 783 P.2d 843 (Colo. 1989).

Disbarment was appropriate where attorney removed $5,000 from a client's trust account, refused to return money upon several request by the client which ultimately resulted in a suit against the attorney, and the attorney lied about the transaction to the attorney with whom he shared office space. Factors in aggravation included a history of prior discipline, including suspension for conversion of client funds, the dishonest motive of the attorney in removing and not returning the client's funds, the attorney's refusal to acknowledge the wrongful nature of his conduct, the vulnerability of the client, and the attorney's legal experience. Mitigating factors were insufficient for disciplinary action short of disbarment. People v. McGrath, 833 P.2d 731 (Colo. 1992).

Disbarment is appropriate sanction where attorney knowingly converts client property and causes injury or potential injury to a client.

People v. Bowman, 887 P.2d 18 (Colo. 1994); People v. Varallo, 913 P.2d 1 (Colo. 1996).

Rule is violated when attorney "knowingly" converts client funds; there is no requirement that the attorney intend to permanently deprive the client of the funds. People v. Varallo, 913 P.2d 1 (Colo. 1996).

Disbarment was appropriate where attorney converted $25,000 of client funds on seven different occasions over a period of four months and did not restore any of the missing funds until after he was detected. People v. Robbins, 869 P.2d 517 (Colo. 1994).

Disbarment was appropriate where the balance of the respondent's trust accounts fell below the amount necessary to pay settlements on at least 45 occasions and where the respondent withdrew attorney fees on at least 68 occasions from trust accounts before receiving the funds from which the fees were to be taken. People v. Lefly, 902 P.2d 361 (Colo. 1995).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Nichols, 796 P.2d 966 (Colo. 1990); People v. Broadhurst, 803 P.2d 478 (Colo. 1990); People v. Rhodes, 814 P.2d 787 (Colo. 1991); People v. Vermillion, 814 P.2d 795 (Colo. 1991); People v. Ashley, 817 P.2d 965 (Colo. 1991); People v. Rouse, 817 P.2d 967 (Colo. 1991); People v. Whitcomb, 819 P.2d 493 (Colo. 1991); People v. Margolin, 820 P.2d 347 (Colo. 1991); People v. Bradley, 825 P.2d 475 (Colo. 1992); People v. Mullison, 829 P.2d 382 (Colo. 1992); People v. Tanquary, 831 P.2d 889 (Colo. 1992); People v. McGrath, 833 P.2d 731 (Colo. 1992); People v. Brown, 840 P.2d 348 (Colo. 1992); People v. Walsh, 880 P.2d 766 (Colo. 1994); People v. Varallo, 913 P.2d 1 (Colo. 1996); People v. Coyne, 913 P.2d 12 (Colo. 1996); People v. Jamrozek, 921 P.2d 725 (Colo. 1996).

Conduct violating this rule sufficient to justify disbarment. People v. Kendrick, 646 P.2d 337 (Colo. 1982); People v. Dwyer, 652 P.2d 1074 (Colo. 1982); People v. Golden, 654 P.2d 853 (Colo. 1982); People v. Fitzke, 716 P.2d 1065 (Colo. 1986); People v. Quick, 716 P.2d 1082 (Colo. 1986); People v. Yost, 729 P.2d 348 (Colo. 1986); People v. James, 731 P.2d 698 (Colo. 1987); People v. Coca, 732 P.2d 640 (Colo. 1987); People v. Foster, 733 P.2d 687 (Colo. 1987); People v. Quintana, 752 P.2d 1059 (Colo. 1988); People v. Kengle, 772 P.2d 605 (Colo. 1989); People v. Frank, 782 P.2d 769 (Colo. 1989); People v. Dulaney, 785 P.2d 1302 (Colo. 1990); People v. Franks, 791 P.2d 1 (Colo. 1990); People v. Mulligan, 817 P.2d 1028 (Colo. 1991); People v. Young, 864 P.2d 563 (Colo. 1993).

Failure to transfer file to new attorney after repeated requests constitutes a violation of this rule. People v. Hebenstreit, 764 P.2d 51 (Colo. 1988).

Conduct held to violate this rule. People v. Goss, 646 P.2d 334 (Colo. 1982).

Applied in People v. Spiegel, 193 Colo. 161, 567 P.2d 353 (1977); People v. Good, 195 Colo. 177, 576 P.2d 1020 (1978); People v. Pacheco, 198 Colo. 455, 608 P.2d 333 (1979); People v. Belfor, 200 Colo. 44, 611 P.2d 979 (1980); People ex rel. Silverman v. Anderson, 200 Colo. 76, 612 P.2d 94 (1980); People v. Lanza, 200 Colo. 241, 613 P.2d 337 (1980); People v. Meldahl, 200 Colo. 332, 615 P.2d 29 (1980); People v. Davis, 620 P.2d 725 (Colo. 1980); People v. Dutton, 629 P.2d 103 (Colo. 1981); People v. Moore, 681 P.2d 480 (Colo. 1984); People v. Underhill, 683 P.2d 349 (Colo. 1984); People v. Franco, 698 P.2d 230 (Colo. 1985); People v. Blanck, 700 P.2d 560 (Colo. 1985); People v. Turner, 746 P.2d 49 (Colo. 1987).

Rule 1.5. Fees

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee and expenses shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation. Any changes in the basis or rate of the fee or

expenses shall also be promptly communicated to the client, in writing.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is otherwise prohibited. A contingent fee agreement shall meet all of the requirements of Chapter 23.3 of the Colorado Rules of Civil Procedure, "Rules Governing Contingent Fees."

(d) Other than in connection with the sale of a law practice pursuant to Rule 1.17, a division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

(2) the client agrees to the arrangement, including the basis upon which the division of fees shall be made, and the client's agreement is confirmed in writing; and

(3) the total fee is reasonable.

(e) Referral fees are prohibited.

(f) Fees are not earned until the lawyer confers a benefit on the client or performs a legal service for the client. Advances of unearned fees are the property of the client and shall be deposited in the lawyer's trust account pursuant to Rule 1.15(f)(1) until earned. If advances of unearned fees are in the form of property other than funds, then the lawyer shall hold such property separate from the lawyer's own property pursuant to Rule 1.15(a).

(g) Nonrefundable fees and nonrefundable retainers are prohibited. Any agreement that purports to restrict a client's right to terminate the representation, or that unreasonably restricts a client's right to obtain a refund of unearned or unreasonable fees, is prohibited.

Source: (b) and Comment amended April 20, 2000, effective July 1, 2000; (d) amended and adopted April 18, 2001, effective July 1, 2001; entire rule and Comment amended and adopted May 30, 2002, effective July 1, 2002; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008; Comment [7] amended and effective November 6, 2008; (b) amended and Comment [3A] repealed March 10, 2011, effective July 1, 2011.

COMMENT

Reasonableness of Fee and Expenses

[1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, the basis or rate of the fee must be promptly communicated in writing to the client. When the lawyer has regularly represented a client, they ordinarily will have reached an understanding concerning the basis or rate of the fee; but, when there has been a change from their previous understanding, the basis or rate of the fee should be promptly communicated in writing. All contingent fee arrangements must be in writing, regardless of whether the client-lawyer relationship is new or established. See C.R.C.P., Ch. 23.3, Rule 1. A written communication must disclose the basis or rate of the lawyer's fees, but it need not take the form of a formal engagement letter or agreement, and it need not be signed by the client. Moreover, it is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, to identify the factors that may be take into account in finally fixing the fee, or to furnish the client with a simple memorandum or the lawyer's customary fee schedule. When developments occur during the representation that render an earlier disclosure substantially inaccurate, a revised written disclosure should be provided to the client.

[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage

allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

[3A] Repealed.

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

[6] [No Colorado comment.]

Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should refer a matter only to a lawyer who the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

Disputes over Fees

[9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

Advances of Unearned Fees and Engagement Retainer Fees

[10] The analysis of when a lawyer may treat advances of unearned fees as property of the lawyer must begin with the principle that the lawyer must hold in trust all fees paid by the client until there is a basis on which to conclude that the lawyer has earned the fee; otherwise the funds must remain in the lawyer's trust account because they are not the lawyer's property.

[11] To make a determination of when an advance fee is earned, the written statement of the basis or rate of the fee, when required by Rule 1.5(b), should include a description of the benefit or service that justifies the lawyer's earning the fee, the amount of the advance unearned fee, as well as a statement describing when the fee is earned. Whether a lawyer has conferred a sufficient benefit to earn a portion of the advance fee will depend on the circumstances of the particular case. The circumstances under which a fee is earned should be evaluated under an objective standard of reasonableness. Rule 1.5(a).

Rule 1.5(f) Does Not Prohibit Lump-sum Fees or Flat Fees

[12] Advances of unearned fees, including "lump-sum" fees and "flat fees," are those funds the client pays for specified legal services that the lawyer has agreed to perform in the future. Pursuant to Rule 1.15, the lawyer must deposit an advance of unearned fees in the lawyer's trust account. The funds may be earned only as the lawyer performs specified legal services or confers benefits on the client as provided for in the written statement of the basis of the fee, if a written statement is required by

Rule 1.5(b). See also Restatement (Third) of the Law Governing Lawyers §§ 34, 38 (1998). Rule 1.5(f) does not prevent a lawyer from entering into these types of arrangements.

[13] For example, the lawyer and client may agree that portions of the advance of unearned fees are deemed earned at the lawyer's hourly rate and become the lawyer's property as and when the lawyer provides legal services.

[14] Alternatively, the lawyer and client may agree to an advance lump-sum or flat fee that will be earned in whole or in part based upon the lawyer's completion of specific tasks or the occurrence of specific events, regardless of the precise amount of the lawyer's time involved. For instance, in a criminal defense matter, a lawyer and client may agree that the lawyer earns portions of the advance lump-sum or flat fee upon the lawyer's entry of appearance, initial advisement, review of discovery, preliminary hearing, pretrial conference, disposition hearing, motions hearing, trial, and sentencing. Similarly, in a trusts and estates matter, a lawyer and client may agree that the lawyer earns portions of the lump-sum or flat fee upon client consultation, legal research, completing the initial draft of testamentary documents, further client consultation, and completing the final documents.

[15] The portions of the advance lump sum or flat fee earned as each such event occurs need not be in equal amounts. However, the fees attributed to each event should reflect a reasonable estimate of the proportionate value of the legal services the lawyer provides in completing each designated event to the anticipated legal services to be provided on the entire matter. See Rule 1.5(a); *Feiger, Collison & Killmer v. Jones*, 926 P.2d 1244, 1252-53 (Colo. 1996) (client's sophistication is relevant factor).

[16] "[A]n 'engagement retainer fee' is a fee paid, apart from any other compensation, to ensure that a lawyer will be available for the client if required. An engagement retainer must be distinguished from a lump-sum fee constituting the entire payment for a lawyer's service in a matter and from an advance payment from which fees will be subtracted (see § 38, Comment g). A fee is an engagement retainer only if the lawyer is to be additionally compensated for actual work, if any, performed." Restatement (Third) of the Law Governing Lawyers § 34 Comment e. An engagement retainer fee agreement must comply with Rule 1.5(a), (b), and (g), and should expressly include the amount of the engagement retainer fee, describe the service or benefit that justifies the lawyer's earning the engagement retainer fee, and state that the engagement retainer fee is earned upon receipt. As defined above, an engagement retainer fee will be earned upon receipt because the lawyer provides an immediate benefit to the client, such as forgoing other business opportunities by making the lawyer's services available for a given period of time to the exclusion of other clients or potential clients, or by giving priority to the client's work over other matters.

[17] Because an engagement retainer fee is earned at the time it is received, it must not be commingled with client property. However, it may be subject to refund to the client in the event of changed circumstances.

[18] It is unethical for a lawyer to fail to return unearned fees, to charge an excessive fee, or to characterize any lawyer's fee as nonrefundable. Lawyer's fees are always subject to refund if either excessive or unearned. If all or some portion of a lawyer's fee becomes subject to refund, then the amount to be refunded should be paid directly to the client if there is no further legal work to be performed or if the lawyer's employment is terminated. In the alternative, if there is an ongoing client-lawyer relationship and there is further work to be done, it may be deposited in the lawyer's trust account, to be withdrawn from the trust account as it is earned.

ANNOTATION

Law reviews. For article, "Confirm Attorney Fees in Writing: Court Changes Colo. RPC 1.4, 1.5", see 29 Colo. Law. 27 (June 2000). For article, "Fee Agreements: Types, Provisions, Ethical Boundaries, and Other Considerations-Part I", see 31 Colo. Law. 35 (March 2002). For article, "Fee Agreements: Types, Provisions, Ethical Boundaries, and Other Considerations-Part II", see 31 Colo. Law. 35 (April 2002). For article, "Enforcing Civility: The Rules of Professional Conduct in Deposition Settings", see 33 Colo. Law. 75 (March 2004). For article, "The Duty of Loyalty and Preparations to Compete", see 34 Colo. Law. 67 (November 2005). For article, "Non-Monetary Compensation for Legal Services How Many Chickens Am I Worth?", see 35 Colo. Law. 95 (January 2006). For article, "The New Rules of Professional Conduct: Significant Changes for In-House Counsel", see 36 Colo. Law. 71 (November 2007). For article, "Ethics in Family Law and the New Rules of Professional Conduct", see 37 Colo. Law. 47 (October 2008). For article, "Midstream Fee and Expense Modifications Under the Colorado Ethics Rules", see 40 Colo. Law. 79 (August 2011).

Annotator's note. Rule 1.5 is similar to Rule 1.5 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

Supreme court is exclusive tribunal for regulation of the practice of law, including reasonableness of fees, notwithstanding statutory provision allowing the director of the division of workers' compensation to determine reasonableness of fees in a workers' compensation case. In re Wimmershoff, 3 P.3d 417 (Colo. 2000).

Agreement for the division of fees between a firm and an attorney separating from the firm is valid and not against public policy. Where an attorney enters into a separation agreement with his or her firm upon departure and the agreement specifies the division of fees for clients continuing legal services with the departing attorney, the agreement is enforceable and does not implicate the policies behind this rule. Norton Frickey, P.C. v. James B. Turner, P.C., 94 P.3d 1266 (Colo. App. 2004).

Further, clients benefit from separation agreements between a departing attorney and the firm because the client is not charged additional fees as a result of the agreement, nor is the client deceived or misled. Norton Frickey, P.C. v. James B. Turner, P.C., 94 P.3d 1266 (Colo. App. 2004).

Charging client for costs of defending grievance proceeding violates DR 2-106(A) where charges are not unfounded and there is no prior agreement to pay such costs. People v. Brown, 840 P.2d 1085 (Colo. 1992).

Lawyer who billed client for the costs of defending a grievance violated this rule. There was no agreement between the attorney and the client to justify the billing, and the attorney's claim that the billing stemmed from the attorney's independent duty to protect the client was found by the grievance panel to be false. Therefore, the billing based on such a theory is deceptive and dishonest in violation of this rule. The appropriate sanction for the lawyer's conduct is public censure. People v. Brown, 840 P.2d 1085 (Colo. 1992).

Attorney's professional misconduct involving the improper collection of attorney's fees in six instances justified 45-day suspension. People v. Peters, 849 P.2d 51 (Colo. 1993).

Lawyer's bills proper under this rule when lawyer billed attorney and secretarial services separately. Newport Pac. Capital Co. v. Waste, 878 P.2d 136 (Colo. App. 1994).

Relief in the nature of mandamus may be appropriate when it is alleged that a sheriff or chief of police has refused to accept applications for concealed weapons permits from private investigators who are not current or retired law enforcement officers and the sheriff or police chief has thereby breached a statutory duty to conduct a background check on each applicant. Miller v. Collier, 878 P.2d 141 (Colo. App. 1994).

Public policy of protecting a client's right to control settlement will be better served by not treating a clause in a representation agreement that restricts the client's right to control settlement as severable from the provision for calculating fees. Where representation agreement provided alternate method of calculating the fees payable if the client unreasonably refused to settle, court refused to enforce either provision and allowed only reasonable value of services rendered by law firm. Jones v. Feiger, Collison & Killmer, 903 P.2d 27 (Colo. App. 1994), rev'd on other grounds, 926 P.2d 1244 (Colo. 1996).

Stipulated agreement and recommendation of public censure with certain conditions and monitoring based upon conditional admission of misconduct were warranted for attorney who required that his associates sign a covenant that allowed his firm to collect 75 to 100 percent of the total fee generated by a case in which his firm did less than all the work. People v. Wilson, 953 P.2d 1292 (Colo. 1998).

Public censure and restitution were appropriate in case of attorney who unilaterally charged client $1,000 in addition to previously agreed contingent fee. In re Wimmershoff, 3 P.3d 417 (Colo. 2000).

Conduct violating this rule in conjunction with other disciplinary rules, where mitigating factors were present, warrants public censure. People v. Davis, 950 P.2d 586 (Colo. 1998).

Conduct violating this rule sufficient to justify public censure. In re Green, 11 P.3d 1078 (Colo. 2000).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Crews, 901 P.2d 472 (Colo. 1995); People v. Hohertz, 926 P.2d 560 (Colo. 1996); People v. Sather, 936 P.2d 576 (Colo. 1997); People v. Kotarek, 941 P.2d 925 (Colo. 1997); People v. Johnson, 946 P.2d 469 (Colo. 1997).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Jenks, 910 P.2d 688 (Colo. 1996); People v. Jamrozek, 921 P.2d 725 (Colo. 1996); People v. Sousa, 943 P.2d 448 (Colo. 1997); People v. Clyne, 945 P.2d 1386 (Colo. 1997); People v. Roybal, 949 P.2d 993 (Colo. 1997); People v. Valley, 960 P.2d 141 (Colo. 1998).

Cases Decided Under Former DR 2-103.

Law reviews. For article, "The Lawyer's Duty to Report Ethical Violations", see 18 Colo. Law. 1915 (1989). For formal opinion of the Colorado Bar Association Ethics Committee on Collaboration with Non-Lawyers in the Preparation and Marketing of Estate Planning Documents, see 19 Colo. Law. 1793 (1990).

Attorney's conduct in paying inmates for referrals to attorney for the provision of legal services justifies 60-day suspension. People v.

Shipp, 793 P.2d 574 (Colo. 1990).

Attorney's conduct in allowing company selling living trust packages to provide his name, exclusively, to customers upon sale, in conjunction with other violations and aggravating factors justifies six-month suspension. People v. Cassidy, 884 P.2d 309 (Colo. 1994).

Cases Decided Under Former DR 2-106.

Law reviews. For article, "Conflicts in Settlement of Personal Injury Cases", see 11 Colo. Law. 399 (1982). For article, "Attorney's Fees", see 11 Colo. Law. 411 (1982). For article, "Providing Legal Services for the Poor: A Dilemma and an Opportunity", see 11 Colo. Law. 666 (1982). For article, "Reduced Malpractice and Augmented Competency: A Proposal", see 12 Colo. Law. 1444 (1983). For article, "Ethical Problem Areas for Probate Lawyers", see 19 Colo. Law. 1069 (1990). For formal opinion of the Colorado Bar Association Ethics Committee on Collaboration with Non-Lawyers in the Preparation and Marketing of Estate Planning Documents, see 19 Colo. Law. 1793 (1990). For formal opinion of the Colorado Bar Association Ethics Committee on Recovery of Attorney Fee by Lender Using In-House Counsel, see 20 Colo. Law. 697 (1991).

Where an attorney makes a uniform practice of imposing charges that exceed the statutory standards, such violates Canon 2. People v. Radinsky, 176 Colo. 357, 490 P.2d 951 (1971).

Attorney's charges for probate proceeding considered excessive on facts of case. People ex rel. Goldberg v. Gordon, 199 Colo. 296, 607 P.2d 995 (1980).

Attorney who assessed excessive legal fees and attempted to retain improperly charged fees, neglected clients' interests to their detriment, and made misrepresentations as to services actually performed on clients' cases was properly suspended for thirty days. Although attorney previously found to have engaged in professional misconduct, attorney suffered personal tragedy prior to misconduct and subsequently improved by engaging in activities beneficial to legal and professional community. People v. Brenner, 764 P.2d 1178 (Colo. 1988).

Where attorney enters into a fee arrangement basing his compensation directly on royalties his client might receive from oil and gas wells, it is clear that the arrangement is not intended as compensation for legal services provided and therefore constitutes conduct violating this rule sufficient to justify suspension. People v. Nutt, 696 P.2d 242 (Colo. 1984).

Contingent fee agreement in a probate proceeding is not unconscionable or unreasonable where it was openly made and supported by adequate consideration. In re Estate of Reid, 680 P.2d 1305 (Colo. App. 1983).

Excessive fees are basis for indefinite suspension of attorney. People v. Radinsky, 176 Colo. 357, 490 P.2d 951 (1971).

Contract held not to violate prohibition against maintenance. Northland Ins. Co. v. Bashor, 177 Colo. 463, 494 P.2d 1292 (1972).

Evidence insufficient to establish excessive fee in violation of paragraph (A). People v. Lanza, 660 P.2d 881 (Colo. 1983).

Suspended or disbarred attorney does not lose right to assert a claim for fees earned prior to suspension or disbarment. Rutenbeck v. Grossenbach, 867 P.2d 36 (Colo. App. 1993).

Suspended attorney was entitled to collect one-third share of contingency fee under an agreement to divide the fee with two other attorneys where the agreement was based on a good faith division of services and responsibility at the time it was entered into. Rutenbeck v. Grossenbach, 867 P.2d 36 (Colo. App. 1993).

Public censure warranted where attorney kept the first lump sum check obtained in settlement as a lump sum payment of his contingency fee and reimbursement of costs even though he knew the settlement might later be reduced by the social security disability award and the client's union award. People v. Maceau, 910 P.2d 692 (Colo. 1996).

Suspension for one year and one day warranted where attorney billed for time that was not actually devoted to work contemplated by contract and for time not actually performed. People v. Shields, 905 P.2d 608 (Colo. 1995).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Schmad, 793 P.2d 1162 (Colo. 1990); People v. Sullivan, 802 P.2d 1091 (Colo. 1990); People v. Dunsmoor, 807 P.2d 561 (Colo. 1991); People v. Koeberle, 810 P.2d 1072 (Colo. 1991); People v. Kardokus, 881 P.2d 1202 (Colo. 1994); People v. Johnson, 881 P.2d 1205 (Colo. 1994); People v. Banman, 901 P.2d 469 (Colo. 1995); People v. Dickinson, 903 P.2d 1132 (Colo. 1995); People v. Mills, 923 P.2d 116 (Colo. 1996).

Conduct violating this rule sufficient to justify suspension. People v. Fleming, 716 P.2d 1090 (Colo. 1986).

Conduct violating this rule sufficient to justify disbarment. People v. Dwyer, 652 P.2d 1074 (Colo. 1982); People v. Golden, 654 P.2d 853 (Colo. 1982); People v. Franks, 791 P.2d 1 (Colo. 1990); In re Bilderback, 971 P.2d 1061 (Colo. 1999).

Applied in Hartman v. Freedman, 197 Colo. 275, 591 P.2d 1318 (1979); People v. Meldahl, 200 Colo. 332, 615 P.2d 29 (1980); People ex rel. Cortez v. Calvert, 200 Colo. 157, 617 P.2d 797 (1980); Mau v. E.P.H. Corp., 638 P.2d 777 (Colo. 1981); Heller v. First Nat'l Bank, 657 P.2d 992 (Colo. App. 1982); People v. Franco, 698 P.2d 230 (Colo. 1985); People v. Coca, 732 P.2d 640 (Colo. 1987).

Rule 1.6. Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to reveal the client's intention to commit a crime and the information necessary to prevent the crime;

(3) to prevent the client from committing a fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(4) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(5) to secure legal advice about the lawyer's compliance with these Rules, other law or a court order;

(6) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(7) to comply with other law or a court order.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008; Comment [16], [17], and [18] added and effective November 6, 2008.

COMMENT

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work-product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the

representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

[5A] A lawyer moving (or contemplating a move) from one firm to another is impliedly authorized to disclose certain limited non-privileged information protected by Rule 1.6 in order to conduct a conflicts check to determine whether the lawyer or the new firm is or would be disqualified. Thus, for conflicts checking purposes, a lawyer usually may disclose, without express client consent, the identity of the client and the basic nature of the representation to insure compliance with Rules such as Rules 1.7, 1.8, 1.9, 1.10, 1.11 and 1.12. Under unusual circumstances, even this basic disclosure may materially prejudice the interests of the client or former client. In those circumstances, disclosure is prohibited without client consent. In all cases, the disclosures must be limited to the information essential to conduct the conflicts check, and the confidentiality of this information must be agreed to in advance by all lawyers who receive the information.

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[6A] Paragraph (b)(2) permits disclosure regarding a client's intention to commit a crime in the future and authorizes the disclosure of information necessary to prevent the crime. This paragraph does not apply to completed crimes. Although paragraph (b)(2) does not require the lawyer to reveal the client's intention to commit a crime, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[7] Paragraph (b)(3) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(3) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[8] Paragraph (b)(4) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(4) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal

responsibility to comply with these Rules, other law, or a court order. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(5) permits such disclosure because of the importance of a lawyer's compliance with these Rules, other law, or a court order. For example, Rule 1.6(b)(5) authorizes disclosures that the lawyer reasonably believes are necessary to seek advice involving the lawyer's duty to provide competent representation under Rule 1.1. In addition, this rule permits disclosure of information that the lawyer reasonably believes is necessary to secure legal advice concerning the lawyer's broader duties, including those addressed in Rules 3.3, 4.1 and 8.4.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(6) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(6) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(7) permits the lawyer to make such disclosures as are necessary to comply with the law.

[13] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. For purposes of paragraph (b)(7), a subpoena is a court order. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(7) permits the lawyer to comply with the court's order.

[13A] Rule 4.1(b) requires a disclosure when necessary to avoid assisting a client's criminal or fraudulent act, if such disclosure will not violate this Rule 1.6.

[14] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[15] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b) (1) through (b)(7). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule.

[15A] The interrelationships between this Rule and Rules 1.2(d), 1.13, 3.3, 4.1, 8.1, and 8.3, and among those rules, are complex and require careful study by lawyers in order to discharge their sometimes conflicting obligations to their clients and the courts, and more generally, to our system of justice. The fact that disclosure is permitted, required, or prohibited under one rule does not end the inquiry. A lawyer must determine whether and under what circumstances other rules or other law permit, require, or prohibit disclosure. While disclosure under this Rule is always permissive, other rules or law may require disclosure. For exam-

ple, Rule 3.3 requires disclosure of certain information (such as a lawyer's knowledge of the offer or admission of false evidence) even if this Rule would otherwise not permit that disclosure. In addition, Rule 1.13 sets forth the circumstances under which a lawyer representing an organization may disclose information, regardless of whether this Rule permits that disclosure. By contrast, Rule 4.1 requires disclosure to a third party of material facts when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless that disclosure would violate this Rule. See also Rule 1.2(d)(prohibiting a lawyer from counseling or assisting a client in conduct the lawyer knows is criminal or fraudulent). Similarly, Rule 8.1(b) requires certain disclosures in bar admission and attorney disciplinary proceedings and Rule 8.3 requires disclosure of certain violations of the Rules of Professional Conduct, except where this Rule does not permit those disclosures.

[16] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Former Client

[18] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

ANNOTATION

Law reviews. For formal opinion of the Colorado Bar Association on Ethical Duties of Attorney Selected by Insurer to Represent Its Insured, see 22 Colo. Law. 497 (1993). For article, "The Maverick Council Member: Protecting Privileged Attorney-Client Communications from Disclosure", see 23 Colo. Law. 63 (1994). For article, "Ethical Considerations and Client Identity", see 30 Colo. Law. 51 (April 2001). For article, "Preservation of the Attorney-Client Privilege: Using Agents and Intermediaries to Obtain Legal Advice", see 30 Colo. Law. 51 (May 2001). For article, "Policing the Legal System: The Duty to Report Misconduct", see 30 Colo. Law. 85 (September 2001). For article, "Am I My Brother's Keeper? Redefining the Attorney-Client Relationship", see 32 Colo. Law. 11 (April 2003). For article, "Metadata: Hidden Information Microsoft Word Documents Its Ethical Implications", see 33 Colo. Law. 53 (October 2004). For article, "Representation of Multiple Estate Or Trust Fiduciaries: Practical and Ethical Issues", see 34 Colo. Law. 65 (July 2005). For article, "Ethical Concerns When Dealing With the Elder Client", see 34 Colo. Law. 27 (October 2005). For article, "The Duty of Loyalty and Preparations to Compete", see 34 Colo. Law. 67 (November 2005). For article, "The New Rules of Professional Conduct: Significant Changes for In-House Counsel", see 36 Colo. Law. 71 (November 2007). For article, "Ethics in Family Law and the New Rules of Professional Conduct", see 37 Colo. Law. 47 (October 2008). For article, "The Duty of Confidentiality: Legal Ethics and the Attorney-Client and Work Product Privileges", see 38 Colo. Law. 35 (January 2009). For article, "Attorney-Client Communications in Colorado", see 38 Colo. Law. 59 (April 2009).

Annotator's note. Rule 1.6 is similar to Rule 1.6 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

Public censure appropriate discipline for lawyer who delivered document containing admissions of client to district attorney without first obtaining client's authorization. People v. Lopez, 845 P.2d 1153 (Colo. 1993).

"Implied" consent not encompassed by rule authorizing attorney to disclose client confidences or secrets. Such disclosure may be made only after full disclosure to and with consent of client. People v. Lopez, 845 P.2d 1153 (Colo. 1993).

Guardian ad litem (GAL) does not have an attorney-client relationship with child who is the subject of a dependency and neglect proceeding, and chief justice directive 04-06 does not designate an attorney-client relationship nor

create an evidentiary privilege. The trial court erred in concluding that the evidentiary privilege in § 13-90-107(1)(b) precluded the GAL's testimony concerning the child's communications. People v. Gabriesheski, 262 P.3d 653 (Colo. 2011).

Disbarment appropriate where attorney accepted fees from a number of clients prior to terminating her legal practice, failed to inform her clients of such termination, failed to refund clients' retainer fees, failed to place clients' funds in separate account, and gave clients' files to other lawyers without clients' consent. People v. Tucker, 904 P.2d 1321 (Colo. 1995).

Cases Decided Under Former DR 4-101.

Law reviews. For article, "The Perjurious Defendant: A Proposed Solution to the Defense Lawyer's Conflicting Ethical Obligations to the Court and to His Client", see 59 Den. L.J. 75 (1981). For article, "Conflicts in Settlement of Personal Injury Cases", see 11 Colo. Law. 399 (1982). For article, "Incriminating Evidence: What to do With a Hot Potato", see 11 Colo. Law. 880 (1982). For article, "Ethics, Tax Fraud and the General Practitioner", see 11 Colo. Law. 939 (1982). For article, "Prior Representation: The Specter of Disqualification of Trial Counsel", see 11 Colo. Law. 1214 (1982). For article, "The Search for Truth Continued: More Disclosure, Less Privilege", see 54 U. Colo. L. Rev. 51 (1982). For article, "The Search for Truth Continued, The Privilege Retained: A Response to Judge Frankel", see 54 U. Colo. L. Rev. 67 (1982). For article, "Some Comments on Conflicts of Interest and the Corporate Lawyer", see 12 Colo. Law. 60 (1983). For article, "Protecting Technical Information: The Role of the General Practitioner", see 12 Colo. Law. 1215 (1983). For article, "Potential Liability for Lawyers Employing Law Clerks", see 12 Colo. Law. 1243 (1983). For article, "Attorney Disclosure: The Model Rules in the Corporate/Securities Area", see 12 Colo. Law. 1975 (1983). For comment, "Colorado's Approach to Searches and Seizures in Law Offices", see 54 U. Colo. L. Rev. 571 (1983). For casenote, "Caldwell v. District Court: Colorado Looks at the Crime and Fraud Exception to the Attorney-Client Privilege", see 55 U. Colo. L. Rev. 319 (1984). For article, "Incest and Ethics: Confidentiality's Severest Test", see 61 Den. L.J. 619 (1984). For article, "Defending the Federal Drug or Racketeering Charge", see 16 Colo. Law. 605 (1987). For article, "Coping with the Paper Avalanche: A Survey on the Disposition of Client Files", see 16 Colo. Law. 1787 (1987). For comment, "Attorney-Client Confidences: Punishing the Innocent", see 61 U. Colo. L. Rev. 185 (1990). For formal opinion of the Colorado Bar Association Ethics Committee on Collaboration with Non-Lawyers in the Preparation and Marketing of Estate Planning Documents, see 19 Colo. Law. 1793 (1990). For article, "Sex, Lawyers and Vilification", see 21 Colo. Law. 469 (1992). For formal opinion of the Colorado Bar Association Ethics Committee on Preservation of Client Confidences in View of Modern Communications Technology, see 22 Colo. Law. 21 (1993).

Prevailing rule is that it will be presumed that confidences were reposed where an attorney-client relationship has been shown to have existed. Osborn v. District Court, 619 P.2d 41 (Colo. 1980).

Ethical obligation to preserve client confidences continues after termination of attorney-client relationship. Rodriquez v. District Court, 719 P.2d 699 (Colo. 1986).

Trustee in bankruptcy succeeds to a debtor's right to assert or waive the attorney-client privilege. In re Inv. Bankers, Inc., 30 Bankr, 883 (Bankr. D. Colo. 1983).

Crime-fraud exception to attorney-client privilege recognized. The code of professional responsibility recognizes the crime-fraud exception to the attorney-client privilege and work-product doctrine. Law Offices of Bernard D. Morley, P.C. v. MacFarlane, 647 P.2d 1215 (Colo. 1982).

Attorney's failure to safeguard a draft letter to a client in which the attorney suggests that the client misrepresented his qualifications, and where federal prosecutor later used the letter during the client's trial on federal criminal charges, violated DR 4-101(B)(1). People v. O'Donnell, 955 P.2d 53 (Colo. 1998).

Bald assertion insufficient to warrant disqualification of district attorney. Bald assertion by defendant that he made confidential statements to the prosecutor during the existence of a prior attorney-client relationship was insufficient to warrant disqualification of the district attorney. Osborn v. District Court, 619 P.2d 41 (Colo. 1980).

An accused seeking to disqualify a prosecutor because of prior representation of a co-defendant by a member of the prosecutor's former firm must show that either the prosecutor or the firm member, by virtue of the prior professional relationship with the co-defendant, received confidential information about the accused which was substantially related to the pending criminal action. McFarlan v. District Court, 718 P.2d 247 (Colo. 1986).

It is no abuse of discretion for court to order public defender to withdraw from a defendant's case where public defender's prior representation of a prosecution witness and his present representation of defendant created a conflict of interest. Rodriquez v. District Court, 719 P.2d 699 (Colo. 1986); People v. Reyes, 728 P.2d 349 (Colo. App. 1986).

Prior employment of plaintiff's attorney by defendant does not disqualify the attorney where the instant case is not substantially re-

lated to any matter in which the attorney previously represented the defendant. Food Brokers, Inc. v. Great Western Sugar, 680 P.2d 857 (Colo. App. 1984).

Disbarment warranted where attorney filed false pleadings and disciplinary complaints, disclosed information concerning the filing of disciplinary complaints, offered to withdraw a disciplinary complaint filed against a judge in exchange for a favorable ruling, failed to serve copies of pleadings on opposing counsel, revealed client confidences and material considered derogatory and harmful to the client, aggravated by a repeated failure to cooperate with the investigation of misconduct, disruption of disciplinary proceedings, and a record of prior discipline. People v. Bannister 814 P.2d 801 (Colo. 1991).

An attorney must disclose information to the court in camera if ordered to do so. People v. Salazar, 835 P.2d 592 (Colo. App. 1992).

Applied in People v. Schultheis, 44 Colo. App. 452, 618 P.2d 710 (1980); People v. Schultheis, 638 P.2d 8 (Colo. 1981); People v. Smith, 778 P.2d 685 (Colo. 1989).

Rule 1.7. Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Source: Committee comment amended October 17, 1996, effective January 1, 1997; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

General Principles

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(e) and (b).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and nonlitigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must

withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and [29].

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Lawyer's Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

Personal Interest Conflicts

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of

personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage or when there is a cohabiting relationship between the lawyers, there may be a significant risk that client confidences will be revealed and that the lawyer's family or cohabiting relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse (or in a cohabiting relationship with another lawyer,) ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship or a cohabiting relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j).

Interest of Person Paying for a Lawyer's Service

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).

Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters

and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

Consent Confirmed in Writing

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

Conflicts in Litigation

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether

the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Nonlitigation Conflicts

[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client

information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles might conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

ANNOTATION

Law reviews. For formal opinion of the Colorado Bar Association on Ethical Duties of Attorney Selected by Insurer to Represent Its Insured, see 22 Colo. Law. 497 (1993). For article, "Representation of Multiple Estate Or Trust Fiduciaries: Practical and Ethical Issues", see 34 Colo. Law. 65 (July 2005). For article, "Ethical Concerns When Dealing With the Elder Client", see 34 Colo. Law. 27 (October 2005). For article, "The Duty of Loyalty and Preparations to Compete", see 34 Colo. Law. 67 (November 2005). For article, "The New Rules of Professional Conduct: Significant Changes for In-House Counsel", see 36 Colo. Law. 71 (November 2007). For article, "Ethics in Family Law and the New Rules of Professional Conduct", see 37 Colo. Law. 47 (October 2008). For article, "Engagement Letters and Common Conflicts of Interest in Joint Representation", see 38 Colo. Law. 43 (February 2009). For article, "Climate Change and Positional Conflicts of Interest", see 40 Colo. Law. 43 (October 2011).

Annotator's note. Rule 1.7 is similar to Rule 1.7 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

Where there is a large group of clients who

are not recognized as a single legal entity, an attorney has an attorney-client relationship with each individual member of the group. Abbott v. Kidder Peabody & Co., Inc., 42 F. Supp. 2d 1046 (D. Colo. 1999).

Representation agreement that gives counsel the ability to negotiate settlement for each member of a large group of clients without providing him or her with personalized advisement and without obtaining individual authority to enter into a settlement agreement violates the professional and ethical standards created to regulate the legal profession in Colorado. Abbott v. Kidder Peabody & Co., Inc., 42 F. Supp. 2d 1046 (D. Colo. 1999).

Any provision of an attorney-client agreement that deprives a client of a right to control his or her case is void as against public policy. Abbott v. Kidder Peabody & Co., Inc., 42 F. Supp. 2d 1046 (D. Colo. 1999).

Valid client consent to waive the potential conflict of interest cannot be obtained under the circumstances. Abbott v. Kidder Peabody & Co., Inc., 42 F. Supp. 2d 1046 (D. Colo. 1999).

Where counsel simultaneously represented company's interests as well as those of company's employees for a substantial period of time and the representation continued through the emergence of conflicts, counsel could continue to represent company because the company and the former clients, the employees, through counsel, consented to such representation after consultation and there was an indication that counsel reasonably believed that the continued representation would not adversely affect the relationship with the former clients. Gates Rubber Co. v. Bando Chem. Indus., Ltd., 855 F. Supp. 330 (D. Colo. 1994).

A defendant may waive the right to conflict-free counsel. The waiver is valid when: (1) The defendant is aware of the conflict and its likely effect on the attorney's ability to render effective assistance; and (2) the waiver is voluntary, knowing, and intelligent. A waiver is voluntary, knowing, and intelligent when the defendant is aware of and understands the various risks, has the capacity to make a decision on the basis of this information, and states unequivocally a desire to hazard those dangers. People v. Preciado-Flores, 66 P.3d 155 (Colo. App. 2002).

A waiver is not knowing and intelligent where a defendant gives merely pro forma answers to pro forma questions. People v. Preciado-Flores, 66 P.3d 155 (Colo. App. 2002).

Defendant does not have an absolute right to revoke waiver of conflict-free counsel at any time, but is subject to the same limitations as any defendant terminating counsel. The court may refuse to revoke an untimely waiver or to grant a revocation that is filed for improper purposes based upon evidence presented at the time of attempted revocation. People v. Maestas, 199 P.3d 713 (Colo. 2009).

Lawyer violated paragraph (b) when his representation of a client was materially limited by his responsibilities to another client. He represented loan documents to be investment agreements to circumvent a provision in the Colorado Liquor Code that restricts the cross-ownership of businesses holding liquor licenses. In re Lopez, 980 P.2d 983 (Colo. 1999).

Public censure was appropriate for attorney who violated this rule by simultaneously representing, as defendants in a quantum meruit and lis pendens suit initiated by a subcontractor, the homeowners, the general contractor, the bank holding deed of trust on homeowners property, and two other parties who had contracted with contractor. Balancing the seriousness of the misconduct with the factors in mitigation, and taking into account the respondent's mental state when he entered into the conflicts in representation, public censure is appropriate. People v. Fritze, 926 P.2d 574 (Colo. 1996).

Public censure warranted for attorney's solicitation of prostitution during telephone conversation with wife of client whom he was representing in a dissolution of marriage proceeding. People v. Bauder, 941 P.2d 282 (Colo. 1997).

Critical inquiry when representation of one client may be limited by representation of another is whether a conflict is likely to arise, and, if so, whether it materially interferes with the lawyer's independent professional judgment. People in Interest of J.A.M., 907 P.2d 725 (Colo. App. 1995).

Actual conflict existed where criminal charges were pending against defense counsel in the same district in which his client was being prosecuted. People v. Edebohls, 944 P.2d 552 (Colo. App. 1996).

Attorney's representation of criminal defendant for whom attorney negotiated a plea bargain for testifying against another criminal defendant prohibited attorney from also representing the other criminal defendant where such other defendant did not consent to conflict-free counsel. People ex rel. Peters v. District Court, 951 P.2d 926 (Colo. 1998).

Attorney who was the trustee of client's trust violated paragraph (b) by utilizing the trust's funds to loan money to his daughter and to purchase his son-in-law's parents' former residence for the purpose of leasing it back to them, and by then failing to take any legal action against them when they did not make lease payments. People v. DeRose, 945 P.2d 412 (Colo. 1997).

Preparation of an extension agreement on the repayment of a loan made to a client by the attorney violated paragraph (b) because certain exceptions were not satisfied. People v. Ginsberg, 967 P.2d 151 (Colo. 1998).

Thirty-day suspension warranted where lawyer, who represented an individual accused of first-degree murder, communicated with co-defendant who also was charged with first-degree murder and whose interests were adverse to the lawyer's client, without the knowledge or consent of the co-defendant's lawyers. The potential for harm was high in a first-degree murder case and the number of unauthorized contacts demonstrated more than negligence on the lawyer's part. People v. DeLoach, 944 P.2d 522 (Colo. 1997).

Suspension for three years was appropriate in case involving violation of this rule and others, together with attorney's breach of his duty as client's trustee to protect his client, who was a particularly vulnerable victim that was recuperating from a serious head injury. People v. DeRose, 945 P.2d 412 (Colo. 1997).

Suspension for three years, rather than disbarment, was appropriate where violation of this rule and others caused serious harm to attorney's clients, but mitigating factors were present, including no previous discipline in 14 years of practice, personal and emotional problems, and cooperation and demonstrated remorse in proceedings. Attorney's ability to represent his client in a bankruptcy was materially limited by his own interest as a creditor in collecting attorney fees. People v. Henderson, 967 P.2d 1038 (Colo. 1998).

The presumed sanction of suspension is appropriate where the attorney knew of a conflict of interest and did not fully disclose to a client the possible effect of that conflict even though such action caused no actual harm. In re Cimino, 3 P.3d 398 (Colo. 2000).

Whether an attorney expects to be paid or not is insignificant to the issue of whether an attorney-client relationship existed. In re Cimino, 3 P.3d 398 (Colo. 2000).

The hearing panel of the former grievance committee committed harmless error by failing to consider the personal and emotional problems that an attorney was experiencing at the time of the attorney's misconduct as mitigating in determining sanctions because no medical or psychological proof of emotional problems was brought forward. In re Cimino, 3 P.3d 398 (Colo. 2000).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Robinson, 853 P.2d 1145 (Colo. 1993); People v. Good, 893 P.2d 101 (Colo. 1995); People v. Silver, 924 P.2d 159 (Colo. 1996); People v. Mason, 938 P.2d 133 (Colo. 1997); People v. Reed, 955 P.2d 65 (Colo. 1998); In re Tolley, 975 P.2d 1115 (Colo. 1999); People v. Beecher, 224 P.3d 442 (Colo. O.P.D.J. 2009).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Bennett, 843 P.2d 1385 (Colo. 1993); In re Lopez, 980 P.2d 983 (Colo. 1999); People v. Sweetman, 218 P.3d 1123 (Colo. O.P.D.J. 2008).

Cases Decided Under Former DR 5-101.

Law reviews. For article, "The Conflicted Attorney", see 11 Colo. Law. 2589 (1982). For article, "The Ethics of Moving for Disqualification of Opposing Counsel", see 13 Colo. Law. 55 (1984). For article, "Why Shouldn't an Attorney Go Into Business With a Client?", see 13 Colo. Law. 431 (1984). For article, "Avoiding Family Law Malpractice: Recognition and Prevention — Part I", see 14 Colo. 787 (1985). For article, "Conflicts of Interest", see 15 Colo. Law. 2001 (1986). For article, "Defending the Federal Drug or Racketeering Charge", see 16 Colo. Law. 605 (1987). For article, "Sex, Lawyers and Vilification", see 21 Colo. Law. 469 (1992).

License to practice law assures public that the lawyer who holds the license will perform basic legal tasks honestly and without undue delay, in accordance with the highest standards of professional conduct. People v. Dixon, 621 P.2d 322 (Colo. 1981).

Public expects appropriate discipline for misconduct. The public has a right to expect that one who engages in professional misconduct will be disciplined appropriately. People v. Dixon, 621 P.2d 322 (Colo. 1981).

A lawyer, by preparing 95 to 99 percent of the pleadings, continues to represent a client even though he has other attorneys sign the pleadings. People v. Garnett, 725 P.2d 1149 (Colo. 1986).

Public censure warranted where attorney engaged in sexual relations with client attorney represented in dissolution of marriage action even though client suffered no actual harm. People v. Zeilinger, 814 P.2d 808 (Colo. 1991).

By investing trust funds in a venture in which the attorney was involved financially and professionally, he allowed his personal interests to affect the exercise of his professional judgment on behalf of his client in violation of DR 5-101(A), justifying suspension from practice. People v. Wright, 698 P.2d 1317 (Colo. 1985).

Theft of client's money, misrepresentations, representation of multiple clients with adverse interests, and failure to respond to informal complaints warrants disbarment. People v. Quick, 716 P.2d 1082 (Colo. 1986).

Conduct found to violate disciplinary rules. People v. Razatos, 636 P.2d 666 (Colo. 1981), appeal dismissed, 455 U.S. 930, 102 S. Ct. 1415, 71 L. Ed. 2d 639 (1982).

Representing client without full disclosure of potential conflict of interest violates disciplinary rule. People v. Watson, 787 P.2d 151 (Colo. 1990).

No violation of paragraph (A). Although

disclosure was inadequate as to the nature of the business relationships between the attorney and his business-partner client, record does not support conclusion that attorney's business relationship with individual client would or reasonably might affect his professional judgment with respect to his representation of that client. In re Quiat, 979 P.2d 1029 (Colo. 1999).

Violation of paragraph (B) where attorney knew, when he accepted employment in connection with his client's bankruptcy, that he could be a witness by virtue of his interests in the general and limited partnerships that were assets of the bankruptcy estate, and by his failure to transfer the partnership interests to his client's children prior to the filing of the bankruptcy. In re Quiat, 979 P.2d 1029 (Colo. 1999).

Representation of client when the exercise of the lawyer's professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests violates disciplinary rule. People v. Ginsberg, 967 P.2d 151 (Colo. 1998).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Stevens, 883 P.2d 21 (Colo. 1994); People v. Wollrab, 909 P.2d 1093 (Colo. 1996); People v. O'Donnell, 955 P.2d 53 (Colo. 1998).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Schmad, 793 P.2d 1162 (Colo. 1990); People v. Lopez, 796 P.2d 957 (Colo. 1990); People v. Watson, 833 P.2d 50 (Colo. 1992); People v. Boyer, 934 P.2d 1361 (Colo. 1997); In re Quiat, 979 P.2d 1029 (Colo. 1999); In re Cohen, 8 P.3d 429 (Colo. 1999).

Conduct violating this rule sufficient to justify suspension. People v. Vernon, 660 P.2d 879 (Colo. 1982); People v. Stineman, 716 P.2d 1079 (Colo. 1986).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. McGrath, 833 P.2d 731 (Colo. 1992).

Conduct violating this rule sufficient to justify disbarment. People v. McGrath, 833 P.2d 731 (Colo. 1992).

Applied in People v. Spiegel, 193 Colo. 161, 567 P.2d 353 (1977); Jones v. District Court, 617 P.2d 803 (Colo. 1980); McCall v. District Court, 783 P.2d 1223 (1989).

Cases Decided Under Former DR 5-102.

Law reviews. For article, "Prior Representation: The Specter of Disqualification of Trial Counsel", see 11 Colo. Law. 1214 (1982). For article, "The Ethics of Moving for Disqualification of Opposing Counsel", see 13 Colo. Law. 55 (1984). For article, "Defending the Federal Drug or Racketeering Charge", see 16 Colo. Law. 605 (1987). For article, "Ethical Problem Areas for Probate Lawyers", see 19 Colo. Law. 1069 (1990).

A lawyer cannot act as an advocate on behalf of his client and yet give testimony adverse to the interests of that client in the same proceeding. Riley v. District Court, 181 Colo. 90, 507 P.2d 464 (1973).

Prosecution subpoena of accused's attorney may stand. A prosecutorial subpoena served on a criminal defendant's attorney can withstand a motion to quash only if the prosecution shows the following: (1) Defense counsel's testimony will be actually adverse to the accused; (2) the evidence will likely be admissible at trial; and (3) there is a compelling need for the evidence which cannot be satisfied from another source. Williams v. District Court, 700 P.2d 549 (Colo. 1985).

The act of subpoenaing defense counsel is itself the functional equivalent of a motion to disqualify. Williams v. District Court, 700 P.2d 549 (Colo. 1985).

Test applied in Rodriquez v. District Court, 719 P.2d 699 (Colo. 1986).

Paragraph (A) of this rule relates to potential testimony of a lawyer during the trial of a matter for which he is presently employed. People v. Rubanowitz, 688 P.2d 231 (Colo. 1984).

When deputy district attorney was endorsed as witness for prosecution, disqualification of deputy district attorney was proper, and disqualification of entire staff of county district attorney's office, under the circumstances, was not an abuse of discretion. People v. Garcia, 698 P.2d 801 (Colo. 1985).

Dismissal of charge is not an appropriate remedy. People v. Garcia, 698 P.2d 801 (Colo. 1985).

Motion to disqualify must set forth specific facts which point to a clear danger that either prejudices counsel's client or his adversary. People ex rel. Woodard v. District Court, 704 P.2d 851 (Colo. 1985).

Paragraph (B) does not provide a tool for disqualifying counsel by the mere stratagem of suggesting that opposing counsel may be called as a witness during the trial. People ex rel. Woodard v. District Court, 704 P.2d 851 (Colo. 1985).

Although the Code mandates that an attorney withdraw on the attorney's own initiative if the attorney violates paragraph (B), there are no provisions in this rule for the trial court to disqualify attorneys and this rule does not require a new trial if the attorney does not withdraw. Although plaintiff's attorneys testified for the defendant, the court found that plaintiff was bound by his counsel's decision not to withdraw and refused to grant plaintiff a new trial. Taylor v. Grogan, 900 P.2d 60 (Colo. 1995).

Applied in Jones v. District Court, 617 P.2d 803 (Colo. 1980); Fed. Deposit Ins. v. Isham, 782 F. Supp. 524 (D. Colo. 1992).

Cases Decided Under Former DR 5-104.

Law reviews. For article, "Why Shouldn't an Attorney Go Into Business With a Client?", see 13 Colo. Law. 431 (1984). For article, "Conflicts of Interest", see 15 Colo. Law. 2001 (1986). For article, "Update on Ethics and Malpractice Avoidance in Family Law — Part I", see 19 Colo. Law. 465 (1990). For article, "Update on Ethics and Malpractice Avoidance in Family Law — Part II", see 19 Colo. Law. 647 (1990).

Attorney, with power to act as trustee, who obtains a loan from the trust through the actual trustee, but does not disclose conflict and does not discuss security for the loan with the actual trustee, violates this section. People v. Tanquary, 831 P.2d 889 (Colo. 1992).

Public censure appropriate for lawyer who failed to make full disclosure to client of their differing interests prior to obtaining her consent for a loan to the lawyer. People v. Potter, 966 P.2d 1061 (Colo. 1998).

An attorney's conduct in lending money to a client, preparing a promissory note with an excessive interest rate, and failing to fully disclose his differing interest in the business transaction constitutes conduct violating this rule. People v. Ginsberg, 967 P.2d 151 (Colo. 1998).

Exploiting a client's friendship and trust to extort funds for one's personal use is reprehensible conduct deserving of disbarment. People v. McMahill, 782 P.2d 336 (Colo. 1988).

Lawyer's encouragement of a client to enter into a business transaction with said lawyer in which the two had differing interests and lawyer's failure to disclose relevant facts warrant disbarment. People v. Martinez, 739 P.2d 838 (Colo. 1987), cert. denied, 484 U.S. 1054, 108 S. Ct. 1003, 98 L. Ed. 2d 970 (1988); People v. Score, 760 P.2d 1111 (Colo. 1988).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Lopez, 796 P.2d 957 (Colo. 1990); People v. Schubert, 799 P.2d 388 (Colo. 1990); People v. Sigley, 917 P.2d 1253 (Colo. 1996).

Conduct violating this rule sufficient to justify suspension. People v. Vernon, 660 P.2d 879 (Colo. 1982); People v. Foster, 716 P.2d 1069 (Colo. 1986).

An attorney's conduct in borrowing money from his former clients and in failing to record deeds of trust on their behalf to be used as security constitutes professional misconduct and justifies his suspension. People v. Brackett, 667 P.2d 1357 (Colo. 1983).

An attorney's failure to disclose to his clients that he was a lender and holder of a long-term mortgage on their property and that his interests in the transaction were necessarily adverse to their interests constitutes conduct violating this rule sufficient to justify suspension. People v. Nutt, 696 P.2d 242 (Colo. 1984).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Broadhurst, 803 P.2d 478 (Colo. 1990); People v. Rouse, 817 P.2d 967 (Colo. 1991); People v. Mulligan, 817 P.2d 1028 (Colo. 1991); People v. Tanquary, 831 P.2d 889 (Colo. 1992).

Conduct violating this rule sufficient to justify disbarment. People v. Quick, 716 P.2d 1082 (Colo. 1986); People v. Foster, 733 P.2d 687 (Colo. 1987); People v. Score, 760 P.2d 1111 (Colo. 1988).

Conduct found to violate disciplinary rules. People v. Razatos, 636 P.2d 666 (Colo. 1981), appeal dismissed, 455 U.S. 930, 102 S. Ct. 1415, 71 L. Ed. 2d 639 (1982); People v. Bennett, 810 P.2d 661 (Colo. 1991); People v. McKie, 900 P.2d 768 (Colo. 1995).

Applied in People v. Good, 195 Colo. 177, 576 P.2d 1020 (1978); People v. Cameron, 197 Colo. 330, 595 P.2d 677 (1979); People v. Luxford, 626 P.2d 675 (Colo. 1981); People v. Barbour, 639 P.2d 1065 (Colo. 1982); People v. Underhill, 683 P.2d 349 (Colo. 1984); People v. Stineman, 716 P.2d 1079 (Colo. 1986).

Cases Decided Under Former DR 5-105.

Law reviews. For article, "Conflicts in Settlement of Personal Injury Cases", see 11 Colo. Law. 399 (1982). For article, "Prior Representation: The Specter of Disqualification of Trial Counsel", see 11 Colo. Law. 1214 (1982). For article, "The Conflicted Attorney", see 11 Colo. Law. 2589 (1982). For article, "Some Comments on Conflicts of Interest and the Corporate Lawyer", see 12 Colo. Law. 60 (1983). For article, "The Professional Liability Insurer's Duty to Defend — Part II", see 15 Colo. Law. 1029 (1986). For article, "Conflicts of Interest", see 15 Colo. Law. 2001 (1986). For article, "Conflict of Interest Systems", see 16 Colo. Law 628 (1987). For article, "Corporate Fiduciary Surcharge Litigation", see 16 Colo. Law. 983 (1987). For article, "Ethics and the Estate Planning Lawyer", see 17 Colo. Law. 241 (1988). For article, "Update on Ethics and Malpractice Avoidance in Family Law — Part I", see 19 Colo. Law. 465 (1990). For article, "Update on Ethics and Malpractice Avoidance in Family Law — Part II", see 19 Colo. Law. 647 (1990). For article, "Ethical Problem Areas for Probate Lawyers", see 19 Colo. Law. 1069 (1990).

Intent of rule is to guarantee the independence of counsel from the conflicting interests of other clients in order to preserve the integrity of the attorney's adversary role. Allen v. District Court, 184 Colo. 202, 519 P.2d 351 (1974).

Genuine conflicts of interest must be scrupulously avoided. Allen v. District Court, 184 Colo. 202, 519 P.2d 351 (1974); McCall v. District Court, 783 P.2d 1223 (Colo. 1989).

It is of the utmost importance that an attorney's loyalty to his client not be diminished, fettered, or threatened in any manner by his loyalty to another client. Allen v. District Court, 184 Colo. 202, 519 P.2d 351 (1974); Watson v. District Court, 199 Colo. 76, 604 P.2d 1165 (1980).

Conflict arises where parties would be opposed in subsequent contribution action. Where litigants in a negligence action are represented by the same attorneys, a conflict of interest arises if the plaintiff are considered opposing parties in the same action for purposes of a subsequent contribution action, because both parties would want to place a higher degree of fault on the other party. Nat'l Farmers Union Prop. & Gas. Co. v. Frackelton, 662 P.2d 1056 (Colo. 1983).

Whenever a motion to withdraw is filed on the grounds that a conflict of interest may exist or may arise in the future, the trial judge must conduct a hearing to determine if a conflict of interest, or a potential conflict of interest, requires that counsel withdraw, and if, from the facts presented at the hearing, it appears that a substantial conflict of interest exists, or will in all probability arise in the course of counsel's representation, the motion to withdraw should be granted. Allen v. District Court, 184 Colo. 202, 519 P.2d 351 (1974); McCall v. District Court, 783 P.2d 1223 (Colo. 1989).

Consent of all parties may be insufficient. There are certain factual situations where the conflicts of interests between parties are so critically adverse to one another so as not to permit the representation of multiple parties by an attorney, even with the consent of all parties made after full disclosure. In re King Res. Co., 20 Bankr. 191 (Bankr. D. Colo. 1982).

Attorney should evaluate potential for impropriety. The attorney should not only inform the parties of the former representations, but should evaluate for himself, as well as for his client, any potential for impropriety that might arise. In re King Res. Co., 20 Bankr. 191 (Bankr. D. Colo. 1982); People v. Belina, 765 P.2d 121 (Colo. 1988).

It must be "obvious" that attorney can adequately represent clients. The general rule that a lawyer may represent clients with potentially conflicting interests with the consent of the clients is qualified in that it must be "obvious" that he can adequately do so. In re King Res. Co., 20 Bankr. 191 (Bankr. D. Colo. 1982); People v. Chew, 830 P.2d 488 (Colo. 1992).

Attorney may represent individual officer of client corporation. When an individual director or officer of a corporation seeks representation from an attorney hired by the corporation, the attorney may serve the individual only if the lawyer is convinced that differing interests are not present. In re King Res. Co., 20 Bankr. 191 (Bankr. D. Colo. 1982).

Knowledge of one attorney must be imputed to lawyers with whom he practices. Osborn v. District Court, 619 P.2d 41 (Colo. 1980).

Imputed disqualification applies to public law firm. The same rule of imputed disqualification stated in subdivision (D) of this rule may be considered in determining the ethical standards for disqualification of a public law firm, such as a district attorney. People v. Garcia, 698 P.2d 801 (Colo. 1985); McCall v. District Court, 783 P.2d 1223 (Colo. 1989).

Rule of imputed disqualification applies to public defenders. Allen v. District Court, 519 P.2d 351 (Colo. 1974); McCall v. District Court, 783 P.2d 1223 (Colo. 1989).

Due to imputed disqualification, appellate division of state public defender's office must be permitted to withdraw from representing on appeal a defendant who claims ineffective counsel provided by local deputy public defender. McCall v. District Court, 783 P.2d 1223 (Colo. 1989).

Disqualification of district attorney's office required where two former district attorneys are witnesses on contested issues in case. Pease v. District Court, 708 P.2d 800 (Colo. 1985).

Trial dates accepted should be honored before withdrawal from employment. When a public defender or a busy defense lawyer finds that his representation of one client is inimical to his representation of another client and he must make an election as to the client he will represent, he has a heavy duty to the court to see that he honors dates that he has agreed to for the trial of a case. Watson v. District Court, 199 Colo. 76, 604 P.2d 1165 (1980).

Attorney's compensation may be denied. Where an attorney is shown to represent more than one party with conflicting interests, a court may deny him all compensation under a retainer agreement. In re King Res. Co., 20 Bankr. 191 (Bankr. D. Colo. 1982).

Continued representation of clients with conflicting interests violates this rule and warrants discipline. People v. Awenius, 653 P.2d 740 (Colo. 1982).

Public censure is generally appropriate when a lawyer is negligent in determining whether the representation of a client will adversely affect another client, causing injury or potential injury to a client. Attorney's representation of two estates where the beneficiaries of the estates have conflicting interests and the attorney fails to obtain waivers from the beneficiaries violates this rule. People v. Gebauer, 821 P.2d 782 (Colo. 1991).

Public censure was appropriate where attorney simultaneously represented one client in

automobile accident case and another client, who was involved in the automobile accident, in a bankruptcy proceeding without listing the accident client as a creditor of the bankruptcy client, and where aggravating factors existed. People v. Gonzales, 922 P.2d 933 (Colo. 1996).

Public censure warranted where attorney entered into compensated consulting agreement with law firm to which he referred client's cases, without full disclosure of agreement to client. People v. Mulvihill, 814 P.2d 805 (Colo. 1991).

An attorney is not always precluded from representing a client in a transaction with a former or currently inactive client. Whether an attorney properly may do so depends upon the nature and extent of the former legal work performed for the previous client as well as the possible relationship between the two transactions. Crystal Homes, Inc. v. Radetsky, 895 P.2d 1179 (Colo. App. 1995).

Evidence sufficient to justify suspension from the practice of law. People v. Belfor, 197 Colo. 223, 591 P.2d 585 (1979); People v. Foster, 716 P.2d 1069 (Colo. 1986).

Three-month suspension appropriate for violation of DR 5-105 (A) and (B) and DR 5-101 (B). The interests of the client and the client's wife, from whom the client was then separated, were so adverse, or potentially adverse, that the conflicts could not be waived even had there been full disclosure. As such, it was not obvious that the attorney could represent the client, the client's estranged wife, and their children in the client's bankruptcy proceedings. Because the attorney knew of the conflicts involved when he undertook the multiple representation, a short period of suspension is warranted, but not the requirement of reinstatement proceedings. In re Quiat, 979 P.2d 1029 (Colo. 1999).

Forty-five-day suspension appropriate for violation of this rule where pattern of misconduct and multiple offenses are factors in aggravation. People v. Chew, 830 P.2d 488 (Colo. 1992).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Odom, 829 P.2d 855 (Colo. 1992); People v. Stevens, 883 P.2d 21 (Colo. 1994); People v. Vsetecka, 893 P.2d 1309 (Colo. 1995); People v. Wollrab, 909 P.2d 1093 (Colo. 1996).

Public censure appropriate where attorney represented buyer and seller of restaurant and did not properly advise the buyer or protect the buyer's interest. People v. Odom, 829 P.2d 855 (Colo. 1992).

Conduct violating this rule sufficient to justify public censure. People v. Gebauer, 821 P.2d 782 (Colo. 1991).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Lopez, 796 P.2d 957 (Colo. 1990); People v. Hansen, 814 P.2d 816 (Colo. 1991); People v. Watson, 833 P.2d 50 (Colo. 1992); People v. Butler, 875 P.2d 219 (Colo. 1994); People v. Banman, 901 P.2d 469 (Colo. 1995); People v. Miller, 913 P.2d 23 (Colo. 1996); People v. Silver, 924 P.2d 159 (Colo. 1996); In re Cohen, 8 P.3d 429 (Colo. 1999).

Conduct violating this rule sufficient to justify disbarment. People v. Quick, 716 P.2d 1082 (Colo. 1986); People v. Martinez, 739 P.2d 838 (Colo. 1987), cert. denied, 484 U.S. 1054, 108 S. Ct. 1003, 98 L. Ed. 2d 970 (1988).

Conduct found to violate disciplinary rules. People v. Razatos, 636 P.2d 666 (Colo. 1981), appeal dismissed, 455 U.S. 930, 102 S. Ct. 1415, 71 L. Ed. 2d 639 (1982).

Applied in People ex rel. MacFarlane v. Boyls, 197 Colo. 242, 591 P.2d 1315 (1979); People v. Meldahl, 200 Colo. 332, 615 P.2d 29 (1980); People v. Castro, 657 P.2d 932 (Colo. 1983); People v. Underhill, 683 P.2d 349 (Colo. 1984); People v. McDowell, 718 P.2d 541 (Colo. 1986).

Cases Decided Under Former DR 5-107.

Law reviews. For article, "Conflicts in Settlement of Personal Injury Cases", see 11 Colo. Law. 399 (1982). For article, "Conflicts of Interest", see 15 Colo. Law. 2001 (1986). For formal opinion of the Colorado Bar Association Ethics Committee on Collaboration with Non-Lawyers in the Preparation and Marketing of Estate Planning Documents, see 19 Colo. Law. 1793 (1990).

Applied in People ex rel. MacFarlane v. Boyls, 197 Colo. 242, 591 P.2d 1315 (1979).

Rule 1.8. Conflict of Interest: Current Clients: Specific Rules

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (b) through (i) that applies to any one of them shall apply to all of them.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

Business Transactions Between Client and Lawyer

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(e) (definition of informed consent).

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

[4] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

Use of Information Related to Representation

[5] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.

Gifts to Lawyers

[6] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of

appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).

[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is a relative of the donee.

[8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

Literary Rights

[9] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraphs (a) and (i).

Financial Assistance

[10] Lawyers may not subsidize law suits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue law suits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

Person Paying for a Lawyer's Services

[11] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

[12] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.

Aggregate Settlements

[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty

or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(e) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

Limiting Liability and Settling Malpractice Claims

[14] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

[15] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

Acquiring Proprietary Interest in Litigation

[16] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

Client-Lawyer Sexual Relationships

[17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

[18] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary

relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).

[19] When the client is an organization, paragraph (j) of this Rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters.

Imputation of Prohibitions

[20] Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (b) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not solicit a substantial gift from a client of another member of the firm, even if the soliciting lawyer is not personally involved in the representation of the client, because the prohibition in paragraph (c) applies to all lawyers associated in the firm. The prohibitions set forth in paragraphs (a) and (j) are personal and are not applied to associated lawyers.

ANNOTATION

Law reviews. For formal opinion of the Colorado Bar Association on Ethical Duties of Attorney Selected by Insurer to Represent Its Insured, see 22 Colo. Law. 497 (1993). For article, "Ethical Considerations of Attorney's Liens", see 31 Colo. Law. 51 (April 2002). For article, "Ethical Concerns When Dealing With the Elder Client", see 34 Colo. Law. 27 (October 2005). For article, "The Duty of Loyalty and Preparations to Compete", see 34 Colo. Law. 67 (November 2005). For article, "The New Rules of Professional Conduct: Significant Changes for In-House Counsel", see 36 Colo. Law. 71 (November 2007). For article, "Ethics in Family Law and the New Rules of Professional Conduct", see 37 Colo. Law. 47 (October 2008).

Annotator's note. Rule 1.8 is similar to Rule 1.8 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

Although the basis of this rule is to deter common law champerty and maintenance, the scope of the rule is not limited to conduct that would constitute champerty and maintenance. People v. Mason, 938 P.2d 133 (Colo. 1997).

A violation of this rule is per se a false representation under 11 U.S.C. § 523(a)(2)(A) of the federal bankruptcy code. In re Waller, 210 Bankr. 370 (Bankr. D. Colo. 1997).

Personal loan from client to attorney was not a standard commercial transaction exempt from the requirements of section (a) of this rule. In re Riebesell, 586 F.3d 782 (10th Cir. 2009).

Suspension for 60 days appropriate for lawyer who entered into an agreement with a client and failed to fully inform the client of the terms of the agreement in writing or obtain the client's consent to the transaction. People v. Foreman, 966 P.2d 1062 (Colo. 1998).

The presumed sanction of suspension is appropriate where the attorney knew of a conflict of interest and did not fully disclose to a client the possible effect of that conflict even though such action caused no actual harm. In re Cimino, 3 P.3d 398 (Colo. 2000).

Whether an attorney expects to be paid or not is insignificant to the issue of whether an attorney-client relationship existed. In re Cimino, 3 P.3d 398 (Colo. 2000).

The hearing panel of the former grievance committee committed harmless error by failing to consider the personal and emotional problems that an attorney was experiencing at the time of the attorney's misconduct as mitigating in determining sanctions because no medical or psychological proof of emotional problems was brought forward. In re Cimino, 3 P.3d 398 (Colo. 2000).

Suspension is generally appropriate when a lawyer knows of a conflict of interest and fails to disclose to a client the possible effect of that conflict. Respondent admittedly and knowingly failed to fully disclose to a client the possible effect of a conflict of interest and was therefore suspended from the practice of law for ninety days, stayed upon the successful completion of a one-year period of probation. People v. Fischer, 237 P.3d 645 (Colo. O.P.D.J. 2010).

By acquiring promissory note and deed of trust in client's property, attorney acquired a pecuniary interest in client's property that was adverse to the client's interest. Therefore, attorney was obligated to comply with requirements of paragraph (a). In re Fisher, 202 P.3d 1186 (Colo. 2009) (decided under rules in effect prior to 2007 repeal and readoption).

When the attorney secured a promissory note with a deed of trust in client's residence, he acquired a proprietary interest in the subject matter of the litigation in violation of

former paragraph (j) (now paragraph (i)). In re Fisher, 202 P.3d 1186 (Colo. 2009) (decided under rules in effect prior to 2007 repeal and readoption).

Attorney's conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify six-month suspension, stayed upon completion of two-year probationary period. In re Fisher, 202 P.3d 1186 (Colo. 2009) (decided under rules in effect prior to 2007 repeal and readoption).

Attorney's conduct warrants punishment whether or not he knew conduct was improper under the rules. In re Fisher, 202 P.3d 1186 (Colo. 2009) (decided under rules in effect prior to 2007 repeal and readoption).

Conduct violating this rule in conjuntion with other disciplinary rules is sufficient to justify suspension. People v. Robinson, 853 P.2d 1145 (Colo. 1993); People v. Silver, 924 P.2d 159 (Colo. 1996); People v. Ginsberg, 967 P.2d 151 (Colo. 1998); In re Tolley, 975 P.2d 1115 (Colo. 1999).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Walsh, 880 P.2d 766 (Colo. 1994); In re Tolley, 975 P.2d 1115 (Colo. 1999).

Cases Decided Under Former DR 5-103.

Law reviews. For article, "Conflicts of Interest", see 15 Colo. Law. 2001 (1986).

The effect of Canon 5 is that whenever a contingent fee contract becomes a subject of litigation in the courts, the lawyer, by reason of the canon, understands that the court, under its general supervisory powers over attorneys as officers of the courts, will determine the reasonableness of the amount and will subject it to the test of quantum meruit. Brillhart v. Hudson, 169 Colo. 329, 455 P.2d 878 (1969).

However, this does not mean that the court can or should remake the contract, but rather that it should determine from all the facts and circumstances the amount of time spent, the novelty of the questions of law, and the risks of nonreturn to the client as well as to the attorney in the situation. Brillhart v. Hudson, 169 Colo. 329, 455 P.2d 878 (1969).

Where the "legal services" rendered were for the most part those which are ordinarily performed by a business chance broker, the established commission payable to such broker at the time would be considered to determine reasonableness. Brillhart v. Hudson, 169 Colo. 329, 455 P.2d 878 (1969) (shown to be 10 percent of purchase price).

Court cannot approve commission of 25 percent. In the exercise of supervisory powers over attorneys as officers of this court, the supreme court cannot approve — under the guise of a "contingent fee" contract for legal services — the payment of what in fact amounts to a broker's commission of 25 percent of the purchase price of the leasehold interest. Brillhart v. Hudson, 169 Colo. 329, 455 P.2d 878 (1969).

Attorney fees secured by a note which was secured by a deed of trust on property to be sold violated this rule when, upon receipt of a check at closing, the attorney was aware that he had encumbered the property in excess of his client's share of the equity. People v. Franco, 698 P.2d 230 (Colo. 1985).

Arrangement of counsel and clients in written fee agreement which assigned alleged interest in oil and gas properties in order to secure payment of legal fees did not endanger a fair trial. Trial court abused its discretion in granting a mistrial, disqualifying counsel, and assessing attorney fees. Gold Rush Invs. v. Ferrell, 778 P.2d 297 (Colo. App. 1989).

Public censure warranted where attorney kept the first lump sum check obtained in settlement as a lump sum payment of his contingency fee and reimbursement of costs even though he knew the settlement might later be reduced by the social security disability award and the client's union award. People v. Maceau, 910 P.2d 692 (Colo. 1996).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Smith, 830 P.2d 1003 (Colo. 1992); In re Polevoy, 980 P.2d 985 (Colo. 1999).

Evidence sufficient to justify suspension from the practice of law. People v. Belfor, 197 Colo. 223, 591 P.2d 585 (1979).

Cases Decided Under Former DR 5-106.

Law reviews. For article, "Conflicts in Settlement of Personal Injury Cases", see 11 Colo. Law. 399 (1982).

Cases Decided Under Former DR 6-102.

Law reviews. For article, "Limiting Liability to the Client", see 11 Colo. Law. 2389 (1982). For article, "Potential Liability for Lawyers Employing Law Clerks", see 12 Colo. Law. 1243 (1983). For article, "The Ethical Obligation to Disclose Attorney Negligence", see 13 Colo. Law 232 (1984). For article, "A Proposal on Opinion Letters in Colorado Real Estate Mortgage Loan Transactions Parts I and II", see 18 Colo. Law. 2283 (1989) and 19 Colo. Law. 1 (1990). For formal opinion of the Colorado Bar Association Ethics Committee on Release and Settlement of Legal Malpractice Claims, see 19 Colo. Law. 1553 (1990).

Conduct violating this rule sufficient to justify suspension. People v. Foster, 716 P.2d 1069 (Colo. 1986).

Conduct violating this rule sufficient to justify disbarment. People v. Dwyer, 652 P.2d 1074 (Colo. 1982).

Applied in People v. Good, 195 Colo. 177, 576 P.2d 1020 (1978).

Rule 1.9. Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Source: IP(c) amended March 17, 1994, effective July 1, 1994; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

[2] The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

[3] Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be

relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

Lawyers Moving Between Firms

[4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the Rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the Rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[5] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

[6] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9(c).

[8] Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

[9] The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). See Rule 1.0(e). With regard to the effectiveness of an advance waiver, see Comment [22] to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

ANNOTATION

Law reviews. For formal opinion of the Colorado Bar Association on Ethical Duties of Attorney Selected by Insurer to Represent Its Insured, see 22 Colo. Law. 497 (1993). For article, "Entity Foundation: Defining the Client And the Duty of Confidentiality", see 34 Colo. Law. 77 (July 2005). For article, "Engagement Letters and Common Conflicts of Interest in Joint Representation", see 38 Colo. Law. 43 (February 2009).

Annotator's note. Rule 1.9 is similar to Rule 1.9 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

The purpose of this rule and rule 1.10 is to protect a client's confidential communica-

tions with his attorney. Funplex Partnership v. FDIC, 19 F. Supp.2d 1202 (D. Colo. 1998).

Motions to disqualify counsel rest within the sound discretion of the trial court. FDIC v. Sierra Res., Inc., 682 F. Supp. 1167 (D. Colo. 1987); Funplex Partnership v. FDIC, 19 F. Supp.2d 1202 (D. Colo. 1998).

The party seeking disqualification under this rule must provide the court with specific facts to show that disqualification is necessary and he cannot rely on speculation or conjecture. FDIC v. Sierra Res., Inc., 682 F. Supp. 1167 (D. Colo. 1987); Funplex Partnership v. FDIC, 19 F. Supp.2d 1202 (D. Colo. 1998).

Specifically, the moving party must show that: (1) An attorney-client relationship existed in the past; (2) the present litigation involves a matter that is "substantially related" to the prior litigation; (3) the present client's interests are materially adverse to the former client's interests; and (4) the former client has not consented to the disputed representation after consultation. English Feedlot, Inc. v. Norden Lab., Inc., 833 F. Supp. 1498 (D. Colo. 1993); Funplex Partnership v. FDIC, 19 F. Supp.2d 1202 (D. Colo. 1998).

Substantiality is present if the factual contexts of the two representations are similar or related. English Feedlot, Inc. v. Norden Lab., Inc., 833 F. Supp. 1498 (D. Colo. 1993); Cole v. Ruidoso Municipal Sch., 43 F.3d 1373 (10th Cir. 1994); Funplex Partnership v. FDIC, 19 F. Supp.2d 1202 (D. Colo. 1998).

Attorney's former representation of the alternate suspect in criminal case prohibited him from representing the criminal defendant where the cases were substantially related because the murder victim in the present case was the informant in the former client's case. People ex rel. Peters v. District Court, 951 P.2d 926 (Colo. 1998).

An attorney needs only to receive consent from his or her former client to represent a new client when the matter the attorney represented the former client in is substantially related to the representation of the new client. The two matters are "substantially related" when they involve the same transaction or legal dispute or if there is substantial risk that confidential factual information as would be normally be obtained by defense counsel in prior representation would materially advance the position of the new client in the current proceeding. The record does not support a finding that there was a substantial risk that confidential factual information as would be normally be obtained by defense counsel in prior representation would materially advance the position of the new client in the current proceeding. People v. Frisco, 119 P.3d 1093 (Colo. 2005).

Applied in English Feedlot, Inc. v. Norden Laboratories, Inc., 833 F. Supp. 1498 (D. Colo. 1993).

Rule 1.10. Imputation of Conflicts of Interest: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

(e) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:

(1) the matter is not one in which the personally disqualified lawyer substantially participated;

(2) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;

(3) the personally disqualified lawyer gives prompt written notice (which shall contain

a general description of the personally disqualified lawyer's prior representation and the screening procedures to be employed) to the affected former clients and the former clients' current lawyers, if known to the personally disqualified lawyer, to enable the former clients to ascertain compliance with the provisions of this Rule; and

(4) the personally disqualified lawyer and the partners of the firm with which the personally disqualified lawyer is now associated reasonably believe that the steps taken to accomplish the screening of material information are likely to be effective in preventing material information from being disclosed to the firm and its client.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

GENERAL RULE

Definition of "Firm"

[1] For purposes of the Rules of Professional Conduct, the term "firm" denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(c). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See Rule 1.0, Comments [2] - [4].

Principles of Imputed Disqualification

[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(b).

[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(k) and 5.3.

[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

[6] Rule 1.10(c) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0(e).

[7] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11(b) and (c),

not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

[8] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

ANNOTATION

Law reviews. For article, "Private Screening", see 38 Colo. Law. 59 (June 2009).

Annotator's note. Rule 1.10 is similar to Rule 1.10 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

The purpose of this rule and rule 1.9 is to protect a client's confidential communications with his attorney. Funplex Partnership v. FDIC, 19 F. Supp.2d 1202 (D. Colo. 1998).

When an attorney associates with a law firm, the principle of loyalty to the client extends beyond the individual attorney and applies with equal force to the other attorneys practicing in the firm. People ex rel. Peters v. District Court, 951 P.2d 926 (Colo. 1998).

The rule of imputed disqualification can be considered from the premise that a firm of attorneys is essentially one attorney for purposes of the rules governing loyalty to the client, or from the premise that each attorney is vicariously bound by the obligation of loyalty owed by each lawyer in the firm. People ex rel. Peters v. District Court, 951 P.2d 926 (Colo. 1998).

And the rule of imputed disqualification applies with equal force to court-appointed attorneys. People ex rel. Peters v. District Court, 951 P.2d 926 (Colo. 1998).

Rule 1.11. Special Conflicts of Interest for Former and Current Government Officers and Employees

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) the personally disqualified lawyer gives prompt written notice (which shall contain a general description of the personally disqualified lawyer's prior participation in the matter and the screening procedures to be employed), to the government agency to enable the government agency to ascertain compliance with the provisions of this Rule; and

(3) the personally disqualified lawyer and the partners of the firm with which the personally disqualified lawyer is now associated, reasonably believe that the steps taken to accomplish the screening of material information are likely to be effective in preventing material information from being disclosed to the firm and its client.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from

any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0(e) for the definition of informed consent.

[2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

[3] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by these paragraphs.

[4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer

participated personally and substantially. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13 Comment [6].

[6] Paragraphs (b) and (c) contemplate a screening arrangement. See Rule 1.0(k) (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

[7] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[8] Paragraph (c) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

[9] Paragraphs (a) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

[10] For purposes of paragraph (e) of this Rule, a "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.

ANNOTATION

Law reviews. For article, "The New Rules of Professional Conduct: Significant Changes for In-House Counsel", see 36 Colo. Law. 71 (November 2007).

Trial court abused its discretion in disqualifying entire state public defender's office from representing defendant where no direct conflict of interest existed because neither individual public defender representing defendant was involved in prior representation of witnesses, potential conflicts that may have existed with regard to other public defenders within the statewide office could not be imputed under this rule to individuals representing defendant, and defendant knowingly, intelligently, and voluntarily waived any conflict. People v. Shari, 204 P.3d 453 (Colo. 2009).

Rule 1.12. Former Judge, Arbitrator, Mediator or Other Third-party Neutral

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and

is apportioned no part of the fee therefrom; and

(2) the personally disqualified lawyer gives prompt written notice (which shall contain a general description of the personally disqualified lawyer's prior participation in the matter and the screening procedures to be employed), to the parties and any appropriate tribunal, to enable the parties and the tribunal to ascertain compliance with the provisions of this Rule; and

(3) the personally disqualified lawyer and the partners of the firm with which the personally disqualified lawyer is now associated, reasonably believe that the steps taken to accomplish the screening of material information are likely to be effective in preventing material information from being disclosed to the firm and its client.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008; Comment [1] amended and effective July 11, 2012.

COMMENT

[1] This Rule generally parallels Rule 1.11. The term "personally and substantially" signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11. The term "adjudicative officer" includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges. Paragraph III(B) of the Application Section of the Colorado Code of Judicial Conduct provides that a part-time judge "shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto." Rule 2.11(A)(5)(a) of the Colorado Code of Judicial Conduct requires a judge to disqualify himself or herself in a proceeding in which the judge served as a lawyer in the matter in controversy, or the judge was associated with a lawyer who participated substantially as a lawyer in the matter during such association. Although phrased differently from this Rule, those Rules correspond in meaning.

[2] Like former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed consent, confirmed in writing. See Rule 1.0(b) and (e). Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See Rule 2.4.

[3] Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Thus, paragraph (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of this paragraph are met.

[4] Requirements for screening procedures are stated in Rule 1.0(k). Paragraph (c) (1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[5] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

Rule 1.13. Organization as Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organi-

zation, or a violation of law that reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to the information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones

entailing serious risk, are not as such in the lawyer's province. Paragraph (19) makes clear, however, that, when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

[5] Paragraph (b) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

[6] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.8, 1.16, 3.3 or 4.1. Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(b)(1) - (7). Under paragraph (c) the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rules 1.6(b)(2), 1.6(b)(3) and 1.6(b)(4) may permit the lawyer to disclose confidential information. In such circumstances Rule 1.2(d) may also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.

[7] Paragraph (d) makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in paragraph (c) does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other person associated with the organization against a client arising out of an alleged violation of law. This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

[8] A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of these paragraphs, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

Government Agency

[9] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See

Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.

Clarifying the Lawyer's Role

[10] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

[12] Paragraph (g) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative Actions

[13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

ANNOTATION

Law Reviews. For article, "Am I My Brother's Keeper? Redefining the Attorney-Client Relationship", see 32 Colo. Law. 11 (April 2003). For article, "Entity Foundation: Defining the Client And the Duty of Confidentiality", see 34 Colo. Law. 77 (July 2005). For article, "The New Rules of Professional Conduct: Significant Changes for In-House Counsel", see 36 Colo. Law. 71 (November 2007). For article, "Attorney-Client Communications in Colorado", see 38 Colo. Law. 59 (April 2009).

There is no ethical violation in the attorney general suing the secretary of state where no client confidences are involved and the attorney general is representing the broader institutional concerns of the state regarding allegedly unconstitutional legislation enacting a congressional redistricting plan. People ex rel. Salazar v. Davidson, 79 P.3d 1221 (Colo. 2003), cert. denied, 79 U.S. 1221, 124 S. Ct. 2228, 159 L. Ed. 2d 260 (2004) (decided prior to 2007 repeal and readoption of the Colorado rules of professional conduct).

Rule 1.14. Client with Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot

adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must to look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator

or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

ANNOTATION

Law reviews. For article, "Ethical Obligations of Petitioners' Counsel in Guardianship and Conservator Cases", see 24 Colo. Law. 2565 (1995). For article, "Ethical Concerns When Dealing With the Elder Client", see 34 Colo. Law. 27 (October 2005). For article, "Rule of Professional Conduct 1.14 and the Diminished-Capacity Client", see 39 Colo. Law. 67 (May 2010).

Annotator's note. Rule 1.14 is similar to Rule 1.14 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

When a substantial question exists regarding the mental competence of a spouse in a domestic relations proceeding, the preferred procedure is for the trial court to conduct a hearing to determine whether or not the spouse is competent, so that a guardian ad litem may be appointed if needed. In re Sorensen, 166 P.3d 254 (Colo. App. 2007).

Because wife's second attorney was allowed to simply withdraw the motion filed by wife's first attorney for the appointment of a guardian ad litem for his client, and because a factual question clearly existed regarding the wife's ability to understand the nature of the proceedings and direct counsel, trial court was required to hold an evidentiary hearing on the issue of wife's competency. In re Sorensen, 166 P.3d 254 (Colo. App. 2007).

Rule 1.15. Safekeeping Property

General Duties of Lawyers Regarding Property of Clients and Third Parties

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate trust account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such funds and other property of clients or third parties shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall, promptly or otherwise as permitted by law or by agreement with the client or third person, deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, promptly upon request by the client or third person, render a full accounting regarding such property.

(c) When in connection with a representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

Required Bank Accounts

(d) Every lawyer in private practice in this state shall maintain in a financial institution doing business in Colorado, in the lawyer's own name, or in the name of a partnership of lawyers, or in the name of an entity authorized pursuant to C.R.C.P. 265 of which the lawyer is a member, or in the name of the lawyer or entity by whom the lawyer is employed or with whom the lawyer is associated:

(1) A trust account or accounts, separate from any business and personal accounts and from any fiduciary accounts that the lawyer may maintain as executor, guardian, trustee, or receiver, or in any other fiduciary capacity, into which the lawyer shall deposit funds entrusted to the lawyer's care and any advance payment of fees that has not been earned or advance payment of expenses that have not been incurred. A lawyer shall not be required to maintain a trust account if the lawyer never receives such funds or payments; and,

(2) A business account or accounts into which all funds received for professional services shall be deposited. All business accounts, as well as all deposit slips and all checks drawn thereon, shall be prominently designated as a "professional account," an "office account," or an "operating account."

(e) With respect to trust accounts established pursuant to this Rule:

(1) One or more of the trust accounts may be a Colorado Lawyer Trust Account Foundation ("COLTAF") account or accounts, as described in Rule 1.15(h)(2). All COLTAF accounts shall be designated "COLTAF Trust Account."

(2) All such trust accounts, whether general or specific, as well as all deposits slips and checks drawn thereon, shall be prominently designated as a "trust account." Nothing herein shall prohibit any additional descriptive designation for a specific trust account.

(3) Trust accounts shall be maintained only in financial institutions doing business in Colorado that are approved by the Regulation Counsel based upon policy guidelines adopted by the Board of Trustees of the Colorado Attorneys' Fund for Client Protection. Regulation Counsel shall annually publish a list of such approved institutions. A financial institution shall be approved if it shall file with the Regulation Counsel an agreement, in a form provided, to report to the Regulation Counsel in the event any properly payable trust account instrument is presented against insufficient funds, irrespective of whether the instrument is honored; any such agreement shall apply to all branches of the financial institution and shall not be canceled except on thirty-days notice in writing to the Regulation Counsel. The agreement shall further provide that all reports made by the financial institution shall be in the following format: (1) in the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the

depositor; (2) in the case of an instrument that is presented against insufficient funds but which instrument is honored, the report shall identify the financial institution, the lawyer or law firm, the account number, the date of presentation for payment, and the date paid, as well as the amount of the overdraft created thereby. Such reports shall be made simultaneously with, and within the time provided by law for, notice of dishonor, if any; if an instrument presented against insufficient funds is honored, then the report shall be made within five banking days of the date of presentation for payment against insufficient funds. In addition, each financial institution approved by the Regulation Counsel must cooperate with the COLTAF program and must offer a COLTAF account to any lawyer who wishes to open one. In addition to the reports specified above, approved financial institutions shall agree to cooperate fully with the Regulation Counsel and to produce any trust account or business account records on receipt of a subpoena therefore in connection with any proceeding pursuant to C.R.C.P. 251. Nothing herein shall preclude a financial institution from charging a lawyer or law firm for the reasonable cost of producing the reports and records required by this Rule, but such charges shall not be a transaction cost to be charged against funds payable to the COLTAF program. Every lawyer or law firm maintaining a trust account in this state shall, as a condition thereof, be conclusively deemed to have consented to the reporting and production requirements by financial institutions mandated by this Rule and shall indemnify and hold harmless the financial institution for its compliance with such reporting and production requirement. A financial institution shall be immune from suit arising out of its actions or omissions in reporting overdrafts or insufficient funds or producing documents under this Rule. The agreement entered into by a financial institution with the Regulation Counsel shall not be deemed to create a duty to exercise a standard of care and shall not constitute a contract for the benefit of any third parties that may sustain a loss as a result of lawyers overdrawing lawyer trust accounts.

(4) The name of institutions in which such accounts are maintained and identification numbers of each account shall be recorded on a statement filed with the annual attorney registration payment pursuant to C.R.C.P. 227(2). Such information shall be available for use in accordance with paragraph (j) of this Rule. For each COLTAF account, the statement shall indicate the account number, the name the account is under, and the depository institution.

Trust Account Requirements and Management; COLTAF Accounts

(f) All trust accounts shall be maintained in interest-bearing, insured depository accounts; provided, that with the consent of the client or third person whose funds are in the account, an account in which interest is paid to the client or third person need not be an insured depository account. All COLTAF accounts shall be insured depository accounts. For the purpose of this Rule, "insured depository accounts" shall mean government insured accounts at a regulated financial institution, on which withdrawals or transfers can be made on demand, subject only to any notice period which the institution is required to reserve by law or regulation.

(g) A lawyer may deposit funds reasonably sufficient to pay anticipated service charges or other fees for maintenance or operation of such account into trust accounts. Such funds shall be clearly identified in the lawyer's records of the account.

(h) COLTAF Accounts:

(1) Except as may be prescribed by subparagraph (2) below, interest earned on accounts in which the funds are deposited (less any deduction for service charges or fees of the depository institution) shall belong to the clients or third persons whose funds have been so deposited; and the lawyer or law firm shall have no right or claim to such interest.

(2) If the funds are not held in accounts with the interest paid to clients or third persons as provided in subsection (h)(1) of this Rule, a lawyer or law firm shall establish a COLTAF account, which is a pooled interest-bearing insured depository account for funds of clients or third persons that are nominal in amount or are expected to be held for a short period of time in compliance with the following provisions:

(a) No interest from such an account shall be payable to a lawyer or law firm.

(b) The account shall include funds of clients or third persons that are nominal in amount or are expected to be held for a short period of time with the intent that such funds

not earn interest in excess of the reasonably estimated cost of establishing, maintaining and accounting for trust accounts for the benefit of such clients or third parties.

(c) A lawyer or law firm depositing funds in a COLTAF account shall direct the depository institution:

(i) To remit interest, net of service charges or fees, if any are charged, computed in accordance with the institution's standard accounting practice, at least quarterly, to COLTAF; and

(ii) To transmit with each remittance to COLTAF a statement showing the name of the lawyer or law firm on whose account the remittance is sent and the rate of interest applied.

(d) The provisions of this subparagraph (h)(2) shall not apply in those instances where it is not feasible to establish a trust account for the benefit of COLTAF for reasons beyond the control of the lawyer or law firm, such as the unavailability of a financial institution in the community that offers such an account.

(3) If a lawyer or law firm discovers that funds of any client or third person have mistakenly been held in a trust account for the benefit of COLTAF in a sufficient amount or for a sufficiently long time so that interest on the funds being held in such account exceeds the reasonably estimated cost of establishing, maintaining and accounting for a trust account for the benefit of such client or third person (including without limitation administrative costs of the lawyer or law firm, bank service charges, and costs of preparing tax reports of such income to the client or third person) the lawyer or law firm shall request COLTAF to calculate and remit trust account interest already received by it to the lawyer or law firm for the benefit of such client or third person in accordance with written procedures that COLTAF shall publish and make available through its website and shall provide to any lawyer or law firm upon request.

(4) Information necessary to determine compliance or justifiable reasons for noncompliance with subparagraph (h)(2) shall be included in the annual attorney registration statement. COLTAF shall assist the Colorado Supreme Court in determining whether lawyers or law firms have complied in establishing the trust account required under subparagraph (h)(2). If it appears that a lawyer or law firm has not complied where it is feasible to do so, the matter may be referred to the Regulation Counsel for investigation and proceedings in accordance with C.R.C.P. 251.

(i) Management of Trust Accounts.

(1) ATM or Debit Cards. A lawyer shall not use any debit card or automated teller machine card to withdraw funds from a trust account.

(2) All trust account withdrawals and transfers shall be made only by a lawyer admitted to practice law in this state or by a person supervised by such lawyer and may be made only by authorized bank or wire transfer or by check payable to a named payee.

(3) Cash withdrawals and checks made payable to "Cash" are prohibited.

(4) Cancelled Checks. A lawyer shall request that the lawyer's trust account bank return to the lawyer, photo static or electronic images of cancelled checks written on the trust account. If the bank provides electronic images, the lawyer shall either maintain paper copies of the electronic images or maintain the electronic images in readily obtainable format.

(5) Persons Authorized to Sign. Only a lawyer admitted to practice law in this state or a person supervised by such lawyer shall be an authorized signatory on a trust account;

(6) Reconciliation of Trust Accounts. No less than quarterly, a lawyer or a person authorized by the lawyer shall reconcile the trust account records both as to individual clients and in the aggregate with the lawyer's trust account bank statement(s).

Required Accounting Records; Retention of Records; Availability of Records

(j) A lawyer, whether practicing as a sole practitioner, in a partnership, or through an entity authorized pursuant to C.R.C.P. 265, shall maintain in a current status and retain for a period of seven years after the event that they record:

(1) Appropriate receipt and disbursement records of all deposits in and withdrawals from all trust accounts and any other bank account that concerns the lawyer's practice of law, specifically identifying the date, payor and description of each item deposited as well as the date, payee, and purpose of each disbursement. All trust account monies intended for

deposit shall be deposited intact without deductions or "cash out" from the deposit and the duplicate deposit slip that evidences the deposit must be sufficiently detailed to identify each item deposited;

(2) An appropriate record-keeping system identifying each separate person or entity for whom the lawyer holds money or property in trust, for all trust accounts, showing the payor of all funds deposited in such accounts, the names and addresses of all persons for whom the funds are or were held, the amount of such funds, the description and amounts of charges or withdrawals from such accounts, and the names of all persons to whom any such funds were disbursed;

(3) Copies of all retainer and compensation agreements with clients (including written communications setting forth the basis or rate for the fees charged by the lawyer as required by Rule 1.5(b);

(4) Copies of all statements to clients showing the disbursement of funds to them or on their behalf;

(5) Copies of all bills issued to clients;

(6) Copies of all records showing payments to any persons, not in the lawyer's regular employ, for services rendered or performed; and

(7) All bank statements and photo static copies or electronic copies of all canceled checks.

(k) The financial books and other records required by this Rule shall be maintained in accordance with one or more of the following recognized accounting methods: the accrual method, the cash basis method, and the income tax method. All such accounting methods shall be consistently applied. Bookkeeping records may be maintained by computer provided they otherwise comply with this Rule and provided further that printed copies can be made on demand in accordance with this Rule. They shall be located at the principal Colorado office of each lawyer, partnership, professional corporation, or limited liability corporation.

(l) Dissolutions and Departures. Upon the dissolution of a law firm, the lawyers in the lawfirm shall make arrangements for the maintenance or disposition of records and client files in accordance with subsection (j) of this Rule and Rule 1.16A. Upon the departure of a lawyer from a law firm, the departing lawyer and the lawyers in the law firm shall make appropriate arrangements for the maintenance or disposition of records and client files in accordance with subsection (j) of this Rule and Rule 1.16A.

(m) Availability Of Records. Any of the records required to be kept by this Rule shall be produced in response to a subpoena duces tecum issued by the Regulation Counsel in connection with proceedings pursuant to C.R.C.P. 251. When so produced, all such records shall remain confidential except for the purposes of the particular proceeding and their contents shall not be disclosed by anyone in such a way as to violate the attorney-client privilege of the lawyer's client.

Source: (a) amended and (g) to (j) added June 25, 1998, effective January 1, 1999; (f) added June 25, 1998, effective July 1, 1999; IP(f), (f)(3), and (f)(6) amended and adopted May 13, 1999, effective July 1, 1999; (e)(3) corrected and effective November 9, 1999; (f)(7) added and adopted April 18, 2001, effective July 1, 2001; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008; (d)(2) and (i)(6) amended and effective November 6, 2008; (j)(6), (j)(7), (l), and Comment [1] amended and (j)(8) deleted and effective February 10, 2011.

COMMENT

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box except when some other form of safekeeping is warranted by special circumstances. "Property" generally refers to jewelry and other valuables entrusted to the lawyer by the client, as well as documents having intrinsic value or directly affecting valuable rights, such as securities, negotiable instruments, deeds, and wills. All property that is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts.

[2] Trust accounts containing funds of clients or third persons held in connection with a

representation must be interest-bearing for the benefit of the client or third person or for the benefit of the Colorado Lawyer Trust Account Foundation where the funds are nominal in amount or expected to be held for a short period of time. A lawyer should exercise good faith judgment in determining initially whether funds are of such nominal amount or are expected to be held by the lawyer for such a short period of time that the funds should not be placed in an interest-bearing account for the benefit of the client or third person. The lawyer should also consider such other factors as (i) the costs of establishing and maintaining the account, service charges, accounting fees, and tax report procedures; (ii) the nature of the transaction(s) involved; and (iii) the likelihood of delay in the relevant proceedings. A lawyer should review at reasonable intervals whether changed circumstances require further action respecting the deposit of such funds, including without limitation the action described in subparagraph 1.15(h)(3).

[3] Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

[4] Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is risk that the client may divert funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[5] Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party.

[6] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction. See Rule 1.16(d) for standards applicable to retention of client papers.

[7] A "client's security fund" provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer should participate.

[8] It is to be noted that the duty to keep separate from the lawyer's own property any property in which any other person claims an interest exists whether or not there is a dispute as to ownership of the property. Likewise, although the second sentence of Rule 1.15(c) deals specifically with disputed ownership, the first sentence of that provision—requiring some form of accounting—applies even if there is no dispute as to ownership. For example, if the lawyer receives a settlement check made payable jointly to the lawyer and the lawyer's client, covering both the lawyer's fee and the client's recovery, the lawyer must provide an accounting to the client before taking the lawyer's fee from the joint funds. Typically the check will be deposited in the lawyer's trust account and, following an accounting to the client with respect to the fee, the lawyer will "sever" the fee by withdrawing the amount of the fee from the trust account and depositing it in the lawyer's operating account.

ANNOTATION

Law reviews. For article, "Settlement Ethics", see 30 Colo. Law. 53 (December 2001). For article, "Problems with Trust Accounts that Come to the Attention of Regulation Counsel", see 34 Colo. Law. 39 (April 2005). For article, "Non-Monetary Compensation for Legal Services How Many Chickens Am I Worth?", see 35 Colo. Law. 95 (January 2006). For article, "New Colorado Rules on Retention of Client Files", see 40 Colo. Law. 85 (August 2011).

Annotator's note. Rule 1.15 is similar to Rule 1.15 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

Supreme court has made the underlying ethical principle of this rule explicit: An attorney earns a fee only when the attorney provides a benefit or service to the client. In re Sather, 3 P.3d 403 (Colo. 2000).

Under this rule, all client funds, including engagement retainers, advance fees, flat fees, lump sum fees, etc., must be held in trust until there is a basis on which to conclude that the attorney "earned" the fee. In re Sather, 3 P.3d 403 (Colo. 2000).

This rule requires that attorneys segregate client funds, including those paid as advance fees, from the attorney's property; however, this holding is made prospective. In re Sather, 3 P.3d 403 (Colo. 2000).

In limited circumstances, an attorney may earn a fee before performing any legal services

(engagement retainers) or the attorney and client may agree that the attorney may treat advance fees as the attorney's property before the attorney earns the fees by supplying a benefit or performing a service. However, the fee agreement must clearly explain the basis for this arrangement and explain how the client's rights are protected by the arrangement. But, under either arrangement, the fees are always subject to refund if excessive or unearned and the attorney cannot communicate otherwise to a client. In re Sather, 3 P.3d 403 (Colo. 2000).

Attorneys cannot enter into "non-refundable" retainer or fee agreements. In re Sather, 3 P.3d 403 (Colo. 2000).

Failure to provide accounting with respect to fees charged and failure to return unearned fees in conjunction with neglect of civil rights suit warranted a 30-day suspension. People v. Fritsche, 849 P.2d 31 (Colo. 1993).

Public censure appropriate for failure by respondent to return clients' original tax returns in a timely manner and to inform the clients that the tax returns were in fact missing, in addition to other conduct violating rules. People v. Berkley, 858 P.2d 699 (Colo. 1993).

Public censure appropriate where attorney neglected and made misrepresentations in two separate legal matters. People v. Eagan, 902 P.2d 841 (Colo. 1995).

Public censure appropriate where the attorney filed the client's retainer in the operating account, rather than the trust account, and when the client fired the attorney and asked for a refund on the retainer, the attorney wrote the client a refund check that was returned for insufficient funds. People v. Pooley, 917 P.2d 712 (Colo. 1996).

Conduct violating this rule in conjunction with other disciplinary rules, where mitigating factors were present, warrants public censure. People v. Davis, 950 P.2d 586 (Colo. 1998).

Depositing personal funds into COLTAF account, paying personal bills from that account, and then knowingly failing to respond to the investigation into the use of the account justifies 60-day suspension with conditions of reinstatement. People v. Herrick, 191 P.3d 172 (Colo. O.P.D.J. 2008).

Depositing personal funds into a COLTAF account to hide personal assets from creditors supports a 90-day suspension with conditions of reinstatement. People v. Alster, 221 P.3d 1088 (Colo. O.P.D.J. 2009).

Commingling personal and client funds in trust account and writing 45 insufficient funds checks on trust account warrants six-month suspension where court found that no clients complained about misuses of funds, all checks were eventually honored, and attorney agreed to make restitution to bank for fees and cooperated in disciplinary proceedings. Court found that 120 days would have been insufficient in light of attorney's two prior admonitions and one prior private censure. People v. Davis, 893 P.2d 775 (Colo. 1995).

Suspension for one year and one day appropriate when attorney neglected to return client files upon request. People v. Honaker, 847 P.2d 640 (Colo. 1993); People v. Fager, 925 P.2d 280 (Colo. 1996).

Suspension for one year and one day is warranted for commingling and misuse of client funds. The hearing board found that the respondent acted recklessly, rather than knowingly, in misappropriating client funds. People v. Zimmermann, 922 P.2d 325 (Colo. 1996).

Suspension for one year and one day appropriate where attorney violated paragraphs (a) and (b) by not returning or accounting for client funds held for emergencies after the clients fired the attorney and for negligently converting other client funds to the attorney's own use. People v. Johnson, 944 P.2d 524 (Colo. 1997).

Disbarment appropriate where attorney accepted fees from a number of clients prior to terminating her legal practice, failed to inform her clients of such termination, failed to refund clients' retainer fees, failed to place clients' funds in separate account, and gave clients' files to other lawyers without clients' consent. People v. Tucker, 904 P.2d 1321 (Colo. 1995).

When a lawyer accepts fees from clients and then abandons those clients while keeping their money and causing serious harm, disbarment is appropriate. People v. Steinman, 930 P.2d 596 (Colo. 1997).

Disbarment warranted where attorney intended to convert client funds, regardless of whether attorney intended to replace the funds at some point. Even consideration of attorney's personal and emotional problems was irrelevant where attorney violated this rule by knowingly converting client funds, as well as violating several other rules of professional conduct. People v. Marsh, 908 P.2d 1115 (Colo. 1996).

Disbarment not warranted where there was mitigating evidence concerning attorney's mental and physical disabilities. Instead, the board imposed a three-year suspension with a condition for reinstatement that professional medical evidence be presented that the disabilities do not interfere with the attorney's ability to practice law. People v. Stewart, 892 P.2d 875 (Colo. 1995).

Previously disbarred attorney who violated this rule would be forced to pay restitution to clients as a condition of readmission. People v. Vigil, 945 P.2d 1385 (Colo. 1997).

Conduct violating this rule in conjunction with other disciplinary rules sufficient to justify disbarment where the attorney continued to practice law while on suspension, repeatedly neglecting his clients and failing to take reason-

able steps to protect clients' interests. People v. Fager, 938 P.2d 138 (Colo. 1997).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Titoni, 893 P.2d 1322 (Colo. 1995); People v. Woodrum, 911 P.2d 640 (Colo. 1996); People v. Todd, 938 P.2d 1160 (Colo. 1997); People v. O'Donnell, 955 P.2d 53 (Colo. 1998).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Robinson, 853 P.2d 1145 (Colo. 1993); People v. Wechsler, 854 P.2d 217 (Colo. 1993); People v. Kerwin, 859 P.2d 895 (Colo. 1993); People v. Murray, 912 P.2d 554 (Colo. 1996); People v. Paulson, 930 P.2d 582 (Colo. 1997); People v. Rishel, 956 P.2d 542 (Colo. 1998); People v. Barr, 957 P.2d 1379 (Colo. 1998); People v. Harding, 967 P.2d 153 (Colo. 1998); In re Nangle, 973 P.2d 1271 (Colo. 1999); In re Corbin, 973 P.2d 1273 (Colo. 1999); In re Fischer, 89 P.3d 817 (Colo. 2004); People v. Edwards, 201 P.3d 555 (Colo. 2008).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Kelley, 840 P.2d 1068 (Colo. 1992); People v. Schindelar, 845 P.2d 1146 (Colo. 1993); People v. Walsh, 880 P.2d 766 (Colo. 1994); People v. Jenks, 910 P.2d 688 (Colo. 1996); People v. Price, 929 P.2d 1316 (Colo. 1996); People v. Mundis, 929 P.2d 1327 (Colo. 1996); People v. Steinman, 930 P.2d 596 (Colo. 1997). People v. Wallace, 936 P.2d 1282 (Colo. 1997); People v. Mannix, 936 P.2d 1285 (Colo. 1997); People v. Sousa, 943 P.2d 448 (Colo. 1997); People v. Schaefer, 944 P.2d 78 (Colo. 1997); People v. Clyne, 945 P.2d 1386 (Colo. 1997); People v. Holmes, 951 P.2d 477 (Colo. 1998); People v. Singer, 955 P.2d 1005 (Colo. 1998); People v. Holmes, 955 P.2d 1012 (Colo. 1998); People v. Valley, 960 P.2d 141 (Colo. 1998); People v. Skaalerud, 963 P.2d 341 (Colo. 1998); People v. Gonzalez, 967 P.2d 156 (Colo. 1998); In re Bilderback, 971 P.2d 1061 (Colo. 1999); In re Stevenson, 979 P.2d 1043 (Colo. 1999); In re Haines, 177 P.3d 1239 (Colo. 2008); People v. Rasure, 212 P.3d 973 (Colo. O.P.D.J. 2009); People v. Gallegos, 229 P.3d 306 (Colo. O.P.D.J. 2010); People v. Edwards, 240 P.3d 1287 (Colo. O.P.D.J. 2010).

Conduct violating this rule is sufficient to justify disbarment. People v. Townshend, 933 P.2d 1327 (Colo. 1997).

Rule 1.16. Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which

the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

Permissive Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15.

ANNOTATION

Law reviews. For article, "Am I My Brother's Keeper? Redefining the Attorney-Client Relationship", see 32 Colo. Law. 11 (April 2003). For article, "The Duty of Loyalty and Preparations to Compete", see 34 Colo. Law. 67 (November 2005). For article, "Ethics in

Family Law and the New Rules of Professional Conduct", see 37 Colo. Law. 47 (October 2008).

Annotator's note. Rule 1.16 is similar to Rule 1.16 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

Attorney discharged without cause may not recover damages under a non-contingency contract for services not rendered before the discharge. It is important to balance the attorney-client relationship and the attorney's right to receive fair and adequate compensation. interests. Olsen & Brown v. City of Englewood, 889 P.2d 673 (Colo. 1995).

The decision as to whether defense counsel should be permitted to withdraw lies within the sound discretion of the court. If the trial court has a reasonable basis for concluding that the attorney-client relationship has not deteriorated to the point at which counsel is unable to give effective assistance in the presentation of a defense, then the court is justified in refusing to appoint new counsel. People v. Rocha, 872 P.2d 1285 (Colo. App. 1993).

Disagreement concerning the refusal of defense counsel to call certain witnesses is not sufficient per se to require the trial court to grant a motion to withdraw. People v. Rocha, 872 P.2d 1285 (Colo. App. 1993).

Among the factors a trial court must consider in determining whether withdrawal is warranted is the possibility that any new counsel will be confronted with the same irreconcilable conflict. People v. Rocha, 872 P.2d 1285 (Colo. App. 1993).

Public censure instead of private censure was appropriate where attorney failed to respond to discovery requests and motions for summary judgment and the findings of the board did not support the applicability of ABA Standard 9.32(i) as a mitigating factor since there was no medical evidence that attorney was affected by chemical dependency or that alcohol contributed to or caused the misconduct. People v. Brady, 923 P.2d 887 (Colo. 1996).

Attorney's restitution agreement was neither an aggravating nor mitigating factor since the attorney did not propose or attempt any form of restitution until after a request for investigation had been filed with the office of disciplinary counsel. People v. Brady, 923 P.2d 887 (Colo. 1996).

Attorney's argument that public discipline is not appropriate because it would stigmatize a recovering alcoholic was rejected since overriding concern in discipline proceedings is to protect the public through the enforcement of professional standards of conduct. People v. Brady, 923 P.2d 887 (Colo. 1996).

Attorney's professional misconduct involving the improper collection of attorney's fees in six instances, and the failure to withdraw upon client's request in one instance justified 45-day suspension. People v. Peters, 849 P.2d 51 (Colo. 1993).

An attorney is entitled only to compensation for the reasonable value of the services rendered if the attorney is employed under a fixed fee contract to render specific legal services and is discharged by the client without cause. The client was entitled to discharge the attorneys without cause and without incurring any further liability, other than payment for services rendered on a quantum meruit theory. Olsen & Brown v. City of Englewood, 867 P.2d 96 (Colo. App. 1993).

Any contractual provision that constrains a client from exercising the right freely to discharge his or her attorney is unenforceable. A client has an unfettered right to discharge freely its attorney without incurring liability under ordinary breach of contract principles. Olsen & Brown v. City of Englewood, 867 P.2d 96 (Colo. App. 1993).

Disbarment appropriate where attorney accepted fees from a number of clients prior to terminating her legal practice, failed to inform her clients of such termination, failed to refund clients' retainer fees, failed to place clients' funds in separate account, and gave clients' files to other lawyers without clients' consent. People v. Tucker, 904 P.2d 1321 (Colo. 1995).

Previously disbarred attorney who violated this rule would be forced to pay restitution to clients as a condition of readmission. People v. Vigil, 945 P.2d 1385 (Colo. 1997).

Conduct violating this rule, in conjunction with other disciplinary rules, sufficient to justify disbarment where the attorney continued to practice law while on suspension, repeatedly neglecting his clients and failing to take reasonable steps to protect clients' interests. People v. Fager, 938 P.2d 138 (Colo. 1997).

Suspension for one year and one day appropriate where attorney violated paragraph (d) by not returning or accounting for client funds held for emergencies after the clients fired the attorney and for negligently converting other client funds to the attorney's own use. People v. Johnson, 944 P.2d 524 (Colo. 1997).

Suspension for three years, rather than disbarment, was appropriate where violation of this rule and others caused serious harm to attorney's clients, but mitigating factors were present, including no previous discipline in 14 years of practice, personal and emotional problems, and cooperation and demonstrated remorse in proceedings. People v. Henderson, 967 P.2d 1038 (Colo. 1998).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Williams, 936

P.2d 1289 (Colo. 1997); People v. Barr, 957 P.2d 1379 (Colo. 1998).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Crews, 901 P.2d 472 (Colo. 1995); People v. Kuntz, 908 P.2d 1110 (Colo. 1996); People v. Johnson, 946 P.2d 469 (Colo. 1997); People v. Rishel, 956 P.2d 542 (Colo. 1998); In re Corbin, 973 P.2d 1273 (Colo. 1999).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Damkar, 908 P.2d 1113 (Colo. 1996); People v. Jamrozek, 921 P.2d 725 (Colo. 1996); People v. Steinman, 930 P.2d 596 (Colo. 1997); People v. Wallace, 936 P.2d 1282 (Colo. 1997); People v. Mannix, 936 P.2d 1285 (Colo. 1997); People v. Madigan, 938 P.2d 1162 (Colo. 1997); People v. Holmes, 951 P.2d 477 (Colo. 1998); People v. Holmes, 955 P.2d 1012 (Colo. 1998); People v. Valley, 960 P.2d 141 (Colo. 1998); People v. Skaalerud, 963 P.2d 341 (Colo. 1998); People v. Rasure, 212 P.3d 973 (Colo. O.P.D.J. 2009); People v. Sweetman, 218 P.3d 1123 (Colo. O.P.D.J. 2008); People v. Edwards, 240 P.3d 1287 (Colo. O.P.D.J. 2010).

Cases Decided Under Former DR 2-104.

Law reviews. For formal opinion of the Colorado Bar Association Ethics Committee on Lawyer Advertising, Solicitation and Publicity, see 19 Colo. Law. 25 (1990). For formal opinion of the Colorado Bar Association Ethics Committee on Collaboration with Non-Lawyers in the Preparation and Marketing of Estate Planning Documents, see 19 Colo. Law. 1793 (1990).

Rule 1.16A. Client File Retention

(a) A lawyer in private practice shall retain a client's files respecting a matter unless:

(1) the lawyer delivers the file to the client or the client authorizes destruction of the file in a writing signed by the client and there are no pending or threatened legal proceedings known to the lawyer that relate to the matter; or

(2) the lawyer has given written notice to the client of the lawyer's intention to destroy the file on or after a date stated in the notice, which date shall not be less than thirty days after the date of the notice, and there are no pending or threatened legal proceedings known to the lawyer that relate to the matter.

(b) At any time following the expiration of a period of ten years following the termination of the representation in a matter, a lawyer may destroy a client's files respecting the matter without notice to the client, provided there are no pending or threatened legal proceedings known to the lawyer that relate to the matter and the lawyer has not agreed to the contrary.

(c) Notwithstanding paragraphs (a) and (b) above, a lawyer in a criminal matter shall retain a client's file for the following time periods:

(1) for the life of the client, if the matter resulted in a conviction and a sentence of death, life without parole, or an indeterminate sentence, including a sentence pursuant to the Colorado Sex Offender Lifetime Supervision Act of 1998, 18-1.3-1001 et seq., C.R.S.

(2) for eight years from the date of sentencing, if the matter resulted in a conviction for any other felony and the conviction and/or sentence was appealed;

(3) for five years from the date of sentencing, if the matter resulted in a conviction for any other felony and neither the conviction nor the sentence was appealed.

(d) A lawyer may satisfy the notice requirements of paragraph (a)(2) of this Rule by establishing a written file retention policy consistent with this Rule and by providing a notice of the file retention policy to the client in a fee agreement or a in writing delivered to the client not later than thirty days before destruction of the client's file or incorporated into a fee agreement.

(e) This Rule does not supersede or limit a lawyer's obligations to retain a client's file that are imposed by law, court order, or rules of a tribunal.

Source: Entire rule and comment added and effective February 10, 2011.

COMMENT

[1] Rule 1.16A is not intended to impose an obligation on a lawyer to preserve documents that the lawyer would not normally preserve, such as multiple copies or drafts of the same document. A client's files, within the meaning of Rule 1.16A, consist of those things, such as

papers and electronic data, relating to a matter that the lawyer would usually maintain in the ordinary course of practice. A lawyer's obligations with respect to client "property" are distinct. Those obligations are addressed in Rules 1.16(d), 1.15(a) and 1.15(b). "Property" generally refers to jewelry and other valuables entrusted to the lawyer by the client, as well as documents having intrinsic value or directly affecting valuable rights, such as securities, negotiable instruments, deeds, and wills.

[2] A lawyer may comply with Rule 1.16A by maintaining a client's files in, or converting the file to, electronic form, provided the lawyer is capable of producing a paper version if necessary. Rule 1.16A does not require multiple lawyers in the same law firm to retain duplicate client files or to retain a unitary file located in one place. "Law firm" is defined in Rule 1.0 to include lawyers employed in a legal services organization or the legal department of a corporation or other organization. Rule 5.1(a) addresses the responsibility of a partner in a law firm to "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct." Generally, lawyers employed by a private corporation or other entity as in-house counsel represent such corporation or entity as employees and the client's files are considered to be in the possession of the client and not the lawyer, such that Rule 1.16A would be inapplicable. Where lawyers are employed as public defenders or by a legal services organization or a government agency to represent third parties under circumstances where the third-party client's files are considered to be files and records of the organization or agency, the lawyer must take reasonable measures to ensure that the client's files are maintained by the organization or agency in accordance with this rule.

[3] Rule 1.16A does not supersede obligations imposed by other law, court order or rules of a tribunal. The maintenance of law firm financial and accounting records covered by Rule 1.15(a) and 1.15(j) is governed exclusively by those rules. Similarly, Rule 1.16A does not supersede specific retention requirements imposed by other rules, such as Rule 5.5(d)(2) (two-year retention of written notification to client of utilization of services of suspended or disbarred lawyer), Rule 4, Chapter 23.3 C.R.C.P. (six-year retention of contingent fee agreement and proof of mailing following completion or settlement of the case) and C.R.C.P. 121, § 1-26(7) (two year retention of signed originals of e-filed documents). A document may be subject to more than one retention requirement, in which case the lawyer should retain the document for the longest applicable period. Rule 1.16A does not prohibit a lawyer from maintaining a client's files beyond the periods specified in the Rule.

[4] A lawyer may not destroy a client's file when the lawyer has knowledge of pending or threatened proceedings relating to the matter. The Rule does not affect a lawyer's obligations under Rule 1.16(d) with respect to the surrender of papers and property to which the client is entitled upon termination of the representation. A client's receipt of papers forwarded from time to time by the lawyer during the course of the representation does not alleviate the lawyer's obligations under Rule 1.16A.

[5] The destruction of a client's files under paragraph (a) of Rule 16A is subject to two sets of preconditions. First, the lawyer must have given written notice to the client of the lawyer's intention to destroy the files on or after a date certain, which date is not less than thirty days after the date the notice was given or the client has authorized the destruction of the files in a writing signed by the client. As provided in paragraph (d), the notice requirement in paragraph (a) can be satisfied by timely giving the client a written statement of the applicable file retention policy; for example, that policy could be contained in a written fee agreement. A lawyer should make reasonable efforts to locate a client for purposes of giving written notice when such notice was not provided during the representation. If the lawyer is unable to locate the client, written notice sent to the client's last known address is sufficient under paragraph (a) Rule 1.16A. Second, the lawyer may not destroy the files if the lawyer knows that there are legal proceedings pending or threatened that relate to the matter for which the lawyer created the files, if the file is subject to paragraph (c) of this Rule, or if the lawyer has agreed otherwise. If these preconditions are satisfied, the lawyer may destroy the files in a manner consistent with the lawyer's continuing obligation to maintain the confidentiality of information relating to the representation under Rules 1.6 and 1.9. Nothing in this Rule is intended to mandate that a lawyer destroy a file in the absence of a client's instruction to do so. Notwithstanding a client's instruction to destroy or return a file, a lawyer may retain a copy of the file or any document in the file.

Rule 1.17. Sale of Law Practice

A lawyer or a law firm may sell or purchase a law practice, or an area of practice, including good will, if the following conditions are satisfied:

(a) the seller ceases to engage in the private practice of law in Colorado, or in the area of practice in Colorado that has been sold;

(b) the entire practice, or the entire area of practice, is sold to one or more lawyers or law firms;

(c) the seller gives written notice to each of the seller's clients regarding:

(1) the proposed sale;

(2) the client's right to retain other counsel or to take possession of the file; and

(3) the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within sixty (60) days of mailing of the notice to the client at the client's last known address; and

(d) the fees charged clients shall not be increased by reason of the sale.

Source: Entire rule added June 12, 1997, effective July 1, 1997; (i) added and adopted and comment amended and adopted April 18, 2001, effective July 1, 2001; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008; Comment [5] amended and effective November 6, 2008.

COMMENT

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice, or ceases to practice in an area of law, and other lawyers or firms take over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. See Rules 5.4 and 5.6.

Termination of Practice by the Seller

[2] The requirement that all of the private practice, or all of an area of practice, be sold is satisfied if the seller in good faith makes the entire practice, or the area of practice, available for sale to the purchasers. The fact that a number of the seller's clients decide not to be represented by the purchasers but take their matters elsewhere, therefore, does not result in a violation. Return to private practice as a result of an unanticipated change in circumstances does not necessarily result in a violation. For example, a lawyer who has sold the practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice upon being defeated in a contested or a retention election for the office or resigns from a judiciary position.

[3] The requirement that the seller cease to engage in the private practice of law does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity that provides legal services to the poor, or as in-house counsel to a business.

[4] The Rule permits a sale of an entire practice attendant upon retirement from the private practice of law within the jurisdiction. Its provisions, therefore, accommodate the lawyer who sells the practice upon the occasion of moving to another state.

[5] This Rule also permits a lawyer or law firm to sell an area of practice. If an area of practice is sold and the lawyer remains in the active practice of law, the lawyer must cease accepting any matters in the area of practice that has been sold, either as counsel or co-counsel or by assuming joint responsibility for a matter in connection with the division of a fee with another lawyer as would otherwise be permitted by Rule 1.5(d). For example, a lawyer with a substantial number of estate planning matters and a substantial number of probate administration cases may sell the estate planning portion of the practice but remain in the practice of law by concentrating on probate administration; however, that practitioner may not thereafter accept any estate planning matters. Although a lawyer who leaves a jurisdiction or geographical area typically would sell the entire practice, this Rule permits the lawyer to limit the sale to one or more areas of the practice, thereby preserving the lawyer's right to continue practice in the areas of the practice that were not sold.

Sale of Entire Practice or Entire Area of Practice

[6] The Rule requires that the seller's entire practice, or an entire area of practice, be sold. The prohibition against sale of less than an entire practice area protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchasers are required to undertake all client matters in the practice or practice area, subject to client consent. This requirement is satisfied, however, even if a purchaser is unable to undertake a particular client matter because of a conflict of interest.

Client Confidences, Consent and Notice

[7] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Rule 1.6 than do preliminary discussions concerning the possible asso-

ciation of another lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific information relating to the representation and to the file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser written notice must be mailed to the client at the client's last known address. The notice must include the identity of the purchaser, and the client must be told that the decision to consent or make other arrangements must be made within 60 days of the mailing of the notice. If nothing is heard from the client within that time, consent to the sale is presumed.

[8] [No Colorado comment.]

[9] All the elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice or area of practice.

Fee Arrangements Between Client and Purchaser

[10] The sale may not be financed by increases in fees charged the clients of the practice. Existing agreements between the seller and the client as to fees and the scope of the work must be honored by the purchaser.

Other Applicable Ethical Standards

[11] Lawyers participating in the sale of a law practice or a practice area are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently (see Rule 1.1); the obligation to avoid disqualifying conflicts, and to secure the client's informed consent for those conflicts that can be agreed to (see Rule 1.7 regarding conflicts and Rule 1.0(e) for the definition of informed consent); and the obligation to protect information relating to the representation (see Rules 1.6 and 1.9).

[12] If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale (see Rule 1.16).

Applicability of the Rule

[13] This Rule applies to the sale of a law practice by representatives of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a non-lawyer representative not subject to these Rules. Since, however, no lawyer may participate in a sale of a law practice which does not conform to the requirements of this Rule, the representatives of the seller as well as the purchasing lawyer can be expected to see to it that they are met.

[14] Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this Rule.

[15] This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice or an area of practice.

Rule 1.18. Duties to Prospective Client

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to the prospective client, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing; or

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of paragraph (a).

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See Rule 1.0(k) (requirements for screening procedures). Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[8] Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[9] For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.

COUNSELOR

Rule 2.1. Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to

the client's situation. In a matter involving or expected to involve litigation, a lawyer should advise the client of alternative forms of dispute resolution that might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

Rule 2.2. Intermediary

Repealed April 12, 2007, effective January 1, 2008.

Rule 2.3. Evaluation for Use by Third Persons

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

(c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

Definition

[1] An evaluation may be performed at the client's direction or when impliedly authorized in order to carry out the representation. See Rule 1.2. Such an evaluation may be for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

[2] A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor's title to property does not have a client-lawyer relationship with the vendor. So also, an investigation into a person's affairs by a government lawyer, or by special counsel employed by the government, is not an evaluation as that term is used in this Rule. The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to client and preservation of confidences apply, which is not the case if the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the lawyer is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

Duties Owed to Third Person and Client

[3] When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this Rule. However, since such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

Access to and Disclosure of Information

[4] The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the noncooperation of persons having relevant information. Any such limitations that are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding circumstances. In no circumstances is the lawyer permitted to knowingly make a false statement of material fact or law in providing an evaluation under this Rule. See Rule 4.1.

Obtaining Client's Informed Consent

[5] Information relating to an evaluation is protected by Rule 1.6. In many situations, providing an evaluation to a third party poses no significant risk to the client; thus, the lawyer may be impliedly authorized to disclose information to carry out the representation. See Rule 1.6(a). Where, however, it is reasonably likely that providing the evaluation will affect the client's interests materially and adversely, the lawyer must first obtain the client's consent after the client has been adequately informed concerning the important possible effects on the client's interests. See Rules 1.6(a) and 1.0(e).

Financial Auditors' Requests for Information

[6] When a question concerning the legal situation of a client arises at the instance of the client's financial auditor and the question is referred to the lawyer, the lawyer's response may be made in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information, adopted in 1975.

Rule 2.4. Lawyer Serving as Third-party Neutral

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator or decision maker depends on the particular process that is either selected by the parties or mandated by a court.

[2] The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.

[3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

[4] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12.

[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(m)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

ADVOCATE

Rule 3.1. Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for

the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

ANNOTATION

Annotator's note. Rule 3.1 is similar to Rule 3.1 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

The constitutional right to petition the government for a redress of grievances protects appeals from court decisions unless the sham exemption applies. Therefore, an attorney may not be disciplined unless the filing of an appeal is objectively without merit and the attorney subjectively intended an ulterior motive. In re Foster, 253 P.3d 1244 (Colo. 2011).

Public censure was appropriate where the attorney failed to cooperate in a disciplinary investigation, made frivolous motions, and made a statement with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge. People v. Thomas, 925 P.2d 1081 (Colo. 1996).

A violation of this rule must be proved by clear and convincing evidence in a disciplinary proceeding. Therefore, the fact that a district court had found by a preponderance of the evidence that an attorney had made a frivolous motion did not preclude the hearing board from determining that the attorney had not violated this rule. In re Egbune, 971 P.2d 1065 (Colo. 1999).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Robinson, 853 P.2d 1145 (Colo. 1993); People v. Maynard, 238 P.3d 672 (Colo. O.P.D.J. 2009).

Cases Decided Under Former DR 1-102.

I. General Consideration.
II. Disciplinary Actions.
A. Public Censure.
B. Suspension.
C. Disbarment.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Incriminating Evidence: What to do With a Hot Potato", see 11 Colo. Law. 880 (1982). For article, "The Ethical Obligation to Disclose Attorney Negligence", see 13 Colo. Law. 232 (1984). For article, "Indemnification or Contribution Among Counsel in Legal Malpractice Actions", see 14 Colo. Law. 563 (1985). For article, "The Lawyer's Duty to Report Ethical Violations", see 18 Colo. Law. 1915 (1989). For article, "Update on Ethics and Malpractice Avoidance in Family Law — Part I", see 19 Colo. Law. 465 (1990). For article, "Update on Ethics and Malpractice Avoidance in Family Law — Part II", see 19 Colo. Law. 647 (1990). For formal opinion of the Colorado Bar Association Ethics Committee on Use of Subpoenas in Civil Proceedings, see 19 Colo. Law. 1556 (1990). For article, "Punishing Ethical Violations: Aggravating and Mitigating Factors", see 20 Colo. Law. 243 (1991). For article, "Sex, Lawyers

and Vilification", see 21 Colo. Law. 469 (1992).

Constitutionality upheld. This rule is not unconstitutionally vague on its face or as applied. People v. Morley, 725 P.2d 510 (Colo. 1986).

Standards used in determining a constitutional challenge to a statute are used in determining a constitutional challenge to this rule. People v. Morley, 725 P.2d 510 (Colo. 1986).

Presumption of constitutionality attaches to such enactment, and the burden is on the party challenging an enactment to demonstrate its unconstitutionality beyond a reasonable doubt. People v. Morley, 725 P.2d 510 (Colo. 1986).

Since a disciplinary rule is promulgated for the purpose of guiding lawyers in their professional conduct, and is not directed to the public at large, the central consideration in resolving a vagueness challenge should be whether the nature of the proscribed conduct encompassed by the rule is readily understandable to a licensed lawyer. People v. Morley, 725 P.2d 510 (Colo. 1986).

Attorney's psychological problems considered as aggravating and mitigating circumstances in arriving at a recommendation for discipline. The presence of psychological problems, however, does not automatically prevent the attorney from assisting in his own defense where evidence is shown to the contrary. People v. Belina, 765 P.2d 121 (Colo. 1988).

Attorney's conduct was so careless or reckless as to constitute sufficient showing of knowledge for violation of subsection (A)(4) of this disciplinary rule. People v. Rader, 822 P.2d 950 (Colo. 1992).

In order to find that attorney engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of this disciplinary rule, it must be shown that attorney had culpable mental state greater than simple negligence. People v. Rader, 822 P.2d 950 (Colo. 1992).

Failure to respond to inquiries from referral service, to pay consultation charges and forwarding fees to service, and to return case status reports to service constitutes a violation of sections (A)(1), (A)(4), and (A)(6). People v. Taylor, 799 P.2d 930 (Colo. 1990).

Attorney's conduct violated section (A)(4), (A)(5), (A)(6), and DR 2-106(A), where the attorney's multiple billing practice resulted in the charging or collection of a clearly excessive fee because the compensation claimed bore no rational relationship to the work performed and exceeded the compensation authorized by law. People v. Walker, 832 P.2d 935 (Colo. 1992).

Attorney's conduct violated sections (A)(4) and (A)(5) where the attorney failed to file applications for approval of fees in a bankruptcy case, did not seek court approval of compensation after the bankruptcy petition was filed, and left the state while the case was pending without providing his client means of contacting him. These actions, aggravated by a previous public censure, warranted a 60-day suspension. People v. Mills, 923 P.2d 116 (Colo. 1996).

Hearing board should not have found violations of sections (A)(4) and (A)(5) where board absolved attorney of the charges the complaint advised him to defend. By failing to find a violation for the failure to disclose certain payments until ordered to do so, the board should not have proceeded with finding that attorney committed misconduct in not detailing the sources of the disputed income. In re Quiat, 979 P.2d 1029 (Colo. 1999).

Board erred in concluding that attorney's representation of individual client with whom he had a business relationship constituted conduct adversely reflecting on attorney's fitness to practice law. Neither complainant's expert nor hearing board paid sufficient attention to the specific and unusual facts of the general and limited partnerships' actual or potential liabilities. The record does not support the board's findings that an actual conflict existed among the general and limited partners, including the attorney, or that potential for conflict was likely. In re Quiat, 979 P.2d 1029 (Colo. 1999).

An attorney's appearance as counsel of record in numerous court proceedings following an order of suspension constituted a violation of DR 1-102(A)(4). People v. Kargol, 854 P.2d 1267 (Colo. 1993).

Attorney's effort to cause suppression of relevant evidence at driver license revocation proceeding in a manner not authorized by statute or other law constitutes conduct prejudicial to administration of justice and contrary to DR 1-102 (A)(5). People v. Attorney A., 861 P.2d 705 (Colo. 1993).

Attorney's effort to condition settlement of a malpractice claim upon client's agreement not to file a grievance against him constituted conduct prejudicial to the administration of justice in violation of paragraph (A)(5). People v. Moffitt, 801 P.2d 1197 (Colo. 1990).

Adopting a conscious scheme to take ownership of homes, collect rents from tenants, make virtually no efforts to sell the homes, and permit foreclosures to occur on which the department of housing and urban development (HUD) would absorb the losses constituted equity skimming in violation of § 18-5-802 and constitutes a violation of sections (A)(4) and (A)(6) for which suspension for one year is appropriate. People v. Phelps, 837 P.2d 755 (Colo. 1992).

As officers of the court, lawyers are charged with obedience to the laws of this state and to the laws of the United States, and

intentional violation by them of these laws subjects them to the severest discipline. People v. Wilson, 176 Colo. 389, 490 P.2d 954 (1971).

The crime with which an attorney is charged is one of serious consequences denoting moral turpitude and he is found guilty of such a crime, he cannot, in good conscience, be permitted to practice law in this state. People v. Wilson, 176 Colo. 389, 490 P.2d 954 (1971).

It is unprofessional conduct and dishonorable to deal other than candidly with the facts in drawing affidavits and other documents. People v. Radinsky, 176 Colo. 357, 490 P.2d 951 (1971).

By filing false documents, an attorney perpetrates a fraud upon the court. People v. Radinsky, 176 Colo. 357, 490 P.2d 951 (1971).

Where an attorney receives as a fee from one of his clients stolen property, then even though he does ask the client whether the item was stolen and receives a negative answer from him, he should make further inquiry as to the actual source of the item, and failure to do so constitutes a breach of his obligations as a member of the bar. People v. Zelinger, 179 Colo. 379, 504 P.2d 668 (1972).

License to practice law assures public that the lawyer who holds the license will perform basic legal tasks honestly and without undue delay, in accordance with the highest standards of professional conduct. People v. Witt, 200 Colo. 522, 616 P.2d 139 (1980); People v. Dixon, 621 P.2d 322 (Colo. 1981); People v. Kendrick, 646 P.2d 337 (Colo. 1982).

An attorney must adhere with dedication to the highest standards of honesty and integrity in order that members of the public are assured that they may deal with attorneys with the knowledge that their matters will be handled with absolute propriety. People v. Golden, 654 P.2d 853 (Colo. 1982).

Client has right to expect competency and integrity from lawyer. A client has every right to expect that conduct taken on its behalf will be carried out with that competence and integrity ideally shared by every lawyer who is licensed to practice law in the jurisdiction. Williams v. Burns, 463 F. Supp. 1278 (D. Colo. 1979); People v. Pooley, 774 P.2d 239 (Colo. 1989).

Public expects appropriate discipline for misconduct. The public has a right to expect that one who engages in professional misconduct will be disciplined appropriately. People v. Witt 200 Colo. 522, 616 P.2d 139 (1980); People v. Dixon, 621 P.2d 322 (Colo. 1981).

Most severe punishment is required when a lawyer disregards his professional obligations and converts his clients' funds to his own use. People v. Kluver, 199 Colo. 511, 611 P.2d 971 (1980); People v. Kendrick, 646 P.2d 337 (Colo. 1982); People v. Bealmear, 655 P.2d 402 (Colo. 1982).

Conversion of client funds is conduct warranting disbarment because it destroys the trust essential to the attorney-client relationship, severely damages the public's perception of attorneys, and erodes public confidence in our legal system. People v. Radosevich, 783 P.2d 841 (Colo. 1989).

Where attorney, as trustee, withdrew $13,100 from the trust without the client-settlor's knowledge and refused to repay the money when given the opportunity by the client-settlor, attorney's conduct was sufficient to warrant disbarment. People v. Whitcomb, 819 P.2d 493 (Colo. 1991).

Conversion of client funds cannot be tolerated regardless of the apparent fact that the attorney did not use such funds for personal gain but to pay the costs and expenses incident to handling a large practice that included many non-paying clients. People v. Franco, 698 P.2d 230 (Colo. 1985).

Fitness to practice law adversely reflected upon by attorney's business judgment and violations of the code of professional responsibility although his legal competence was not questioned. People v. Franco, 698 P.2d 230 (Colo. 1985).

Failure to represent a client also adversely reflects upon an attorney's fitness to practice law. People v. Coca, 732 P.2d 640 (Colo. 1987).

Attorney should never obstruct justice or judicial process. An attorney has a high duty as an officer of the court to never participate in any scheme to obstruct the administration of justice or the judicial process. People v. Kenelly, 648 P.2d 1065 (Colo. 1982); People v. Haase, 781 P.2d 80 (Colo. 1989).

Submission of false transcript to obtain admission to law school and to qualify for admission as a member of the bar is a violation of this rule and requires that respondent's admission to the bar be voided. People v. Culpepper, 645 P.2d 5 (Colo. 1982).

Failure to disclose a misdemeanor conviction in another state when applying for the bar and subsequent disbarment from the other state constitutes conduct involving fraud, deceit, and misrepresentation prejudicial to the administration of justice. People v. Mattox, 639 P.2d 397 (Colo. 1982).

Lawyer owes obligation to client to act with diligence in handling his client's legal work and in his representation of his client in court. People v. Bugg, 200 Colo. 512, 616 P.2d 133 (1980).

Failure to take any action on behalf of his client after he was retained and entrusted with work and in making representations to his client which were false, an attorney violates the code of professional responsibility and C.R.C.P. 241.6. People v. Southern, 638 P.2d 787 (Colo. 1982).

Fact that attorney informed client that

workers' compensation hearing was cancelled due to attorney's illness when attorney was actually abandoning practice constituted conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of this rule. People v. Felker, 770 P.2d 402 (Colo. 1989).

Fabricating documents to justify conduct breaches attorney's ethical obligations to his client and to the bar. People v. Yost, 729 P.2d 348 (Colo. 1986).

Falsification of an adoption decree with the original intent to use it for a fraudulent purpose is forgery in violation of § 18-5-103 and is a violation of DR 1-102 and DR 7-102 whether of not the attorney who falsified the decree actually used or attempted to use the decree. People v. Marmon, 903 P.2d 651 (Colo. 1995).

Absence of contempt finding by trial court concerning attorney's willful failure to pay child support is a non-dispositive factor to be considered when imposing discipline. People v. Kolenc, 887 P.2d 1024 (Colo. 1994).

Trial court's finding in child support hearing that attorney willfully violated child support order should be accorded collateral estoppel effect before the hearing board as long as court makes finding by clear and convincing evidence or beyond a reasonable doubt. People v. Kolenc, 887 P.2d 1024 (Colo. 1994).

Attorney violated this rule and C.R.P.C. 1.1 when he prepared and filed child support worksheets that failed to properly reflect the new stipulation concerning custody. People v. Davies, 926 P.2d 572 (Colo. 1996).

Lawyer may not secretly record any conversation he has with another lawyer or person. People v. Selby, 198 Colo. 386, 606 P.2d 45 (1979).

Telephone conversation, which attorney initiated and recorded without the permission of other party to conversation established unethical conduct on attorney's part. People v. Wallin, 621 P.2d 330 (Colo. 1981).

Inherent in the undisclosed use of a recording device is an element of deception, artifice, and trickery which does not comport with the high standards of candor and fairness by which all attorneys are bound. People v. Selby, 198 Colo. 386, 606 P.2d 45 (1979); People v. Smith, 778 P.2d 685 (Colo. 1989).

Suspension from practice in tax court is a determination of misconduct in another jurisdiction constituting grounds for discipline under these rules. People v. Hartman, 744 P.2d 482 (Colo. 1987).

Unfounded assertion of attorney's lien violates professional code. The assertion of an attorney's lien in circumstances where the attorney has no statutory or legal foundation for a lien and, in fact, has only an uncertain claim to the fee on which the purported lien is founded violates the code of professional responsibility. People v. Razatos, 636 P.2d 666 (Colo. 1981), appeal dismissed, 455 U.S. 930, 102 S. Ct. 1415, 71 L. Ed. 2d 639 (1982).

Willful and knowing failure to make a federal income tax return is an offense involving moral turpitude. People v. Emeson, 638 P.2d 293 (Colo. 1981).

Both the charges and the well pleaded complaint are deemed admitted by the entry of a default judgment. People v. Richards, 748 P.2d 341 (Colo. 1987).

Continued representation of clients with conflicting interests violates this rule and warrants discipline. People v. Awenius, 653 P.2d 740 (Colo. 1982).

Attorney's representation of two estates where the beneficiaries of the estates had conflicting interests and the attorney fails to obtain waivers from the beneficiaries is a violation of this rule. People v. Gebauer, 821 P.2d 782 (Colo. 1991).

Attorney violated this rule by lying to grievance committee counsel regarding the return of client's files. People v. Felker, 770 P.2d 402 (Colo. 1989).

Conduct found to violate disciplinary rules. People v. Bugg, 635 P.2d 881 (Colo. 1981); People v. Sachs, 732 P.2d 633 (Colo. 1987); People v. Ross, 810 P.2d 659 (Colo. 1991).

Conduct held to violate this rule. People v. Goss, 646 P.2d 334 (Colo. 1982).

Applied in People v. Spiegel, 193 Colo. 161, 567 P.2d 353 (1977); People v. Schermerhorn, 193 Colo. 364, 567 P.2d 799 (1977); People v. Pittam, 194 Colo. 104, 572 P.2d 135 (1977); People v. Good, 195 Colo. 177, 576 P.2d 1020 (1978); People v. McMichael, 196 Colo. 128, 586 P.2d 1 (1978); People v. Susman, 196 Colo. 458, 587 P.2d 782 (1978); People v. Harthun, 197 Colo. 1, 593 P.2d 324 (1979); People v. Cameron, 197 Colo. 330, 595 P.2d 677 (1979); People ex rel. Aisenberg v. Young, 198 Colo. 26, 599 P.2d 257 (1979); People v. Pacheco, 198 Colo. 455, 608 P.2d 333 (1979); People ex rel. Gallagher v. Hertz, 198 Colo. 522, 608 P.2d 335 (1979); People ex rel. Silverman v. Anderson, 200 Colo. 76, 612 P.2d 94 (1980); People v. Hilgers, 200 Colo. 211, 612 P.2d 1134 (1980); People v. Lanza, 200 Colo. 241, 613 P.2d 337 (1980); People v. Meldahl, 200 Colo. 332, 615 P.2d 29 (1980); People v. Hurst, 200 Colo. 537, 618 P.2d 1113 (1980); People v. Kendrick, 619 P.2d 65 (Colo. 1980); People v. Gottsegen, 623 P.2d 878 (Colo. 1981); People v. Luxford, 626 P.2d 675 (Colo. 1981); People v. Rotenberg, 635 P.2d 220 (Colo. 1981); People v. Wright, 638 P.2d 251 (Colo. 1981); People v. Kane, 638 P.2d 253 (Colo. 1981); People v. Archuleta, 638 P.2d 255 (Colo. 1981); Law Offices of Bernard D. Morley, P.C. v. MacFarlane, 647 P.2d 1215 (Colo. 1982); People v. Whitcomb, 676 P.2d 11 (Colo. 1983); People v.

Tucker, 676 P.2d 680 (Colo. 1983); People v. Bollinger, 681 P.2d 950 (Colo. 1984); People v. Underhill, 683 P.2d 349 (Colo. 1984); People v. Simon, 698 P.2d 228 (Colo. 1985); People v. McDowell, 718 P.2d 541 (Colo. 1986); People v. Smith, 778 P.2d 685 (Colo. 1989).

II. DISCIPLINARY ACTIONS.

A. Public Censure.

Violation of election laws sufficient to justify public censure. People v. Casias, 646 P.2d 391 (Colo. 1982).

Bigamy, an offense of moral turpitude, warrants public censure. People v. Tucker, 755 P.2d 452 (Colo. 1988).

An attorney's inaction in response to the grievance committee's request concerning informal complaint filed, considered with other circumstances, justified public censure. People v. Moore, 681 P.2d 480 (Colo. 1984).

Where an attorney repeatedly issued checks from his law office account knowing that they would not be paid by the bank, such conduct, considered with other circumstances, justified public censure. People v. Moore, 681 P.2d 480 (Colo. 1984).

Public censure warranted where attorney kept the first lump sum check obtained in settlement as a lump sum payment of his contingency fee and reimbursement of costs even though he knew the settlement might later be reduced by the social security disability award and the client's union award. People v. Maceau, 910 P.2d 692 (Colo. 1996).

Adjudicating, as a judge, the criminal case of a person who is his client in a divorce proceeding warrants public censure because it is the duty of an attorney-judge to promptly disclose conflicts of interest and to disqualify himself without suggestion from anyone. People v. Perrott, 769 P.2d 1075 (Colo. 1989).

Conduct was prejudicial to the administration of justice and warranted public censure where, during the course of criminal proceedings, attorney made an offer to the deputy district attorney to dismiss a related civil action if the criminal charges against his client were dismissed. People v. Silvola, 888 P.2d 244 (Colo. 1995).

Use of racial epithet by prosecutor in discussing case with defense counsel for two Hispanic defendants constituted a violation of this section warranting public censure. People v. Sharpe, 781 P.2d 659 (Colo. 1989).

Neglect of a legal matter ordinarily warranting a letter of admonition by way of reprimand requires imposition of public censure when such conduct is repeated after three letters of admonition. People v. Goodwin, 782 P.2d 1 (Colo. 1989).

Public censure was appropriate where an already suspended attorney was the subject of prior discipline for misdemeanor convictions of assault and driving while impaired and where an additional period of suspension would have little, if any, practical effect and would not have afforded a meaningful measure of protection for the public. People v. Flores, 871 P.2d 1182 (Colo. 1994).

Evidence sufficient to justify public censure. People v. Hertz, 638 P.2d 794 (Colo. 1982).

Public censure was appropriate where lawyer's actions involving criminal activity did not seriously affect the lawyer's fitness to practice law and mitigating factors were present in the absence of any aggravating factors. People v. Fahselt, 807 P.2d 586 (Colo. 1991).

Public censure was appropriate where multiple representations and neglect caused no actual harm and attorney was cooperative during disciplinary proceedings, had no prior discipline, and was relatively inexperienced at the time the misconduct occurred. People v. Ramseur, 897 P.2d 1391 (Colo. 1995).

Threatening to invoke disciplinary proceedings against judge in anticipation of adverse ruling warrants public censure. People v. Tatum, 814 P.2d 388 (Colo. 1991).

Failure to timely file a paternity action constitutes neglect of a legal matter that warrants public censure. People v. Good, 790 P.2d 331 (Colo. 1990).

Public censure was warranted where attorney made false statements in the course of discovery in cases where the attorney was the plaintiff. Evidence showed that the attorney was suffering from a psychiatric condition at the time, and the assistant disciplinary counsel could not prove that the attorney's false statements were knowing, but only that they were negligent. People v. Dillings, 880 P.2d 1220 (Colo. 1994).

Public censure was appropriate where attorney failed to provide a critical document to opposing counsel after agreeing to do so and failed to reveal relevant information at the time of trial. People v. Wilder, 860 P.2d 523 (Colo. 1993).

Failure to inform arbitrators of errors in expert witness' testimony constituted violation of DR 7-102 warranting public censure because attorney did not disclose that expert had informed attorney of mistakes in writing, and attorney made closing arguments based on uncorrected expert conclusions. People v. Bertagnolli, 861 P.2d 717 (Colo. 1993) (decided under DR 7-102).

Public censure was appropriate where attorney's failure to appear at three hearings violated subsection (A)(5) and, in aggravation, there was a pattern of misconduct. People v. Cabral, 888 P.2d 245 (Colo. 1995).

Public censure warranted where attorney

engaged in sexual relations with client attorney represented in dissolution of marriage action even though client suffered no actual harm. People v. Zeilinger, 814 P.2d 808 (Colo. 1991).

Discharging firearm in direction of spouse while intoxicated, although not a crime involving dishonesty, goes beyond mere negligence and public censure is appropriate. Mitigating factors, although present, were insufficient to warrant making censure private. People v. Senn, 824 P.2d 822 (Colo. 1992).

Public censure is appropriate for attorney's negligence in closing estates in an untimely manner and for representing two estates where the beneficiaries of the estates have conflicting interests and the attorney fails to obtain waivers from the beneficiaries. People v. Gebauer, 821 P.2d 782 (Colo. 1991).

Attorney's unlawful assertion of charging lien against client's share of estate proceeds following client's demand for return of property is subject to public censure. People v. Mills, 861 P.2d 708 (Colo. 1993) (decided under DR 1-102 (A)(5)).

Public censure is appropriate where lawyer's predominant mental state was one of negligence and there was an absence of actual harm to the client. People v. Hickox, 889 P.2d 47 (Colo. 1995).

Public censure is appropriate if attorney's course of behavior exhibits a serious error in judgment going beyond simple negligence. People v. Blundell, 901 P.2d 1268 (Colo. 1995).

Public censure was appropriate where the attorney failed to cooperate in a disciplinary investigation, made frivolous motions, and made a statement with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge. People v. Thomas, 925 P.2d 1081 (Colo. 1996).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Ashley, 796 P.2d 962 (Colo. 1990); People v. Mulvihill, 814 P.2d 805 (Colo. 1991); People v. Smith, 819 P.2d 497 (Colo. 1991); People v. Richardson, 820 P.2d 1120 (Colo 1991); People v. Dalton, 840 P.2d 351 (Colo. 1992); People v. Vsetecka, 893 P.2d 1309 (Colo. 1995); People v. Wollrab, 909 P.2d 1093 (Colo. 1996); People v. Fitzgibbons, 909 P.2d 1098 (Colo. 1996); People v. Cohan, 913 P.2d 523 (Colo. 1996).

Conduct violating this rule sufficient to justify public censure. People v. Bollinger, 648 P.2d 620 (Colo. 1982); People v. Driscoll, 716 P.2d 1086 (Colo. 1986); People v. Mayer, 716 P.2d 1094 (Colo. 1986); People v. Carpenter, 731 P.2d 726 (Colo. 1987); People v. Schaiberger, 731 P.2d 728 (Colo. 1987); People v. Horn, 738 P.2d 1186 (Colo. 1987); People v. Stauffer, 745 P.2d 240 (Colo. 1987); People v. Barr, 748 P.2d 1302 (Colo. 1988); People v. Dowhan, 759 P.2d 4 (Colo. 1988); People v. Fieman, 778 P.2d 830 (Colo. 1990); People v. Stayton, 798 P.2d 903 (Colo. 1990); People v. Brinn, 801 P.2d 1195 (Colo. 1990); People v. Moffitt, 801 P.2d 1197 (Colo. 1990); People v. Barr, 805 P.2d 440 (Colo. 1991); People v. Shunneson, 814 P.2d 800 (Colo. 1991); People v. Reichman, 819 P.2d 1035 (Colo. 1991); People v. Gebauer, 821 P.2d 782 (Colo. 1991); People v. Dillings, 880 P.2d 1220 (Colo. 1994); People v. Wollrab, 909 P.2d 1093 (Colo. 1996).

B. Suspension.

Preparing false carbon copies of correspondence to a client and testifying falsely to grievance committee of the supreme court concerning these letters warrants suspension from practice of law for period of at least three years, but not disbarment. People v. Klein, 179 Colo. 408, 500 P.2d 1181 (1972).

Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court, or that material information is improperly being withheld, takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding, or when a lawyer knows that he is violating a court order or rule and there is injury or potential injury to a client or a party, or interference or potential interference with a legal proceeding. People v. Walker, 832 P.2d 935 (Colo. 1992).

One-year suspension warranted where attorney failed to promptly respond to discovery requests, failed to inform client of case progress after custody hearing, failed to withdraw upon client's request, failed to advise client of child support modification hearing, misrepresented to the court that he was unable to contact client, and had been previously suspended for similar misconduct. People v. Regan, 871 P.2d 1184 (Colo. 1994).

Fraud, jury tampering, and excessive fees are basis for indefinite suspension. People v. Radinsky, 176 Colo. 357, 490 P.2d 951 (1971).

Attorney suspended for three years for repeated neglect and delay in handling legal matters, failure to comply with the directions contained in a letter of admonition, failure to answer letter of complaint from the grievance committee, and conviction of a misdemeanor. People v. Hebenstreit, 764 P.2d 51 (Colo. 1988).

By commingling trust funds with his own, failing to maintain complete records of his client's funds, and failure to render appropriate accounts to his client, the attorney's conduct adversely reflected on his fitness to practice law, justifying suspension from practice. People v. Wright, 698 P.2d 1317 (Colo. 1985).

For commingling of funds in trust account warranting suspension from practice, see People v. Calvert, 721 P.2d 1189 (Colo. 1986).

Recommendation of prosecution without legitimate interest warrants suspension. Where an attorney took advantage of his position of respect and status in a district attorney's office by repeatedly urging criminal prosecution in matters where his only legitimate professional interest could be in related civil matters, such actions are prejudicial to the administration of justice in violation of paragraph (A) (5). People ex rel. Gallagher v. Hertz, 198 Colo. 522, 608 P.2d 335 (1979).

Actions taken by attorney contrary to court order violate this rule and justify suspension. People v. Awenius, 653 P.2d 740 (Colo. 1982).

Suspension is appropriate discipline given number and severity of instances of misconduct, including pattern of neglect over clients' affairs over lengthy period and in variety of circumstances and misrepresentation in dissolution case to client who wished to remarry concerning the filing of a dissolution petition. Considering proper mitigating factors such as attorney's lack of experience, absence of prior discipline, attorney's willingness to undergo psychiatric evaluation and accept transfer to disability inactive status, suspension without credit for time on disability inactive status is appropriate. People v. Griffin, 764 P.2d 1166 (Colo. 1988).

Suspension is appropriate for a lawyer addicted to alcohol and cocaine and who neglected a client's case resulting in the entry of default judgment, but who entered into an uncompelled restitution agreement and successfully completed substance abuse treatment. People v. Richtsmeier, 802 P.2d 471 (Colo. 1990).

Attorney misconduct of neglecting a guardianship matter and engaging in conduct prejudicial to the administration of justice warrant 90-day suspension when aggravated by history of five prior instances of disciplinary offenses for neglect, pattern of misconduct, refusal to acknowledge wrongful nature of conduct, vulnerability of victim, and substantial experience in the practice of law. People v. Dolan, 813 P.2d 733 (Colo. 1991).

Conduct manifesting gross carelessness in representation of clients is sufficient to justify suspension. People v. Roehl, 655 P.2d 1381 (Colo. 1983); People v. Fahrney, 782 P.2d 743 (Colo. 1989).

Attorney's neglect of dissolution case and misrepresentation to client concerning the filing of dissolution petition was especially egregious in view of client's desire to remarry. Such conduct in addition to number and severity of other instances of misconduct, taking into account mitigating factors, is sufficient for suspension. People v. Griffin, 764 P.2d 1166 (Colo. 1988).

Felony theft held sufficient grounds for suspension. People v. Petrie, 642 P.2d 519 (Colo. 1982).

Photocopying another attorney's securities opinion letter and presenting it as one's own, refusing to comply with discovery rules and court orders in litigation to which one is a party, and continuously failing to answer grievance complaint without good cause warrants suspension. People v. Spangler, 676 P.2d 674 (Colo. 1983).

An attorney's conduct in borrowing money from his former clients and in failing to record deeds of trust on their behalf to be used as security constitutes professional misconduct and justifies his suspension. People v. Brackett, 667 P.2d 1357 (Colo. 1983).

Where attorney engaged in a pattern of neglect, obvious conflict, and caused injury to his clients, suspension is warranted. People v. Belina, 765 P.2d 121 (Colo. 1988).

Evidence sufficient to justify suspension from the practice of law. People v. Belfor, 197 Colo. 223, 591 P.2d 585 (1979); People v. Stineman, 716 P.2d 1079 (Colo. 1986).

Both the charges and the well pleaded complaint are deemed admitted by the entry of a default judgment. People v. Richards, 748 P.2d 341 (Colo. 1987); People v. McMahill, 782 P.2d 336 (Colo. 1988).

Suspended attorney must demonstrate rehabilitation for readmittance to bar. Actions of a suspended attorney who took part in a complex real estate transaction and engaged in the practice of law by representing, counseling, advising, and assisting a former client warranted suspension until he demonstrates by clear and convincing evidence that (1) he has been rehabilitated; (2) he has complied with and will continue to comply with all applicable disciplinary orders and rules; and (3) he is competent and fit to practice law. People v. Belfor, 200 Colo. 44, 611 P.2d 979 (1980).

Where a practicing attorney breached fiduciary duties to his client in misrepresenting his dealings and in handling of funds given to him in trust, his conduct warranted disbarment, and before he may seek readmittance to the state bar association, he must first demonstrate to the grievance committee that rehabilitation has occurred and that he is entitled to a new start. People ex rel. Buckley v. Beck, 199 Colo. 482, 610 P.2d 1069 (Colo. 1980).

Attorney's payment to inmates for referrals to attorney for the provision of legal services justifies 60-day suspension. People v. Shipp, 793 P.2d 574 (Colo. 1990); People v. Whitaker, 814 P.2d 812 (Colo. 1991).

Three-month suspension appropriate where attorney intentionally misrepresented that he possessed automobile insurance coverage to automobile accident victim, police officer, and grievance committee investigator, and where attorney was previously publicly censured for engaging in lengthy delay tactics. People v. Dowhan, 814 P.2d 822 (Colo. 1991).

Reckless disregard for the propriety of submitting multiple and duplicative billing in court-appointed cases constitutes knowing conduct warranting a 90-day suspension. People v. Walker, 832 P.2d 935 (Colo. 1992).

Repeated drawings of checks upon insufficient funds and misuse of trust account moneys constituted grounds for suspension. People v. Lamberson, 802 P.2d 1098 (Colo. 1990).

Attorney's failure to file personal state and federal income tax returns and to pay withholding taxes for federal income taxes and FICA, and use of cocaine and marijuana constitute conduct warranting suspension for one year and one day. People v. Holt, 832 P.2d 948 (Colo. 1992).

Suspension for one year and one day warranted where attorney misrepresented to client that a trial had been scheduled, that continuances and new trial settings had been made, that a settlement had been reached, and where the attorney's previous, similar discipline, was a significant aggravating factor. People v. Smith, 888 P.2d 248 (Colo. 1995).

Suspension for one year and one day warranted for attorney who "represented" client for a period of 19 months without that person's knowledge or consent, even asserting a counterclaim on his behalf without talking to him; who did not communicate with him in any manner for an extended period of time and then did not withdraw within a reasonable time after being unable to contact him; and who failed to answer discovery requests, resulting in the entries of default and then a default judgment against him. People v. Silvola, 915 P.2d 1281 (Colo. 1996).

Suspension for one year and one day is warranted for commingling and misuse of client funds. The hearing board found that the respondent acted recklessly, rather than knowingly, in misappropriating client funds. People v. Zimmermann, 922 P.2d 325 (Colo. 1996).

Suspension of one year and one day necessary where lawyer engaged in sexual relationship with client, had been previously disciplined, and submitted false evidence to the hearing board concerning the sexual relationship. People v. Good, 893 P.2d 101 (Colo. 1995).

Suspension of one year and one day warranted in light of the seriousness of attorney's misconduct in conjunction with his noncooperation in the disciplinary proceedings and his substantial experience in the practice of law. People v. Clark, 900 P.2d 129 (Colo. 1995).

Suspension for one year and one day warranted where attorney billed for time that was not actually devoted to work contemplated by contract and for time not actually performed. People v. Shields, 905 P.2d 608 (Colo. 1995).

Suspension for one year and one day was warranted for attorney who violated this rule and C.R.P.C. 1.1 by preparing and filing child support worksheets that failed to properly reflect the new stipulation concerning custody and where aggravating factors included a previous disciplinary history and failure to appear in the grievance proceedings. People v. Davies, 926 P.2d 572 (Colo. 1996).

Mental disability that caused misconduct is a mitigating factor which, when considered in conjunction with other factors, justifies suspension of attorney for conversion of funds that would otherwise warrant disbarment. People v. Lujan, 890 P.2d 109 (Colo. 1995).

District attorney's failure to prosecute personal friend for possession of marijuana violates paragraphs (A)(1), (A)(5), and (A)(6) of this rule and warrants three-year suspension. People v. Larsen, 808 P.2d 1265 (Colo. 1991).

Suspension of lawyer for three years, which is the longest possible period for suspension, is appropriate where there was extensive pattern of client neglect and intentional deception in client matters over a period of years. Anything less would be too lenient. People v. Hellewell, 811 P.2d 386 (Colo. 1991).

Suspension justified where respondent violated federal and state laws by failing to file personal income tax returns, failing to pay withholding taxes, using cocaine, and using marihuana. People v. Holt, 832 P.2d 948 (Colo. 1992).

The fact that no specific client of the respondent was actually harmed by the respondent's misconduct misses the point in proceeding for suspension of an attorney. While the primary purpose of attorney discipline is the protection of the public and not to mete punishment to the offending lawyer, lawyers are, nonetheless, charged with obedience to the law, and intentional violation of those laws subjects an attorney to the severest discipline. People v. Holt, 832 P.2d 948 (Colo. 1992).

Felony convictions warrant suspension for attorney convicted of violating California Tax Code where numerous mitigating factors were found to exist. People v. Mandell, 813 P.2d 732 (Colo. 1991).

Three-year suspension appropriate where attorney was convicted for felony distribution of cocaine, but had no record of prior discipline, there was no selfish or dishonest motive associated with crime, and the attorney successfully participated in interim rehabilitation programs. People v. Rhodes, 829 P.2d 850 (Colo. 1992).

Failure to communicate with clients, court, and opposing counsel, misrepresentation of the status of the proceedings to client, and failure to investigate clients' case justifies three-year suspension. People v. Wilson, 814 P.2d 791 (Colo. 1991).

Abusive, insulting, and unprofessional conduct towards deponent and opposing counsel during deposition and repeated in-

stances of using health as an excuse for continuances when respondent was ill-prepared for trial warrants six-month suspension. People v. Genchi, 824 P.2d 815 (Colo. 1992).

Adopting a conscious scheme to take ownership of homes, collect rents from tenants, make virtually no efforts to sell the homes, and permit foreclosures to occur on which HUD would absorb the losses constituted equity skimming in violation of § 18-5-802 and constitutes a violation of sections (A)(4) and (A)(6) for which suspension for one year is appropriate. People v. Phelps, 837 P.2d 755 (Colo. 1992).

Attorney who employed devices to defraud, made untrue statements of material fact, and engaged in acts which operated as fraud or deceit upon persons in violation of the Securities and Exchange Act violated DR 1-102 (A)(4) and DR 1-102 (A)(6) for which suspension of two years is appropriate, considering mitigating factors. People v. Hanks, 967 P.2d 141 (Colo. 1998).

Attorney who conveyed real property to defraud creditors suspended from the practice of law. In mitigation, the attorney had fully cooperated with the board. People v. Koller, 873 P.2d 761 (Colo. 1994).

Respondent's multiple acts of violence are indicative of a dangerous volatility which might well prejudice his ability to effectively represent his client's interests. Although respondent had taken major steps towards rehabilitation the acts committed were of such gravity as to require a public censure and a three-month suspension. People v. Wallace, 837 P.2d 1223 (Colo. 1992).

Third-degree sexual assault of wife adequate basis for one-year and one day suspension. People v. Brailsford, 933 P.2d 592 (Colo. 1997).

Suspension for 180 days is warranted based upon conviction of third degree assault charges. People v. Knight, 883 P.2d 1055 (Colo. 1994).

Willful nonpayment of child support and failure to pay arrearages after ordered by court to do so are violations of subsections (A)(5) and (A)(6) and constitute adequate basis for six-month suspension. People v. Tucker, 837 P.2d 1225 (Colo. 1992).

Where deputy district attorney was convicted of possession of cocaine under federal law, one-year suspension is appropriate due to seriousness of offense and fact that attorney had higher responsibility to the public by virtue of engaging in law enforcement. People v. Robinson, 839 P.2d 4 (Colo. 1992).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Murphy, 778 P.2d 658 (Colo. 1989); People v. Hodge, 782 P.2d 25 (Colo. 1989); People v. Masson, 782 P.2d 335 (Colo 1989); People v. Chappell, 783 P.2d 838 (Colo. 1989); People v. Moya, 793 P.2d 1154 (Colo. 1990); People v. Creasey, 793 P.2d 1159 (Colo. 1990); People v. Schmad, 793 P.2d 1162 (Colo. 1990); People v. Wilbur, 796 P.2d 976 (Colo. 1990); People v. Baptie, 796 P.2d 978 (Colo. 1990); People v. Schubert, 799 P.2d 388 (Colo. 1990); People v. Taylor, 799 P.2d 930 (Colo. 1990); People v. Barber, 799 P.2d 936 (Colo. 1990); People v. Garrett, 802 P.2d 1082 (Colo. 1990); People v. Sullivan, 802 P.2d 1091 (Colo. 1990); People v. Rhodes, 803 P.2d 514 (Colo. 1991); People v. Flores, 804 P.2d 192 (Colo. 1991); People v. Crimaldi, 804 P.2d 863 (Colo. 1991); People v. Dunsmoor, 807 P.2d 561 (Colo. 1991); People v. Bennett, 810 P.2d 661 (Colo. 1991); People v. Hall, 810 P.2d 1069 (Colo. 1991); People v. Koeberle, 810 P.2d 1072 (Colo. 1991); People v. Gaimara, 810 P.2d 1076 (Colo. 1991); People v. Dash, 811 P.2d 36 (Colo. 1991); People v. Honaker, 814 P.2d 785 (Colo. 1991); People v. Anderson, 817 P.2d 1035 (Colo. 1991); People v. Redman, 819 P.2d 495 (Colo. 1991); People v. Rader, 822 P.2d 950 (Colo. 1992); People v. Hyland, 830 P.2d 1000 (Colo. 1992); People v. Smith, 830 P.2d 1003 (Colo. 1992); People v. Driscoll, 830 P.2d 1019 (Colo. 1992); People v. Raubolt, 831 P.2d 462 (Colo. 1992); People v. Regan, 831 P.2d 893 (Colo. 1992); People v. Southern, 832 P.2d 946 (Colo. 1992); People v. Denton, 839 P.2d 6 (Colo. 1992); People v. Hindorff, 860 P.2d 526 (Colo. 1993); People v. Brown, 863 P.2d 288 (Colo. 1993); People v. Cole, 880 P.2d 158 (Colo. 1994); People v. Smith, 880 P.2d 763 (Colo. 1994); People v. Swan, 893 P.2d 769 (Colo. 1995); People v. Davis, 893 P.2d 775 (Colo. 1995); People v. Miller, 913 P.2d 23 (Colo. 1996); People v. Calvert, 915 P.2d 1310 (Colo. 1996); People v. Sigley, 917 P.2d 1253 (Colo. 1996); People v. Boyer, 934 P.2d 1361 (Colo. 1997).

Conduct violating this rule sufficient to justify suspension. People v. Yaklich, 646 P.2d 938 (Colo. 1982); People v. Craig, 653 P.2d 1115 (Colo. 1982); People v. Kane, 655 P.2d 390 (Colo. 1982); People v. Vernon, 660 P.2d 879 (Colo. 1982); People v. Pilgrim, 698 P.2d 1322 (Colo. 1985); People v. Convery, 704 P.2d 296 (Colo. 1985); People v. Doolittle, 713 P.2d 834 (Colo. 1985); People v. Foster, 716 P.2d 1069 (Colo. 1986); People v. Coca, 716 P.2d 1073 (Colo. 1986); People v. Barnett, 716 P.2d 1076 (Colo. 1986); People v. Fleming, 716 P.2d 1090 (Colo. 1986); People v. Larson, 716 P.2d 1093 (Colo. 1986); People v. McPhee, 728 P.2d 1292 (Colo. 1986); People v. Yost, 729 P.2d 348 (Colo. 1986); People v. Holmes, 731 P.2d 677 (Colo. 1987); People v. Proffitt, 731 P.2d 1257 (Colo. 1987); People v. May, 745 P.2d 218 (Colo. 1987); People v. Turner, 746 P.2d 49 (Colo. 1987); People v. Susman, 747 P.2d 667 (Colo. 1987); People v. Richards, 748 P.2d 341

(Colo. 1987); People v. Geller, 753 P.2d 235 (Colo. 1988); People v. Convery, 758 P.2d 1338 (Colo. 1988); People v. Lustig, 758 P.2d 1342 (Colo. 1988); People v. Preblud, 764 P.2d 822 (Colo. 1988); People v. Goldberg, 770 P.2d 408 (Colo. 1989); People v. Goens, 770 P.2d 1218 (Colo. 1989); People v. Kaemingk, 770 P.2d 1247, (Colo. 1989); People v. Fahrney, 782 P.2d 743 (Colo. 1989); People v. Bottinelli, 782 P.2d 746 (Colo. 1989); People v. Barnthouse, 775 P.2d 545 (Colo. 1989), cert. denied, 493 U.S. 1026, 110 S. Ct. 734, 107 L. Ed. 2d 752 (1990); People v. Gregory, 788 P.2d 823 (Colo. 1990); People v. Macy, 789 P.2d 188 (Colo. 1990); People v. Lopez, 796 P.2d 957 (Colo. 1990); People v. Abelman, 804 P.2d 859 (Colo. 1991); People v. Heilbrunn, 814 P.2d 819 (Colo. 1991); People v. Barr, 818 P.2d 761 (Colo. 1991); People v. Nulan, 820 P.2d 111 (Colo. 1991); People v. Dieters, 825 P.2d 478 (Colo. 1992); People v. Larson, 828 P.2d 793 (Colo. 1992); People v. Tisdel, 828 P.2d 795 (Colo. 1992); People v. Rhodes, 829 P.2d 850 (Colo. 1992); People v. Walker, 832 P.2d 935 (Colo. 1992); People v. Koller, 873 P.2d 761 (Colo. 1994); People v. Dickinson, 903 P.2d 1132 (Colo. 1995); People v. Kolbjornsen, 917 P.2d 277 (Colo. 1996); People v. Pierson, 917 P.2d 275 (Colo. 1996).

C. Disbarment.

Disbarment is discipline for lawyer guilty of crimes of moral turpitude. People v. Wilson, 176 Colo. 389, 490 P.2d 954 (1971).

Attorney disbarred for continued pattern of conduct involving neglect and misrepresentation and for failure to cooperate in investigation by grievance committee. People v. Young, 673 P.2d 1003 (Colo. 1984); People v. Coca, 732 P.2d 640 (Colo. 1987); People v. Johnston, 759 P.2d 10 (Colo. 1988).

Continuing pattern of neglect, including failure to timely file tax returns on behalf of personal representative of estate, failure to file timely notice of alibi, failure to notify opposing counsel, and failure to be adequately prepared for argument, coupled with similar behavior resulting in previous suspension, warrants disbarment. People v. Stewart, 752 P.2d 528 (Colo. 1987).

Misappropriation of funds, failure to account, and deceit and fraud in handling the affairs of a client necessitate that an attorney be disbarred. People v. Bealmear, 655 P.2d 402 (Colo. 1982).

A lawyer's knowing misappropriation of funds, whether belonging to a client or third party, warrants disbarment except in the presence of extraordinary factors of mitigation. People v. Lavenhar, 934 P.2d 1355 (Colo. 1997).

Lawyer's encouragement of a client to enter into a business transaction with said lawyer in which the two had differing interests and lawyer's failure to disclose relevant facts warrant disbarment. People v. Martinez, 739 P.2d 838 (Colo. 1987), cert. denied, 484 U.S. 1054, 108 S. Ct. 1003, 98 L. Ed. 2d 970 (1988).

Convictions for crimes of theft, theft-receiving, and conspiracy to commit theft are serious, involve moral turpitude, and are grounds for disbarment as opposed to an indefinite suspension. People v. Silvola, 195 Colo. 74, 575 P.2d 413 (1978).

Conviction of two counts of sexual assault on a child warrants no less a sanction than disbarment. People v. Grenemyer, 745 P.2d 1027 (Colo. 1987).

Disbarment warranted by attorney's conviction of conspiracy to deliver counterfeited federal reserve notes, serious neglect of several legal matters, unjustified retention of clients' property, failure to respond to the grievance committee, and previous disciplinary record. People v. Mayer, 752 P.2d 537 (Colo. 1988).

False testimony and counselling of such conduct warrant disbarment. When a lawyer counsels his client to testify falsely at a hearing on a bankruptcy petition and the client does so, and the lawyer gives a false answer to a question asked of him by the bankruptcy judge, his misconduct warrants disbarment. People v. McMichael, 199 Colo. 433, 609 P.2d 633 (1980).

Misrepresenting the status of a dissolution of marriage action with knowledge of impending remarriage and then forging the purported decree of dissolution is conduct involving moral turpitude deserving of disbarment. People v. Belina, 782 P.2d 26 (Colo. 1989).

Where an attorney demonstrates an extreme indifference to the welfare of his clients and the status of their cases and an extreme insensitivity to his professional duties in the face of adverse judgments due to neglect, client complaints, and repeated disciplinary proceedings, disbarment is the appropriate sanction. People v. Wyman, 782 P.2d 339 (Colo. 1989).

Abandoning clients sufficient to justify disbarment. People v. Sanders, 713 P.2d 837 (Colo. 1985).

Abandoning clients without notice, causing them financial losses, and failing to cooperate with grievance committee justified disbarment despite lack of any prior professional misconduct. People v. Lovett, 753 P.2d 205 (Colo. 1988).

Abandoning law practice, engaging in multiple acts of misconduct involving dishonesty, fraud, deceit, and misrepresentation grounds for disbarment. People v. Greene, 773 P.2d 528 (Colo. 1989).

Converting estate or trust funds for one's personal use, overcharging for services rendered, neglecting to return inquiries relating to

client matters, failing to make candid disclosures to grievance committee, and attempting to conceal wrongdoing during disciplinary proceedings warrants the severe sanction of disbarment. People v. Gerdes, 782 P.2d 2 (Colo. 1989).

Use of license to practice law for the purpose of bringing into being an illegal prostitution enterprise renders disbarment the only possible form of discipline. People v. Morley, 725 P.2d 510 (Colo. 1986).

Theft of client's money, misrepresentations, representation of multiple clients with adverse interests, and failure to respond to informal complaints warrants disbarment. People v. Quick, 716 P.2d 1082 (Colo. 1986).

Felony theft held sufficient grounds for disbarment in Colorado where respondent was convicted of crime and disbarred in another jurisdiction. Unless the disciplinary proceedings conducted in the foreign jurisdiction involved a denial of due process or other infirmity, or the imposition of the same discipline would result in a grave injustice, or the attorney's conduct warrants a substantially different discipline, the court is required to impose the same discipline. People v. Bradbury, 772 P.2d 46 (Colo. 1989).

Altering authentic dissolution decrees coupled with past attorney misconduct sufficient to warrant disbarment. People v. Blanck, 713 P.2d 832 (Colo. 1985).

Continuing to practice while suspended is conduct justifying disbarment. People v. James, 731 P.2d 698 (Colo. 1987).

Disbarment in another state warrants disbarment. People v. Montano, 744 P.2d 480 (Colo. 1987); People v. Brunn, 764 P.2d 1165 (Colo. 1988).

Attorney's failure to disclose felony conviction and subsequent disbarment in another state is sufficient for disbarment. People v. Brunn, 764 P.2d 1165 (Colo. 1988).

Facts sufficient to justify disbarment of attorney for failure to comply with registration requirements of C.R.C.P. 227, misappropriation of funds, and improper withdrawal from employment. People v. Scudder, 197 Colo. 99, 590 P.2d 493 (1979).

A lawyer who enters into a conspiracy to violate the law by importing narcotic drugs for distribution should be disbarred. People v. Unruh, 621 P.2d 948 (Colo. 1980).

Where a lawyer's conduct not only constitutes a violation of the code of professional responsibility, but also involves felonious conduct, clearly and convincingly proven by testimony of sheriff's officers, the grievance committee is justified in requiring disbarment. People v. Harfmann, 638 P.2d 745 (Colo. 1981).

Total disregard of obligation to protect a client's rights and interests over an extended period of time in conjunction with the violation of a number of disciplinary rules and an extended prior record of discipline requires most severe sanction of disbarment. People v. O'Leary, 783 P.2d 843 (Colo. 1989).

Attorney's continued practice of law while under an order of suspension, with no efforts to wind up the legal practice, and the failure to take action to protect the legal interests of the attorney's clients, warrants disbarment. People v. Wilson, 832 P.2d 943 (Colo. 1992).

Convictions for conspiring to commit fraud against the United States and impeding an officer of a United States court warrant disbarment. People v. Pilgrim, 802 P.2d 1084 (Colo. 1990).

Disbarment was the proper remedy where the attorney was afforded multiple opportunities including two suspensions and court ordered rehabilitation and where attorney's conduct demonstrated (a) neglect of legal matters entrusted to him; (b) misrepresentation to the client and the grievance committee; and (c) a pattern of neglect followed by the respondent that had the potential of causing serious injury to his clients. People v. Susman, 787 P.2d 1119 (Colo. 1990).

A lawyer's continued practice of law while under an order of suspension, with no efforts to wind up the legal practice, and failure to take action to protect the legal interests of the lawyer's clients, warrants disbarment. People v. Wilson, 832 P.2d 943 (Colo. 1992).

Likewise, disbarment was appropriate where attorney removed $5,000 from a client's trust account, refused to return money upon several requests by the client which ultimately resulted in a suit against the attorney, and the attorney lied about the transaction to the attorney with whom he shared office space. Factors in aggravation included a history of prior discipline, including suspension for conversion of client funds, the dishonest motive of the attorney in removing and not returning the client's funds, the attorney's refusal to acknowledge the wrongful nature of his conduct, the vulnerability of the client, and the attorney's legal experience. Mitigating factors were insufficient for disciplinary action short of disbarment. People v. McGrath, 833 P.2d 731 (Colo. 1992).

Disbarment is essentially automatic when a lawyer converts funds or property and there are no significant factors in mitigation. People v. Lujan, 890 P.2d 109 (Colo. 1995).

Entering guilty pleas to multiple counts of bank fraud evidences serious criminal conduct warranting disbarment. People v. Vidakovich, 810 P.2d 1071 (Colo. 1991).

Payment of restitution required prior to petition for readmission. Where, in proceedings to enforce a debt, attorney fails to pay debt, appear for deposition, produce documents requested by subpoena duces tecum or appear at an examination pursuant to C.R.C.P. 69 and on separate occasions writes insufficient funds

checks and fails to comply with requests for investigation, restitution is a proper condition of readmission and is to be made prior to petition for readmission. People v. Koransky, 830 P.2d 490 (Colo. 1992).

Where money was accepted for investment plans which were false, fictitious, and fraudulent and the presence of aggravating factors, including substantial experience by attorney, prior disciplinary offenses, dishonest or selfish motive, presence of multiple offenses, refusal to acknowledge the wrongful nature of conduct, and an indifference to making restitution, disbarment of attorney for violation of legal ethics was proper. People v. Kramer, 819 P.2d 77 (Colo. 1991).

Disbarment appropriate where attorney accepted fees from a number of clients prior to terminating her legal practice, failed to inform her clients of such termination, failed to refund clients' retainer fees, failed to place clients' funds in separate account, and gave clients' files to other lawyers without clients' consent. People v. Tucker, 904 P.2d 1321 (Colo. 1995).

Disbarment warranted where attorney was convicted of two separate sexual assaults on a client and a former client and attorney's previous dishonest conduct was an aggravating factor as well as findings of the attorney's selfish motive in engaging in the sexual misconduct, the two clients' vulnerability, the attorney's more than 20 years practicing law, and the attorney's failure to acknowledge the wrongful nature of his conduct. People v. Bertagnolli, 922 P.2d 935 (Colo. 1996).

Notwithstanding the entry of attorney's "Alford" plea in sexual assault proceedings, for purpose of disciplinary proceeding, the attorney was held to have actually committed the acts necessary to accomplish third degree sexual assault and therefore the attorney knowingly had sexual contact with a former client and with a current client without either woman's consent. People v. Bertagnolli, 922 P.2d 935 (Colo. 1996).

Disbarment appropriate when attorney engages in conduct prejudicial to client and the administration of justice and neglects numerous legal matters. People v. Theodore, 926 P.2d 1237 (Colo. 1996).

Notwithstanding financial stress and serious and costly medical problems, intentional conversion of law firm funds required disbarment. People v. Guyerson, 898 P.2d 1062 (Colo. 1995).

Propounding interrogatories to harass parties to a case and falsely accusing judicial officers and others of conspiracy warranted disbarment where respondent had been previously suspended for similar conduct. People v. Bottinelli, 926 P.2d 553 (Colo. 1996).

Failure to respond to discovery and motions, failure to attend case management hearing, and failure to inform client of progress of a civil case is grounds for disbarment. People v. Hebenstreit, 823 P.2d 125 (Colo. 1992).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Lyons, 762 P.2d 143 (Colo. 1988); People v. Costello, 781 P.2d 85 (Colo. 1989); People v. Nichols, 976 P.2d 966 (Colo. 1990); People v. Bergmann, 807 P.2d 568 (Colo. 1991); People v. Rhodes, 814 P.2d 787 (Colo. 1991); People v. Vermillion, 814 P.2d 795 (Colo. 1991); People v. Bannister, 814 P.2d 801 (Colo. 1991); People v. Grossenbach, 814 P.2d 810 (Colo. 1991); People v. Ashley, 817 P.2d 965 (Colo. 1991); People v. Rouse, 817 P.2d 967 (Colo. 1991); People v. Calt, 817 P.2d 969 (Colo. 1991); People v. Mulligan, 817 P.2d 1028 (Colo. 1991); People v. Margolin, 820 P.2d 347 (Colo. 1991); People v. Koransky, 824 P.2d 819 (Colo. 1992); People v. Bradley, 825 P.2d 475 (Colo. 1992); People v. Mullison, 829 P.2d 382 (Colo. 1992); People v. Tanquary, 831 P.2d 889 (Colo. 1992); People v. Southern, 832 P.2d 946 (Colo. 1992); People v. McGrath, 833 P.2d 731 (Colo. 1992); People v. Brown, 840 P.2d 348 (Colo. 1992); People v. Walsh, 880 P.2d 766 (Colo. 1994); People v. Tyler, 884 P.2d 694 (Colo. 1994); People v. Kolenc, 887 P.2d 1024 (Colo. 1994); People v. Fritsche, 897 P.2d 805 (Colo. 1995); People v. Sims, 913 P.2d 526 (Colo. 1996); People v. Allbrandt, 913 P.2d 532 (Colo. 1996); People v. McDowell, 942 P.2d 486 (Colo. 1997); People v. Singer, 955 P.2d 1005 (Colo. 1998).

Conduct violating this rule sufficient to justify disbarment. People v. Kendrick, 646 P.2d 337 (Colo. 1982); People v. Dwyer, 652 P.2d 1074 (Colo. 1982); People v. Golden, 654 P.2d 853 (Colo. 1982); People v. Buckles, 673 P.2d 1008 (Colo. 1984); People v. Loseke, 698 P.2d 809 (Colo. 1985); People v. Fitzke, 716 P.2d 1065 (Colo. 1986); People v. Rice, 728 P.2d 714 (Colo. 1986); People v. Young, 732 P.2d 1208 (Colo. 1987); People v. Foster, 733 P.2d 687 (Colo. 1987); People v. Franco, 738 P.2d 1174 (Colo. 1987); People v. Quintana, 752 P.2d 1059 (Colo. 1988); People v. Brooks, 753 P.2d 208 (Colo. 1988); People v. Cantor, 753 P.2d 238 (Colo. 1988); People v. Turner, 758 P.2d 1335 (Colo. 1988); People v. Danker, 759 P.2d 14 (Colo. 1988); People v. Score, 760 P.2d 1111 (Colo. 1988); People v. Hanneman, 768 P.2d 709 (Colo. 1989); People v. Kengle, 772 P.2d 605 (Colo. 1989); People v. Vernon, 782 P.2d 745 (Colo. 1989); People v. Frank, 782 P.2d 769 (Colo. 1989); People v. Johnston, 782 P.2d 1195 (Colo. 1989); People v. Hedicke, 785 P.2d 918 (Colo. 1990); People v. Dulaney, 785 P.2d 1302 (Colo. 1990); People v. Franks, 791 P.2d 1 (Colo. 1990); People v. Gregory, 797 P.2d 42 (Colo. 1990); People v. Broadhurst, 803 P.2d 478 (Colo. 1990); People v. Goens, 803 P.2d 480 (Colo. 1990); People v. Hansen, 814

P.2d 816 (Colo. 1991); People v. Schwartz, 814 P.2d 793 (Colo. 1991); People v. Whitcomb, 819 P.2d 493 (Colo. 1991); People v. Kinkade, 831 P.2d 892 (Colo. 1992); People v. Marmon, 903 P.2d 651 (Colo. 1995); People v. Gilbert, 921 P.2d 48 (Colo. 1996).

Rule 3.2. Expediting Litigation

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

ANNOTATION

Law reviews. For article, "Enforcing Civility: The Rules of Professional Conduct in Deposition Settings", see 33 Colo. Law. 75 (March 2004).

Annotator's note. Rule 3.2 is similar to Rule 3.2 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Robinson, 853 P.2d 1145 (Colo. 1993); People v. Barr, 855 P.2d 1386 (Colo. 1993); People v. Maynard, 238 P.3d 672 (Colo. O.P.D.J. 2009).

Rule 3.3. Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering

such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

Remedial Measures

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperates in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

[15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer

relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

ANNOTATION

Law reviews. For article, "The Attorney, the Client and the Criminal History: A Dangerous Trio", see 23 Colo. Law. 569 (1994). For article, "Exculpatory Evidence and Grand Juries", see 28 Colo. Law. 47 (April 1999). For article, "Ethical Considerations and Client Identity", see 30 Colo. Law. 51 (April 2001). For article, "Policing the Legal System: The Duty to Report Misconduct", see 30 Colo. Law. 85 (September 2001). For article, "The Duty of Loyalty and Preparations to Compete", see 34 Colo. Law. 67 (November 2005).

Annotator's note. Rule 3.3 is similar to Rule 3.3 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

It was inappropriate for counsel to file a motion and not mention contrary legal authority that was decided by the chief judge when the existence of the authority was readily available to counsel. United States v. Crumpton, 23 F. Supp. 2d 1218 (D. Colo. 1998).

An attorney will not be held responsible for failing to inform the court of material information of which the attorney is unaware. Waters v. District Ct., 935 P.2d 981 (Colo. 1997).

An attorney cannot close her eyes to obvious facts, however, the duty to inform the court concerning her client's financial status does not obligate the attorney to undertake an affirmative investigation of her client's financial status. Waters v. District Ct., 935 P.2d 981 (Colo. 1997).

An attorney is not responsible for informing the court of every known change in a client's financial circumstances but she must inform the court of material changes that not disclosing to the court would work a fraud on the court. For the purpose of determining eligibility for court appointed counsel, material changes are those which clearly render the client capable, on a practical basis, of securing competent representation or reimbursing some or all of the expenses of court-appointed counsel and costs. Waters v. District Ct., 935 P.2d 981 (Colo. 1997).

Public censure is appropriate discipline for attorney who submitted falsified response to grievance committee's request for investigation, violated prohibition against engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, and revealed client confidences to district attorney without client's consent. People v. Lopez, 845 P.2d 1153 (Colo. 1993).

Public censure is appropriate discipline where attorney falsely testified that he had automobile insurance at the time of an accident, but outcome of case was not thereby affected. People v. Small, 962 P.2d 258 (Colo. 1998).

Attorney signing substitute counsel's name to pleadings in a style different from his own signature, without authority to sign in a representative capacity and without any indication that he was signing in a representative capacity, violated this rule and warranted a six-month suspension. People v. Reed, 955 P.2d 65 (Colo. 1998).

Thirty-day suspension appropriate where attorney failed to inform U.S. bankruptcy court in Colorado, in a hearing on a motion to remand the matter to U.S. bankruptcy court in Massachusetts, that an order of dismissal of the bankruptcy proceeding between the same parties had been entered in California. People v. Farry, 927 P.2d 841 (Colo. 1996).

Attorney conduct violating this rule, in conjunction with other rules, sufficient to justify suspension when violation did not arise from neglect or willingness to take advantage of client's vulnerability and is mitigated by her inexperience in the practice of law, her lack of any prior disciplinary record, the fact that she had already been held in contempt and punished by the district court, and the fact that there is no suggestion of selfish motivation. Attorney's failure to appreciate the serious nature of conduct and the jurisdiction of the hearing board to discipline her is a serious matter meriting a period of suspension and a redetermination of her fitness before being permitted to practice law again. In re Roose, 69 P.3d 43 (Colo.), cert. denied, 540 U.S. 1053, 124 S. Ct. 815, 157 L. Ed. 2d 705 (2003).

Aiding client to violate custody order sufficient to justify disbarment. People v. Chappell, 927 P.2d 829 (Colo. 1996).

Attorney who knowingly violated rule but without intent to deceive court is justifiably sanctioned. People v. Trogani, 203 P.3d 643 (Colo. O.P.D.J. 2008).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Rolfe, 962 P.2d 981 (Colo. 1998).

Conduct violating this rule in conjunction

with other disciplinary rules is sufficient to justify suspension. People v. Mason, 938 P.2d 133 (Colo. 1997); People v. Trogani, 203 P.3d 643 (Colo. O.P.D.J. 2008); People v. Maynard, 219 P.3d 430 (Colo. O.P.D.J. 2008).

Cases Decided Under Former DR 7-106.

Law reviews. For formal opinion of the Colorado Bar Association Ethics Committee on Use of Subpoenas in Civil Proceedings, see 19 Colo. Law. 1556 (1990).

Lawyers, as officers of the court, must maintain the respect due to courts and judicial officers. Losavio v. District Court, 182 Colo. 180, 512 P.2d 266 (1973).

License to practice law assures public that the lawyer who holds the license will perform basic legal tasks honestly and without undue delay, in accordance with the highest standards of professional conduct. People v. Dixon, 621 P.2d 322 (Colo. 1981).

Public expects appropriate discipline for misconduct. The public has a right to expect that one who engages in professional misconduct will be disciplined appropriately. People v. Dixon, 621 P.2d 322 (Colo. 1981).

Actions taken by attorney contrary to court order violate this rule and justify suspension. People v. Awenius, 653 P.2d 740 (Colo. 1982); People v. Belina, 765 P.2d 121 (Colo. 1988).

Willful nonpayment of child support and failure to pay arrearages after ordered by court to do so is a violation of subsection (A). People v. Tucker, 837 P.2d 1225 (Colo. 1992).

Threatening to invoke disciplinary proceedings against judge in anticipation of adverse ruling warrants public censure. People v. Tatum, 814 P.2d 388 (Colo. 1991).

Prosecutor engaged in professional misconduct where references to the defense theory as "insulting" or a "lie" and to the defense's challenge to the credibility of a prosecution witness as "cheap innuendos" were made for the obvious purpose of denigrating defense counsel. People v. Jones, 832 P.2d 1036 (Colo. App. 1991).

Prosecutor made argument of a highly improper nature by implying to jurors that opposing counsel did not have a good faith belief in the innocence of her client and such an argument served no legitimate purpose but had the function only of erroneously diverting the attention of the jurors from the factual issues concerning defendant's guilt. People v. Jones, 832 P.2d 1036 (Colo. App. 1991).

An attorney's personal belief in the veracity of a witness' testimony is not a proper subject of closing argument. Consequently, the law requires that the prosecutor's personal opinion as to the truth or falsity of any testimony or as to guilt shall not be outwardly indicated nor presented to the jury as an interpretation based upon legitimate inferences which might be drawn from the evidence adduced at trial. People v. Jones, 832 P.2d 1036 (Colo. App. 1991).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Dalton, 840 P.2d 351 (Colo. 1992).

Conduct violating this rule sufficient to justify public censure. People v. Fieman, 788 P.2d 830 (Colo. 1990).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Creasey, 793 P.2d 1159 (Colo. 1990); People v. Taylor, 799 P.2d 930 (Colo. 1990); People v. Hyland, 830 P.2d 1000 (Colo. 1992); People v. Cohan, 913 P.2d 523 (Colo. 1996); People v. Wotan, 944 P.2d 1257 (Colo. 1997); People v. Porter, 980 P.2d 536 (Colo. 1999); In re Bobbitt, 980 P.2d 538 (Colo. 1999).

Conduct violating this rule sufficient to justify suspension. People v. Kane, 655 P.2d 390 (Colo. 1982); People v. Barnthouse, 775 P.2d 545 (Colo. 1989), cert. denied, 493 U.S. 1026, 110 S. Ct. 734, 107 L. Ed. 2d 752 (1990).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Schaefer, 944 P.2d 78 (Colo. 1997).

Applied in People ex rel. Aisenberg v. Young, 198 Colo. 26, 599 P.2d 257 (1979); People v. Kane, 638 P.2d 253 (Colo. 1981); People v. Harfmann, 638 P.2d 745 (Colo. 1981); Wilson v. People, 743 P.2d 415 (Colo. 1987).

Cases Decided Under Former DR 7-107.

Law reviews. For formal opinion of the Colorado Bar Association Ethics Committee on Lawyer Advertising, Solicitation and Publicity, see 19 Colo. Law. 25 (1990).

Trial judge has power to punish summarily for contempt any lawyer who in his presence wilfully contributes to disorder or disruption in the courtroom. Losavio v. District Court, 182 Colo. 180, 512 P.2d 266 (1973).

News releases by counsel held contrary to good practice. Sergent v. People, 177 Colo. 354, 497 P.2d 983 (1972).

The participation of the district attorney and his deputy in an ill-timed radio interview which suggested a connection between the condominium fires and organized crime is not condoned. People v. Mulligan, 193 Colo. 509, 568 P.2d 449 (1977).

Rule 3.4. Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client and the lawyer is not prohibited by other law from making such a request; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

[3] With regard to paragraph (b), it is not improper to pay an expert or non-expert's expenses or to compensate an expert witness on terms permitted by law. It is improper to pay any witness a contingent fee for testifying. A lawyer may reimburse a non-expert witness not only for expenses incurred in testifying but also for the reasonable value of the witness's time expended in testifying and preparing to testify, so long as such reimbursement is not prohibited by law. The amount of such compensation must be reasonable based on all relevant circumstances, determined on a case-by-case basis.

[4] Paragraph (f) permits a lawyer to advise relatives and employees of a client to refrain from giving information to another party because the relatives or employees may identify their interests with those of the client. See also Rule 4.2. However, other law may preclude such a request. See Rule 16, Colorado Rules of Criminal Procedure.

ANNOTATION

Law reviews. For article, "Enforcing Civility: The Rules of Professional Conduct in Deposition Settings", see 33 Colo. Law. 75 (March 2004).

Annotator's note. Rule 3.4 is similar to Rule 3.4 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

Expressions of personal opinion, personal knowledge, or inflammatory comments violate ethical standards. A prosecutor cannot communicate his or her opinion on the truth or falsity of witness testimony during final argument. The use of any form of the word "lie" is improper. However, an attorney may argue from reasonable inferences anchored in the facts in evidence about the truthfulness of a witness's testimony. Domingo-Gomez v. People, 125 P.3d 1043 (Colo. 2005); Crider v. People, 186 P.3d 39 (Colo. 2008).

Attorney violated paragraph (c) when he knowingly violated orders of Colorado supreme court suspending him from practice of law for failing to comply with continuing legal education (CLE) requirements and for failing to pay attorney registration fees. People v. Swarts, 239 P.3d 441 (Colo. O.P.D.J. 2010).

Thirty-day suspension, petition for reinstatement requirement, and requirement of payment of costs of prior disciplinary proceedings justified where aggravating factors include attorney's previous public censure, refusal to acknowledge the wrongfulness of his conduct, substantial experience in the practice of law, and indifference to making restitution. In re Bauder, 980 P.2d 507 (Colo. 1999).

Ninety-day suspension justified where attorney's failure to respond to discovery requests resulted in default and entry of judgment against client for $816,613. People v. Clark, 927 P.2d 838 (Colo. 1996).

Ninety-day suspension and order of restitution as a condition of reinstatement was justified where attorney failed to pay court-ordered award of attorney's fees resulting from his filing of a frivolous motion, without regard to whether this debt was subsequently discharged in attorney's bankruptcy proceedings. People v. Huntzinger, 967 P.2d 160 (Colo. 1998).

Attorney who knowingly violated rule but without intent to deceive court is justifiably sanctioned. People v. Trogani, 203 P.3d 643 (Colo. O.P.D.J. 2008).

Attorney conduct violating this rule, in conjunction with other rules, sufficient to justify suspension when violation did not arise from neglect or willingness to take advantage of client's vulnerability and is mitigated by her inexperience in the practice of law, her lack of any prior disciplinary record, the fact that she had already been held in contempt and punished by the district court, and the fact that there is no suggestion of selfish motivation. Attorney's failure to appreciate the serious nature of conduct and the jurisdiction of the hearing board to discipline her is a serious matter meriting a period of suspension and a redetermination of her fitness before being permitted to practice law again. In re Roose, 69 P.3d 43 (Colo.), cert. denied, 540 U.S. 1053, 124 S. Ct. 815, 157 L. Ed. 2d 705 (2003).

Attorney conduct violating this rule, in conjunction with other rules, sufficient to justify disbarment when attorney failed to comply with court orders applicable to his child support payments until after contempt citation was issued and attorney was ordered to report to jail to begin serving his sentence, and also committed numerous other violations consisting of knowingly commingling and misappropriating clients' funds, and neglecting multiple cases resulting in the entry of default judgments against attorney's clients. People v. Gonzalez, 967 P.2d 156 (Colo. 1998).

Conduct violating this rule in conjunction with other disciplinary rules, where mitigating factors were present, warrants public censure. People v. Davis, 950 P.2d 586 (Colo. 1998).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Barr, 855 P.2d 1386 (Colo. 1993); People v. Babinski, 951 P.2d 1240 (Colo. 1998); People v. Blunt, 952 P.2d 356 (Colo. 1998); People v. Hanks, 967 P.2d 144 (Colo. 1998); People v. Harding, 967 P.2d 153 (Colo. 1998); In re Demaray, 8 P.3d 427 (Colo. 1999); In re Fischer, 89 P.3d 817 (Colo. 2004); People v. Edwards, 201 P.3d 555 (Colo. 2008); People v. Trogani, 203 P.3d 643 (Colo. O.P.D.J. 2008); People v. Maynard, 238 P.3d 672 (Colo. O.P.D.J. 2009).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Singer, 955 P.2d 1005 (Colo. 1998); In re Hugen, 973 P.2d 1267 (Colo. 1999); People v. Mason, 212 P.3d 141 (Colo. O.P.D.J. 2009).

Cases Decided Under Former DR 7-104.

Rule held inapplicable to district attorney's communications with defendant when communications are unrelated to pending charges for which defendant had retained counsel. People v. Hyun Soo Son, 723 P.2d 1337 (Colo. 1986).

Evidence sufficient to justify suspension from the practice of law. People v. Belfor, 197

Colo. 223, 591 P.2d 585 (1979); People v. Zinn, 746 P.2d 970 (Colo. 1987).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Crews, 901 P.2d 472 (Colo. 1995).

Applied in People ex rel. MacFarlane v. Boyls, 197 Colo. 242, 591 P.2d 1315 (1979); In re East Nat'l Bank, 517 F. Supp. 1061 (D. Colo. 1981).

Rule 3.5. Impartiality and Decorum of the Tribunal

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order, or unless a judge initiates such a communication and the lawyer reasonably believes that the subject matter of the communication is within the scope of the judge's authority under a Rule of Judicial Conduct;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate;

(3) the communication involves misrepresentation, coercion, duress or harassment; or

(4) the communication is intended to or is reasonably likely to demean, embarrass, or criticize the jurors or their verdicts; or

(d) engage in conduct intended to disrupt a tribunal.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008; (b) and Comment [2] amended and effective July 11, 2012.

COMMENT

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the Colorado Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, subject to two exceptions: (1) when a law or court order authorizes the lawyer to engage in the communication, and (2) when a judge initiates an ex parte communication with the lawyer and the lawyer reasonably believes that the subject matter of the communication is within the scope of the judge's authority to engage in the communication under a rule of judicial conduct. Examples of ex parte communications authorized under the first exception are restraining orders, submissions made in camera by order of the judge, and applications for search warrants and wiretaps. *See also* Cmt. [5]. Colo. RPC 4.2 (discussing communications authorized by law or court order with persons represented by counsel in a matter). With respect to the second exception, Rule 2.9(A)(1) of the Colorado Code of Judicial Conduct, for example, permits judges to engage in ex parte communications for scheduling, administrative, or emergency purposes not involving substantive matters, but only if "circumstances require it," "the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication," and "the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond." Code of Jud. Conduct, Rule 2.9(A)(1). See also Code of Judicial Conduct for United States judges, Canon 3(A)(4)(b) ("a judge may. . . (b) when circumstances require it, permit ex parte communication for scheduling, administrative, or emergency purposes, but only if the ex parte communication does not address substantive matters and the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication[.]"). The second exception does not authorize the lawyer to initiate such a communication. However, a judge will be deemed to have initiated a communication for purposes of this Rule if the judge or the court maintains a regular practice of allowing or requiring lawyers to contact the judge for administrative matters such as scheduling a hearing and the lawyer communicates in compliance with that practice. When a judge initiates a communication, the lawyer must discontinue the communication if it exceeds the judge's authority under the applicable rule of judicial conduct. For example, if a judge properly communicates ex parte with a lawyer about the scheduling of a hearing, pursuant to Rule 2.9(a)(1) of the Colorado Code of Judicial Con-

duct, but proceeds to discuss substantive matters, the lawyer has an obligation to discontinue the communication.

[3] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order but must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.

[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

[5] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(m).

ANNOTATION

Law reviews. For article, "Ex Parte Communications with a Tribunal: From Both Sides", see 29 Colo. Law. 55 (April 2000).

Annotator's note. Rule 3.5 is similar to DR 7-101, DR 7-106, DR 7-108, DR 7-109, DR 7-110, and DR 8-101 as they existed prior to the 1992 repeal and reenactment of the code of professional responsibility. Relevant cases construing DR 7-108, DR 7-109, DR 7-100, and DR 8-101 have been included in the annotations to this rule. Cases construing DR 7-101 have been included under Rule 1.2 and cases construing DR 7-106 have been included under Rule 3.3.

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension for one year and one day. People v. Brennan, 240 P.3d 887 (Colo. O.P.D.J. 2009).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Maynard, 238 P.3d 672 (Colo. O.P.D.J. 2009).

Cases Decided Under Former DR 7-108.

Jury tampering is basis for indefinite suspension of attorney. People v. Radinsky, 176 Colo. 357, 490 P.2d 951 (1971).

Cases Decided Under Former DR 7-109.

Evidence sufficient to justify suspension from the practice of law. People v. Belfor, 197 Colo. 223, 591 P.2d 585 (1979).

Cases Decided Under Former DR 7-110.

Suggesting that witness contact chief justice for attorney's benefit justifies public censure. Where an attorney suggested to a principal witness in a pending grievance proceeding against that attorney that he write a letter on behalf of the attorney to the chief justice of the state supreme court, substantially recanting his testimony in the grievance proceeding, the attorney's conduct violated the code of professional responsibility and C.R.C.P. 241.6. Public censure is the appropriate discipline for this breach of professional obligations. People v. Hertz, 638 P.2d 794 (Colo. 1982).

The imposition of a one-year suspension in Illinois for the loaning of money to a judge warrants imposition of the same sanction in Colorado. People v. Chatz, 788 P.2d 157 (1990).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Bannister, 814 P.2d 801 (Colo. 1991).

Cases Decided Under Former DR 8-101.

District attorney not tribunal. It is not the intent of paragraph (A)(2) to treat a district attorney or those acting under him as a tribunal. People ex rel. Gallagher v. Hertz, 198 Colo. 522, 608 P.2d 335 (1979).

Rule 3.6. Trial Publicity

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a) and Rule 3.8(f), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a) and Rule 3.8(f), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Source: Entire rule and comment replaced and adopted June 12, 1997, effective January 1, 1998; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008; IP(b) and (c) amended and effective Febraury 10, 2011.

COMMENT

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.

[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the Rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a

person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

[8] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

Rule 3.7. Lawyer as Witness

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.

Advocate-Witness Rule

[2] The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

[3] To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a)(1) through (a)(3). Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the impor-

tance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The conflict of interest principles stated in Rules 1.7, 1.9 and 1.10 have no application to this aspect of the problem.

[5] Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness, paragraph (b) permits the lawyer to do so except in situations involving a conflict of interest.

Conflict of Interest

[6] In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rules 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer the representation involves a conflict of interest that requires compliance with Rule 1.7. This would be true even though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (a)(3) might be precluded from doing so by Rule 1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent. See Rule 1.7. See Rule 1.0(b) for the definition of "confirmed in writing" and Rule 1.0(e) for the definition of "informed consent."

[7] Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by paragraph (a). If, however, the testifying lawyer would also be disqualified by Rule 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 1.10 unless the client gives informed consent under the conditions stated in Rule 1.7.

ANNOTATION

Law reviews. For Formal Opinion No. 78 of the CBA Ethics Committee, "Disqualification of the Advocate/Witness", see 23 Colo. Law. 2087 (1994).

Annotator's note. Rule 3.7 is similar to Rule 3.7 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

A violation of section (a) of this rule ordinarily will require disqualification because the very purpose of the rule is to avoid the taint to a trial that results from jury confusion when a lawyer acts as both witness and advocate. Merrill Lynch Bus. Fin. Servs., Inc. v. Nudell, 239 F. Supp.2d 1170 (D. Colo. 2003).

Section (a) is a prohibition only against acting as an advocate at trial. It does not automatically require that a lawyer be disqualified from pretrial activities, such as participating in strategy sessions, pretrial hearings, settlement conferences, or motions practice. Merrill Lynch Bus. Fin. Servs., Inc. v. Nudell, 239 F. Supp.2d 1170 (D. Colo. 2003).

Disqualification from pretrial matters may be appropriate, however, where that activity includes obtaining evidence which, if admitted at trial, would reveal the attorney's dual role. Merrill Lynch Bus. Fin. Servs., Inc. v. Nudell, 239 F. Supp.2d 1170 (D. Colo. 2003).

Subsection (a)(1) allows an attorney to testify only regarding an uncontested issue and does not allow an attorney to testify to undisputed facts to support a disputed issue. People v. Pasillas-Sanchez, 214 P.3d 520 (Colo. App. 2009).

A party seeking disqualification of any attorney as "likely to be a necessary witness" must show that "the advocate's testimony is necessary, and not merely cumulative". Religious Tech. Ctr. v. F.A.C.T. Net, Inc., 945 F. Supp. 1470 (D. Colo. 1996).

This rule does not mandate a hearing where there is a possibility of a conflict of interest on the part of an attorney called as a witness against his or her client. Taylor v. Grogan, 900 P.2d 60 (Colo. 1995).

Rule requires that plaintiffs' counsel who is also their son be disqualified from appearing as an advocate because he is likely to be called as a witness at trial. Determining whether the moving party has demonstrated that opposing counsel is "likely to be a necessary witness" involves a consideration of the nature of the case, with emphasis on the subject of the lawyer's testimony, the weight the testimony might have in resolving disputed issues, and the

availability of other witnesses or documentary evidence which might independently establish the relevant issues. The moving party's burden is complete if he proves that opposing counsel is "likely to be a witness" at trial. Here, the facts and circumstances demonstrate that plaintiffs' son who is also their counsel and who was endorsed by plaintiffs as a fact witness is likely to be a necessary witness on his clients' and parents' behalf. The statements of plaintiffs' counsel and son is that he spoke with the defendant-doctor after the procedure performed on his plaintiff father and that the defendant made certain admissions against interest. Fognani v. Young, 115 P.3d 1268 (Colo. 2005).

Rule permits a lawyer to maintain a dual role in the same proceeding if "disqualification would work substantial hardship on the client". Even if there is a risk of prejudice to both parties if the attorney is permitted to testify, court must balance the competing interests, affording "due regard" to the effect of disqualification on his clients. When determining whether disqualification would impose a substantial hardship on the client, court should consider all relevant factors in light of the specific facts before it, including the nature of the case, financial hardship, giving weight to the stage in the proceedings, the time at which the attorney became aware of the likelihood of his testimony, and whether the client has secured alternate representation. Here, considering the specific facts and circumstances, trial court did not abuse its discretion in rejecting plaintiffs' substantial hardship claim. In light of ample justification in the record, trial court did not abuse its discretion in disqualifying plaintiffs' counsel and son from his representation of his parents at trial. Fognani v. Young, 115 P.3d 1268 (Colo. 2005).

But trial court did not abuse discretion in disqualifying a lawyer where the lawyer was the sole source, other than the defendant, of potentially critical and outcome determinative information to be used to establish the defendant's defense and the court determined that allowing the lawyer to continue the representation would undermine the public's interest in maintaining the integrity in the judicial system. People v. Pasillas-Sanchez, 214 P.3d 520 (Colo. App. 2009).

Court declines to issue a rule that would permit automatic participation by disqualified attorney in all pretrial litigation. Upon assuring that the client has consented to pretrial representation by the disqualified attorney, trial court has discretion to determine whether participation by the attorney in a particular pretrial activity would undermine the purpose of the rule. If, for example the attorney's dual role in a deposition proceeding would likely be revealed at trial, trial court may properly limit attorney's role in that activity. Here, trial court was given opportunity on remand to fashion its orders in a way dictated by facts of the case. Fognani v. Young, 115 P.3d 1268 (Colo. 2005).

Rule does not impose automatic vicarious disqualification of the disqualified attorney's law firm. As such, the trial court must consider whether the requirements of C.R.C.P. 1.7 and 1.9 have been met. The inquiry is two-fold: (1) Whether the firm reasonably believes its representation of the plaintiffs will not be materially limited by its responsibilities to the attorney; and (2) the client's consent to the ongoing representation and whether that consent is objectively reasonable under the circumstances. The trial court has the authority to decline to honor the client's choice if the court concludes that the client should not agree to the representation under the circumstances of the case. In making that determination, the court may balance the clients' interests in the continuing representation against the nature of the anticipated testimony and the credibility issues that the testimony may pose. Here, record does not permit supreme court to determine whether trial court abused its discretion in disqualifying the law firm of plaintiffs' son from representing plaintiffs. Accordingly, remand is necessary to determine whether the requirements of C.R.C.P. 1.7 have been met. Fognani v. Young, 115 P.3d 1268 (Colo. 2005).

Trial court's conclusion that defendant would likely have a compelling need to call his attorney to testify within its discretion. Although prosecution failed to demonstrate a compelling need for testimony of defendant's attorney, thus creating a conflict under this rule and need for disqualification, the trial court did not rule arbitrarily, unreasonably, or unfairly when it ruled to disqualify defendant's attorney. People v. Hagos, 250 P.3d 596 (Colo. App. 2009).

Court of appeals uses abuse of discretion standard to review trial court's decision to disqualify counsel under this rule. Haralampopoulos v. Kelly, __ P.3d __ (Colo. App. 2011).

Court did not abuse discretion in disqualifying counsel from representing plaintiff at trial but allowing counsel to participate in pretrial preparation and allowing counsel's firm to represent plaintiff at trial. Counsel had been deposed and could be called as a witness but exclusion of counsel from pretrial preparation could create a substantial hardship for plaintiff. Haralampopoulos v. Kelly, __ P.3d __ (Colo. App. 2011).

Rule 3.8. Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused unless such comments are permitted under Rule 3.6(b) or 3.6(c), and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

(g) When a prosecutor knows of new, credible and material evidence creating a reasonable probability that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall within a reasonable time:

(1) disclose that evidence to an appropriate court or prosecutorial authority, and

(2) if the judgment of conviction was entered by a court in which the prosecutor exercises prosecutorial authority

(A) disclose the evidence to the defendant, and

(B) if the defendant is not represented, move the court in which the defendant was convicted to appoint counsel to assist the defendant concerning the evidence.

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant was convicted in a court in which the prosecutor exercises prosecutorial authority, of an offense that the defendant did not commit, the prosecutor shall take steps in the appropriate court, consistent with applicable law, to set aside the conviction.

Source: (f) and comment amended and adopted and (2) deleted, effective February 19, 1997; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008; (g) and (h) added and adopted, comment [1] amended and adopted, and comment [3A], [7], [7A], [8], [8A], [9], and [9A] added and adopted June 17, 2010, effective July 1, 2010; (f) and comment [5] amended and effective February 10, 2011.

COMMENT

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence and that special precautions are taken to prevent and to address the conviction of innocent persons. The extent of mandated remedial action is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which are the product of prolonged and careful deliberation by lawyers

experienced in both criminal prosecution and defense. Competent representation of the sovereign may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented defendants. Paragraph (c) does not apply, however, to a defendant appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[3A] A prosecutor's duties following conviction are set forth in sections (g) and (h) of this rule.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (f) supplements the prohibition in Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding, but does not limit the protection of Rule 3.6(b) or Rule 3.6(c). In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public condemnation of the accused. Nevertheless, a prosecutor shall not be subject to disciplinary action on the basis that the prosecutor's statement violated paragraph (f), if the statement was permitted by Rule 3.6(b) or Rule 3.6(c).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

[7] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (g) requires disclosure to the court or other prosecutorial authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, the prosecutor must take the affirmative step of making a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.

[7A] What constitutes "within a reasonable time" will vary according to the circumstances presented. When considering the timing of a disclosure, a prosecutor should consider all of the circumstances, including whether the defendant is subject to the death penalty, is presently incarcerated, or is under court supervision. The prosecutor should also consider what investigative resources are available to the prosecutor, whether the trial prosecutor who prosecuted the case is still reasonably available, what new investigation or testing is appropriate, and the prejudice to an on-going investigation.

[8] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of either an offense that the defendant did not commit or of an offense that involves conduct of others for which the defendant is legally accountable (*see* C.R.S. §18-1-601 *et seq.* and 18 U.S.C. §2), but which those others did not commit, then the prosecutor must take steps in the appropriate court. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

[8A] Evidence is considered new when it was unknown to a trial prosecutor at the time the conviction was entered or, if known to a trial prosecutor, was not disclosed to the defense, either deliberately or inadvertently. The reasons for the evidence being unknown (and therefore new) are varied. It may be new because: the information was not available to a

trial prosecutor or the prosecution team at the time of trial; the police department investigating the case or other agency involved in the prosecution did not provide the evidence to a trial prosecutor; or recent testing was performed which was not available at the time of trial. There may be other circumstances when information would be deemed new evidence.

[9] A prosecutor's reasonable judgment made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), although subsequently determined to have been erroneous, does not constitute a violation of this Rule.

[9A] Factors probative of the prosecutor's reasonable judgment that the evidence casts serious doubt on the reliability of the judgment of conviction include: whether the evidence was essential to a principal issue in the trial that produced the conviction; whether the evidence goes beyond the credibility of a witness; whether the evidence is subject to serious dispute; or whether the defendant waived the establishment of a factual basis pursuant to criminal procedural rules.

ANNOTATION

Annotator's note. Rule 3.8 is similar to Rule 3.8 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

Paragraph (f)(1) is inconsistent with federal law and thus is invalid as applied to federal prosecutors practicing before the grand jury. As applied to proceedings other than those before the grand jury, paragraph (f)(1) is not inconsistent with federal law and does not violate the supremacy clause. Thus, paragraph (f)(1) is valid and enforceable except as it pertains to federal prosecutors practicing before the grand jury. U.S. v. Colo. Supreme Court, 988 F. Supp. 1368 (D. Colo. 1998), aff'd, 189 F.3d 1281 (10th Cir. 1999).

Paragraph (d) should be read as containing a requirement that a prosecutor disclose exculpatory, outcome-determinative evidence that tends to negate the guilt or mitigate the punishment of the accused in advance of the next critical stage of the proceeding, consistent with the materiality standard adopted with respect to the rules of criminal procedure. In re Attorney C, 47 P.3d 1167 (Colo. 2002).

Violation of paragraph (d) requires mens rea of intent. In re Attorney C, 47 P.3d 1167 (Colo. 2002).

Cases Decided Under Former DR 7-103.

While the prosecutor may strike hard blows, he is not at liberty to strike foul ones, for it is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. People v. Walker, 180 Colo. 184, 504 P.2d 1098 (1972).

Prosecutor's zealous prosecution of a case is not improper. People v. Marin, 686 P.2d 1351 (Colo. App. 1983).

A prosecutor's duty is to seek justice, not merely to convict. People v. Walker, 180 Colo. 184, 504 P.2d 1098 (1972); People v. Drake, 841 P.2d 364 (Colo. App. 1992).

If the prosecution witness advises prosecutor that he or she knows or recognizes one of the jurors, the prosecutor has an affirmative duty immediately to notify the court and opposing counsel of the witness' statement. People v. Drake, 841 P.2d 364 (Colo. App. 1992).

There was no prosecutorial misconduct when the district attorney and police had no knowledge of any evidence that would negate the defendant's guilt or reduce his punishment. People v. Wood, 844 P.2d 1299 (Colo. App. 1992).

Prosecutor should see that justice is done by seeking the truth. The duty of a prosecutor is not merely to convict, but to see that justice is done by seeking the truth of the matter. People v. Elliston, 181 Colo. 118, 508 P.2d 379 (1973).

No evidence proving defendant's innocence shall be withheld from him. It is the duty of both the prosecution and the courts to see that no known evidence in the possession of the state which might tend to prove a defendant's innocence is withheld from the defense before or during trial. People v. Walker, 180 Colo. 184, 504 P.2d 1098 (1972).

A prosecutor must be careful in his conduct to ensure that the jury tries a case solely on the basis of the facts presented to it. People v. Elliston, 181 Colo. 118, 508 P.2d 379 (1973).

The district attorney has the duty to prevent conviction on misleading or perjured evidence. The duty of the district attorney extends not only to marshalling and presenting evidence to obtain a conviction, but also to protecting the court and the accused from having a conviction result from misleading evidence or perjured testimony. DeLuzio v. People, 177 Colo. 389, 494 P.2d 589 (1972).

Rule 3.9. Advocate in Nonadjudicative Proceedings

A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity. Further, in such a representation, the lawyer:

(a) shall conform to the provisions of Rules 3.3(a)(1), 3.3(a)(3), 3.3(b), 3.3(c), and 3.4(a) and (b);

(b) shall not engage in conduct intended to disrupt such proceeding unless such conduct is protected by law; and

(c) may engage in ex parte communications, except as prohibited by law.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it and on the candor of the lawyer. For this reason the lawyer must conform to Rules 3.3(a)(1), 3.3(a)(3), 3.3(b), 3.3(c), and 3.4(a) and (b) in such representation.

[2] Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

[3] This Rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns. Nor does it apply to the representation of a client in connection with an investigation or examination of the client's affairs conducted by government investigators or examiners. Representation in such matters is governed by Rules 4.1 through 4.4.

[4] This Rule recognizes that the lawyer's conduct and communications described in Rules 3.9(b) and (c) may be protected by constitutional or other legal principles.

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

Rule 4.1. Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

False Statements

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A false statement can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Omissions or partially true but misleading statements can be the equivalent of affirmative false statements. For dishonest conduct generally see Rule 8.4.

Statements of Fact

[2] This Rule refers to statements of fact.

Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Crime or Fraud by Client

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.

ANNOTATION

Law reviews. For article, "Ethical Considerations and Client Identity", see 30 Colo. Law. 51 (April 2001).

Annotator's note. Rule 4.1 is similar to Rule 4.1 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

Attorneys are responsible for ethical violation when their investigator failed to disclose to an employee of the defendant prior to an interview that the investigator worked for the attorneys. McClelland v. Blazin' Wings, Inc., 675 F. Supp. 2d 1074 (D. Colo. 2009).

Suspension stayed, in view of respondent's cooperation and remorse, conditioned upon successful completion of six-month probationary period and ethics refresher course. People v. Rosen, 199 P.3d 1241 (Colo. O.P.D.J. 2007).

Conduct violating this rule in conjunction with other rules of disciplinary conduct sufficient to justify public censure. People v. Newman, 925 P.2d 783 (Colo. 1996).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Mason, 938 P.2d 133 (Colo. 1997); In re Meyers, 981 P.2d 143 (Colo. 1999); People v. Rosen, 199 P.3d 1241 (Colo. O.P.D.J. 2007).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Jackson, 943 P.2d 450 (Colo. 1997); In re Hugen, 973 P.2d 1267 (Colo. 1999).

Rule 4.2. Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Source: Comment amended and adopted June 17, 1999, effective July 1, 1999; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns

that person is one with whom communication is not permitted by this Rule.

[4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person, such as a contractually-based right or obligation to give notice, is permitted to do so.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

[9A] A pro se party to whom limited representation has been provided in accordance with C.R.C.P. 11(b) or C.R.C.P. 311(b), and Rule 1.2, is considered to be unrepresented for purposes of this Rule unless the lawyer has knowledge to the contrary.

ANNOTATION

Law reviews. For formal opinion of the Colorado Bar Association on Ex Parte Contacts with Government Officials, see 23 Colo. Law. 329 (1994). For formal opinion of the Colorado Bar Association on Ex Parte Communications With Represented Persons During Criminal and Civil Regulatory/Investigations and Proceedings, see 23 Colo. Law. 2297 (1994). For article, "Discrete Task Representation a/k/a Unbundled Legal Services", see 29 Colo. Law. 5 (January 2000). For article, "Policing the Legal System: The Duty to Report Misconduct", see 30 Colo. Law. 85 (September 2001). For article, "Settlement Ethics", see 30 Colo. Law. 53 (December 2001). For article, "Investigative Tactics: They May Be Legal, But Are They Ethical?", see 35 Colo. Law. 43 (January 2006). For article, "The New Rules of Professional Conduct: Significant Changes for In-House Counsel", see 36 Colo. Law. 71 (November 2007). For formal opinion of the Colorado Bar Association on Propriety of Communicating With Employee or Former Employee of an Adverse Party, see 39 Colo. Law. 21 (October 2010).

Annotator's note. Rule 4.2 is similar to Rule 4.2 as it existed prior to the 2007 repeal and

readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

The protections of this rule attach only once an "adversarial relationship" sufficient to trigger an organization's right to counsel arises. Johnson v. Cadillac Plastic Group, Inc., 930 F. Supp. 1437 (D. Colo. 1996).

The fact that an employee is a management level employee alone does not make him a "party" for purposes of this rule. Johnson v. Cadillac Plastic Group, Inc., 930 F. Supp. 1437 (D. Colo. 1996).

Attorneys are responsible for ethical violation when their investigator, without the defendant's permission, contacted an employee of the defendant whose statements about the events surrounding a fight may constitute admissions by the defendant. McClelland v. Blazin' Wings, Inc., 675 F. Supp. 2d 1074 (D. Colo. 2009).

This rule does not require any greater or more specific limitations on the communications of government lawyers with suspects, or with indigent suspects in particular, than apply to attorney communications in general. The fact that the defendant was appointed counsel in a different matter does not automatically prohibit certain communications with prosecution investigators relating to a different matter. An assessment of compliance with this rule requires facts concerning the matters for which the public defender had already been appointed to represent the defendant and the subject of the subsequent interviews with the investigators. People v. Wright, 196 P.3d 1146 (Colo. 2008).

Public censure was warranted for attorney who prepared motions to dismiss for his client's wife to sign when proceedings had been brought by the client's wife against the client and the client's wife was represented by counsel and was not advised that she should contact her own lawyer before signing the motions, nor asked if she wished to discuss the motions with her lawyer before signing. Three letters of admonition for unrelated misconduct also were an aggravating factor for purposes of determining the appropriate level of discipline. People v. McCray, 926 P.2d 578 (Colo. 1996).

Thirty-day suspension warranted where lawyer, who represented an individual accused of first-degree murder, communicated with co-defendant who also was charged with first-degree murder and whose interests were adverse to the lawyer's client, without the knowledge or consent of the co-defendant's lawyers. The potential for harm was high in a first-degree murder case and the number of unauthorized contacts demonstrated more than negligence on the lawyer's part. People v. DeLoach, 944 P.2d 522 (Colo. 1997).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Crews, 901 P.2d 472 (Colo. 1995); People v. Wotan, 944 P.2d 1257 (Colo. 1997); In re Tolley, 975 P.2d 1115 (Colo. 1999).

Rule 4.3. Dealing with Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Source: Comment amended and adopted June 17, 1999, effective July 1, 1999; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(d).

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to

obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

[2A] The lawyer must comply with the requirements of this Rule for pro se parties to whom limited representation has been provided, in accordance with C.R.C.P. 11(b), C.R.C.P. 311(b), Rule 1.2, and Rule 4.2. Such parties are considered to be unrepresented for purposes of this Rule.

ANNOTATION

Law reviews. For article, "Discrete Task Representation a/k/a Unbundled Legal Services", see 29 Colo. Law. 5 (January 2000). For article, "The New Rules of Professional Conduct: Significant Changes for In-House Counsel", see 36 Colo. Law. 71 (November 2007).

Annotator's note. Rule 4.3 is similar to Rule 4.3 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

A noble motive does not justify departure from any rule of professional conduct. A prosecutor trying to protect public safety is not immune from the code of professional conduct when he or she chooses deception as means for protecting public safety. In re Pautler, 47 P.3d 1175 (Colo. 2002).

There is no imminent public harm, duress, or choice of evils exception or defense for a prosecutor to the rules of professional conduct. In re Pautler, 47 P.3d 1175 (Colo. 2002).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. In re Meyers, 981 P.2d 143 (Colo. 1999).

Rule 4.4. Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

(c) Unless otherwise permitted by court order, a lawyer who receives a document relating to the representation of the lawyer's client and who, before reviewing the document, receives notice from the sender that the document was inadvertently sent, shall not examine the document and shall abide by the sender's instructions as to its disposition.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Paragraph (c) imposes an additional obligation on lawyers under limited circumstances. If a lawyer receives a document and also receives notice from the sender prior to reviewing the document that the document was inadvertently sent, the receiving lawyer must refrain from examining the document and also must abide by the sender's instructions as to the disposition of

the document, unless a court otherwise orders. Whether a lawyer is required to take additional steps beyond those required by paragraphs (b) and (c) is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this Rule, "document" includes e-mail or other electronic modes of transmission subject to being read or put into readable form.

[3] In the circumstances of paragraph (b), some lawyers may choose to return an inadvertently sent document. Where a lawyer is not required by applicable law or paragraph (c) to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

ANNOTATION

Law reviews. For article, "Enforcing Civility: The Rules of Professional Conduct in Deposition Settings", see 33 Colo. Law. 75 (March 2004). For article, "Inadvertent Disclosure of Confidential or Privileged Information", see 40 Colo. Law. 65 (January 2011).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Beecher, 224 P.3d 442 (Colo. O.P.D.J. 2009).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Bennett, 843 P.2d 1385 (Colo. 1993) (decided prior to 2007 repeal and readoption of the Colorado rules of professional conduct).

Rule 4.5. Threatening Prosecution

(a) A lawyer shall not threaten criminal, administrative or disciplinary charges to obtain an advantage in a civil matter nor shall a lawyer present or participate in presenting criminal, administrative or disciplinary charges solely to obtain an advantage in a civil matter.

(b) It shall not be a violation of Rule 4.5 for a lawyer to notify another person in a civil matter that the lawyer reasonably believes that the other's conduct may violate criminal, administrative or disciplinary rules or statutes.

Source: Entire rule and comment amended and adopted June 19, 1997, effective July 1, 1997; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal, disciplinary and some administrative processes are designed for the protection of society as a whole. For purposes of this Rule, a civil matter is a controversy or potential controversy over rights and duties of two or more persons under the law whether or not an action has been commenced.

[2] Threatening to use, or using the criminal, administrative or disciplinary process to coerce adjustment of private civil matters is a subversion of that process; further, the person against whom the criminal, administrative or disciplinary process is so misused may be deterred from asserting valid legal rights and thus the usefulness of the civil process in settling private disputes is impaired. As in all cases of abuse of judicial process, the improper use of criminal, administrative or disciplinary process tends to diminish public confidence in our legal system.

[3] The Rule distinguishes between threats to bring criminal, administrative or disciplinary charges and the actual filing or presentation of such charges. Threats to file such charges are prohibited if a purpose is to obtain any advantage in a civil matter while the actual presentation of such charges is proscribed by this Rule only if the sole purpose for presenting the charges is to obtain an advantage in a civil matter.

[4] This distinction is appropriate because the abuse of the judicial process is at its greatest when a threat of filing charges is used as a lever to obtain an advantage in a collateral, civil proceeding. This leverage is either eliminated or greatly reduced when the charge actually is presented.

[5] Moreover, this Rule does not prohibit a lawyer from notifying another person involved in a civil matter that such person's conduct may violate criminal, administrative or disciplinary rules or statutes where the notifying lawyer reasonably believes that such a violation has taken place.

[6] While it may be difficult in certain circumstances to distinguish between a notification and a threat, public policy is served by allowing a lawyer to notify another person of a perceived violation without subjecting the notifying lawyer to discipline. Many minor violations can be eliminated, rectified or minimized if there is frank dialogue among participants to a dispute.

[7] Rule 4.5(b) provides a safe harbor for notifications of this type. Other factors that should be considered to differentiate threats from notifications in difficult cases include (a) an absence of any suggestion by the notifying lawyer that he or she could exert any improper influence over the criminal, administrative or disciplinary process, (b) consideration of whether any monetary recovery or other relief sought by the notifying lawyer is reasonably related to the harm suffered by the lawyer's clients. Where no such reasonable relation exists, the communication likely constitutes a proscribed threat. For example, a lawyer violates Rule 4.5 if the lawyer threatens to file a charge or complaint of tax fraud against another party where issues of tax fraud have nothing to do with the dispute. It is not a violation of Rule 4.5 for a lawyer to notify another party that the other person's writing of an insufficient funds check may have criminal as well as civil ramifications in a civil action for collection of the bad check.

ANNOTATION

Law reviews. For article, "Policing the Legal System: The Duty to Report Misconduct", see 30 Colo. Law. 85 (September 2001). For article, "Settlement Ethics", see 30 Colo. Law. 53 (December 2001). For article, "Colo. RPC 4.5: The Ethical Prohibition Against Threatening Prosecution", see 35 Colo. Law. 99 (May 2006).

Annotator's note. Rule 4.5 is similar to Rule 4.5 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

Threatening client with criminal prosecution to obtain attorney fees violates this rule. People v. Farrant, 852 P.2d 452 (Colo. 1993).

Attorney threatened to present disciplinary charges to obtain an advantage in a civil action where the attorney, in response to a legal malpractice action, threatened to file a grievance against the attorney filing the action unless the action was dismissed. People v. Gonzales, 922 P.2d 933 (Colo. 1996).

Applied in People v. Sigley, 951 P.2d 481 (Colo. 1998).

Cases Decided Under Former DR 7-105.

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Bannister, 814 P.2d 801 (Colo. 1991).

Applied in People ex rel. Gallagher v. Hertz, 198 Colo. 522, 608 P.2d 335 (1979).

LAW FIRMS AND ASSOCIATIONS

Rule 5.1. Responsibilities or a Partner of Supervisory Lawyer

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved;

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. See Rule 1.0(c). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.

[2] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.4(a).

[5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

[7] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.2(a).

ANNOTATION

Law reviews. For article, "The New Rules of Professional Conduct: Significant Changes for In-House Counsel", see 36 Colo. Law. 71 (November 2007).

Rule 5.2. Responsibilities of a Subordinate Lawyer

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

ANNOTATION

Annotator's note. Rule 5.2 is similar to Rule 5.2 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

The protection afforded by subsection (b) for a subordinate who acts in accordance with a supervisory lawyer's direction is not available to an attorney who failed to disclose his client's true identity in violation of Rule 3.3(b). However, a good-faith but unsuccessful attempt to bring an ethical problem to a superior's attention to receive guidance may be a mitigating factor in superior's determining punishment. People v. Casey, 948 P.2d 1014 (Colo. 1997).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Bennett, 843 P.2d 1385 (Colo. 1993).

Rule 5.3. Responsibilities Regarding Nonlawyer Assistants

With respect to nonlawyers employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

[2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Comment [1] to Rule 5.1. Paragraph (b) applies to lawyers who have supervisory authority, over the work of nonlawyers. Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of nonlawyers that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

ANNOTATION

Law reviews. For article, "The Duty of Loyalty and Preparations to Compete", see 34 Colo. Law. 67 (November 2005). For article, "Investigative Tactics: They May Be Legal, But Are They Ethical?", see 35 Colo. Law. 43 (January 2006). For article, "The New Rules of Professional Conduct: Significant Changes for In-House Counsel", see 36 Colo. Law. 71 (November 2007). For article, "Ethics in Family Law and the New Rules of Professional Conduct", see 37 Colo. Law. 47 (October 2008).

This rule does not apply to attorney special advocates. In re Redmond, 131 P.3d 1167 (Colo. App. 2005) (decided prior to 2007 repeal and readoption of the Colorado rules of professional conduct).

Rule 5.4. Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer;

(3) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(4) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(5) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommend employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional company, if

(1) A nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration; or

(2) A nonlawyer has the right to direct or control the professional judgment of a lawyer.

(e) A lawyer shall not practice with or in the form of a professional company except in compliance with C.R.C.P. 265.

(f) For purposes of this Rule, a "nonlawyer" includes (1) a lawyer who has been disbarred, (2) a lawyer who has been suspended and who must petition for reinstatement, (3) a lawyer who has been immediately suspended pursuant to C.R.C.P. 251.8 or 251.20(d), (4) a lawyer who is on inactive status pursuant to C.R.C.P. 227(A)(6), or (5) a lawyer who, for a period of six months or more, has been (i) on disability inactive status pursuant to C.R.C.P. 251.23 or (ii) suspended pursuant to C.R.C.P. 251.8.5, 227(A)(4), 260.6, or 251.8.6.

Source: Entire rule amended and adopted June 12, 1997, effective July 1, 1997; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008; (d) amended and (e) and (f) added and Comment amended and effective February 26, 2009.

COMMENT

[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment on behalf of the lawyer's client. Moreover, since a lawyer should not aid or encourage a nonlawyer to practice law, the lawyer should not practice law or otherwise share legal fees with a nonlawyer. This does not mean, however, that the pecuniary value of the interest of a deceased lawyer in the lawyer's firm or practice may not be paid to the lawyer's estate or specified persons such as the lawyer's spouse or heirs. In like manner, profit-sharing retirement plans of a lawyer or law firm which include nonlawyer office employees are not improper. These limited exceptions to the rule against sharing legal fees with nonlawyers are permissible since they do not aid or encourage nonlawyers to practice law. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c) such arrangements should not interfere with the lawyer's professional judgment on behalf of the lawyer's client. A lawyer should, however, make full disclosure of such arrangements to the client; and if the lawyer or client believes that the effectiveness of lawyer's representation has been or will be impaired thereby, the lawyer should take proper steps to withdraw from representation of the client.

[2] To assist a lawyer in preserving independence, a number of courses are available, For example, a lawyer may practice law in the form of a professional company, if in doing so the lawyer complies with all applicable rules of the Colorado Supreme Court. Although a lawyer may be employed by a business corporation with nonlawyers serving as directors or officers, and they necessarily have the right to make decisions of business policy, a lawyer must decline to accept direction of the lawyer's professional judgment from any nonlawyer. Various types of legal aid offices are administered by boards of directors composed of lawyers and nonlawyers. A lawyer should not accept employment from such an organization unless the board sets only broad policies and there is no interference in the relationship of the lawyer and the individual client the lawyer serves. Where a lawyer is employed by an organization, a written agreement that defines the relationship between the. Lawyer and the organization and provides for the lawyer's independence is desirable since it may serve to prevent misunderstanding as to their respective roles. Although other innovations in the means of supplying legal counsel may develop, the responsibility of the lawyer to maintain the lawyer's professional independence remains constant, and the legal profession must insure that changing circumstances do not result in loss of the professional independence of the lawyer.

[3] As part of the legal profession's commitment to the principle that high quality legal services should be available to all, lawyers are encouraged to cooperate with qualified legal assistance organizations providing prepaid legal services. Participation should at all times be in accordance with the basic tenets of the profession: independence, integrity, competence, and devotion to the interests of individual clients. A lawyer so participating should make certain that a relationship with a qualified legal assistance organization in no way interferes with the lawyer's independent professional representation of the interests of the individual client. A lawyer should avoid situations in which officials of the organization who are not lawyers attempt to direct lawyers concerning the manner in which legal services are performed for individual members, and should also avoid situations in which considerations of economy are given undue weight in determining the lawyers employed by an organization or the legal services to be performed for the member or beneficiary rather than competence and quality of service. A lawyer interested in maintaining the historic traditions of the profession and preserving the function of a lawyer as a trusted and independent advisor to individual members of society

should carefully assess those factors when accepting employment by, or otherwise participating in, a particular qualified legal assistance organization, and while so participating should adhere to the highest professional standards of effort and competence.

ANNOTATION

Annotator's note. Rule 5.4 is similar to Rule 5.4 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

Transferring various ownership interests to lawyer employees of firm who did not receive profits and were not managers warranted suspension of one year and a day. Suspension appropriate because attorney made misrepresentations and was dishonest in such transfers. People v. Reed, 942 P.2d 1204 (Colo. 1997).

Motion to dismiss should have been denied on the basis that a joint venturer cannot shield itself from liability on the grounds that the joint venture was prohibited by this rule of professional conduct. Bebo Constr. Co. v. Mattox & O'Brien, 998 P.2d 475 (Colo. App. 2000).

An attorney's attempt to share legal fees with nonlawyers is professional misconduct. People v. Easley, 956 P.2d 1257 (Colo. 1998).

Conduct violating this rule in conjunction with other disciplinary rules sufficient to justify suspension. People v. Easley, 956 P.2d 1257 (Colo. 1998).

Rule 5.5. Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not:

(1) practice law in this jurisdiction without a license to practice law issued by the Colorado Supreme Court unless specifically authorized by C.R.C.P. 220, C.R.C.P. 221, C.R.C.P. 221.1, C.R.C.P. 222 or federal or tribal law;

(2) practice law in a jurisdiction where doing so violates the regulations of the legal profession in that jurisdiction;

(3) assist a person who is not authorized to practice law pursuant to subpart (a) of this Rule in the performance of any activity that constitutes the unauthorized practice of law; or

(4) allow the name of a disbarred lawyer or a suspended lawyer who must petition for reinstatement to remain in the firm name.

(b) A lawyer shall not employ, associate professionally with, allow or aid a person the lawyer knows or reasonably should know is a disbarred, suspended, or on disability inactive status to perform the following on behalf of the lawyer's client:

(1) render legal consultation or advice to the client;

(2) appear on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer;

(3) appear on behalf of a client at a deposition or other discovery matter;

(4) negotiate or transact any matter for or on behalf of the client with third parties;

(5) otherwise engage in activities that constitute the practice of law; or

(6) receive, disburse or otherwise handle client funds.

(c) Subject to the limitation set forth below in paragraph (d), a lawyer may employ, associate professionally with, allow or aid a lawyer who is disbarred, suspended (whose suspension is partially or fully served), or on disability inactive status to perform research, drafting or clerical activities, including but not limited to:

(1) legal work of a preparatory nature, such as legal research, the assemblage of data and other necessary information, drafting of pleadings, briefs, and other similar documents;

(2) direct communication with the client or third parties regarding matters such as scheduling, billing, updates, confirmation of receipt or sending of correspondence and messages; and

(3) accompanying an active member in attending a deposition or other discovery matter for the limited purpose of providing assistance to the lawyer who will appear as the representative of the client.

(d) A lawyer shall not allow a person the lawyer knows or reasonably should know is

disbarred, suspended, or on disability inactive status to have any professional contact with clients of the lawyer or of the lawyer's firm unless the lawyer:

(1) prior to the commencement of the work, gives written notice to the client for whom the work will be performed that the disbarred or suspended lawyer, or the lawyer on disability inactive status, may not practice law; and

(2) retains written notification for no less than two years following completion of the work.

(e) Once notice is given pursuant to C.R.C.P. 251.28 or this Rule, then no additional notice is required.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] The definition of the practice of law is established by law and varies from one jurisdiction to another. In order to protect the public, persons not admitted to practice law in Colorado cannot hold themselves out as lawyers in Colorado or as authorized to practice law in Colorado. Rule 5.5(a)(1) recognizes that C.R.C.P. 20, C.R.C.P. 221, C.R.C.P. 221.1, and C.R.C.P. 222 permit lawyers to practice law in accordance with their terms in Colorado without a license from the Colorado Supreme Court. Lawyers may also be permitted to practice law within the physical boundaries of the State, without such a license, where they do so pursuant to Federal or tribal law. Such practice does not constitute a violation of the general proscription of Rule 5.5(a)(1).

[2] Paragraph (a)(3) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3. Likewise, it does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in governmental agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[3] A lawyer may employ or contract with a disbarred, suspended lawyer or a lawyer on disability inactive status, to perform services that a law clerk, paralegal or other administrative staff may perform so long as the lawyer directly supervises the work. Lawyers who are suspended but whose entire suspension has been stayed may engage in the practice of law, and the portion of the Rule limiting what suspended lawyers may do does not apply.

[4] The name of a disbarred lawyer or a suspended lawyer who must petition for reinstatement must be removed from the firm name. A lawyer will be assisting in the unauthorized practice of law if the lawyer fails to remove such name.

[5] Disbarred, suspended lawyers or lawyers on disability inactive status may have contact with clients of the licensed lawyer so long as such lawyer and the licensed lawyer provide written notice to the client that the lawyer may not practice law. Written notice to the client shall include an advisement that the person may not give advice or engage in any other conduct considered the practice of law. Proof of service shall be maintained in the licensed lawyer's file for a minimum of two years.

[6] Separate and apart from the disbarred, suspended or disabled lawyer's obligation not to practice law, the licensed lawyer who employs or hires such person has an obligation to directly supervise that individual.

ANNOTATION

Law reviews. For article, "Negotiations and the Unauthorized Practice of Law", see 23 Colo. Law. 361 (1994). For comment, "Increasing Access to Justice: Expanding the Role of Nonlawyers in the Delivery of Legal Services to Low-Income Coloradans", see 72 U. Colo. L. Rev. 459 (2001). For article, "Avoiding the Unauthorized Practice of Law by Non-lawyer Assistants", see 32 Colo. Law. 27 (March 2003). For article, "The New Rules of Professional Conduct: Significant Changes for In-House Counsel", see 36 Colo. Law. 71 (November 2007).

Annotator's note. Rule 5.5 is similar to Rule 5.5 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

An attorney's appearance as counsel of record in numerous court proceedings following an order of suspension constituted

conduct involving the unauthorized practice of law. People v. Kargol, 854 P.2d 1267 (Colo. 1993).

An attorney who is suspended for failure to comply with CLE requirements is barred from practicing law under this rule and C.R.C.P. 241.21 (d), the same as if the attorney had been suspended following a disciplinary proceeding. Continuing to practice law after such an administrative suspension warranted an additional 18-month suspension. People v. Johnson, 946 P.2d 469 (Colo. 1997).

Public censure justified where, although the attorney failed to notify opposing counsel and appeared in one hearing after imposition of the suspension, the attorney's involvement was minimal, it occurred only upon request by the client, it did not result in any harm to the client, and the attorney did not receive any benefit from the appearance. People v. Pittam, 917 P.2d 710 (Colo. 1996).

Public censure appropriate for practicing law while suspended where 90-day suspension ended four years before the unauthorized practice and where the attorney never applied for reinstatement. People v. Cain, 957 P.2d 346 (Colo. 1998).

Suspension of one year and one day warranted in light of the seriousness of attorney's misconduct in conjunction with his noncooperation in the disciplinary proceedings and his substantial experience in the practice of law. People v. Clark, 900 P.2d 129 (Colo. 1995).

Conduct violating this rule, in conjunction with other disciplinary rules, sufficient to justify disbarment where the attorney continued to practice law while on suspension, repeatedly neglecting his clients and failing to take reasonable steps to protect clients' interests. People v. Fager, 938 P.2d 138 (Colo. 1997).

Conduct violating this rule in conjunction with other rules of professional conduct is sufficient to justify public censure. People v. Newman, 925 P.2d 783 (Colo. 1996).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Johnson, 946 P.2d 469 (Colo. 1997); People v. Swarts, 239 P.3d 441 (Colo. O.P.D.J. 2010).

Conduct violating this rule sufficient to justify disbarment where attorney continued to practice law when under suspension. People v. Redman, 902 P.2d 839 (Colo. 1995); People v. Ebbert, 925 P.2d 274 (Colo. 1996).

Counsel violated this rule by allowing his non-lawyer wife to conduct initial client interviews and to counsel clients concerning appropriate actions to take while in bankruptcy proceedings. This in conjunction with violation of other disciplinary rules was sufficient to justify disbarment. People v. Steinman, 930 P.2d 596 (Colo. 1997).

Conduct violating this rule in conjunction with other disciplinary rules sufficient to justify disbarment. People v. Steinman, 930 P.2d 596 (Colo. 1997); People v. Holmes, 955 P.2d 1012 (Colo. 1998); In re Hugen, 973 P.2d 1267 (Colo. 1999); People v. Mason, 212 P.3d 141 (Colo. O.P.D.J. 2009).

Cases Decided Under Former DR 3-101.

Law reviews. For article, "Potential Liability for Lawyers Employing Law Clerks", see 12 Colo. Law. 1243 (1983). For formal opinion of the Colorado Bar Association Ethics Committee on Collaboration with Non-Lawyers in the Preparation and Marketing of Estate Planning Documents, see 19 Colo. Law. 1793 (1990).

License to practice law assures public that the lawyer who holds the license will perform basic legal tasks honestly and without undue delay, in accordance with the highest standards of professional conduct. People v. Dixon, 621 P.2d 322 (Colo. 1981).

Public expects appropriate discipline for professional misconduct. The public has a right to expect that one who engages in professional misconduct will be disciplined appropriately. People v. Dixon, 621 P.2d 322 (Colo. 1981).

Services of an attorney not licensed in Colorado are compensable as attorney fees where no court appearances made and the work performed consisted of obtaining a variance from a municipal zoning code. Catoe v. Knox, 709 P.2d 964 (Colo. App. 1985).

Consulting services performed by an out-of-state lawyer do not constitute unauthorized practice of law and therefore may be compensated as attorney fees. Dietrich Corp. v. King Res. Co., 596 F.2d 422 (10th Cir. 1979).

Evidence sufficient to justify one-year suspension. People ex rel. MacFarlane v. Boyls, 197 Colo. 242, 591 P.2d 1315 (1979).

Suspended attorney must demonstrate rehabilitation. The actions of a suspended attorney who took part in a complex real estate transaction and engaged in the practice of law by representing, counseling, advising, and assisting a former client warranted suspension until he demonstrates by clear and convincing evidence that (1) he has been rehabilitated; (2) he has complied with and will continue to comply with all applicable disciplinary orders and rules; and (3) he is competent and fit to practice law. People v. Belfor, 200 Colo. 44, 611 P.2d 979 (1980).

Permitting law clerk to render legal advice to clients constitutes aiding a nonlawyer in the unauthorized practice of law. People v. Felker, 770 P.2d 402 (Colo. 1989).

Lawyer's review of living trusts which were sold by nonlawyers constituted aiding a nonlawyer in the unauthorized practice of law. Although suspension is generally prescribed for this type of conduct, weighing fac-

tors in mitigation against the seriousness of the conduct, public censure is an appropriate sanction in this case. People v. Volk, 805 P.2d 1116 (Colo. 1991); People v. Laden, 893 P.2d 771 (Colo. 1995).

The counseling and sale of living trusts by nonlawyers constitutes the unauthorized practice of law. Lawyer's review of living trusts that were sold by nonlawyers constituted aiding a nonlawyer in the unauthorized practice of law. Six-month suspension held justified in this case because of aggravating factors including selfish motive, multiple offenses, and refusal to acknowledge the wrongful nature of such conduct. People v. Cassidy, 884 P.2d 309 (Colo. 1994).

Attorney's practice of law while on inactive status constituted unauthorized practice of law. People v. Cassidy, 884 P.2d 309 (Colo. 1994).

Attorney's continued practice of law while under an order of suspension, with no efforts to wind up the legal practice, and the failure to take action to protect the legal interests of the attorney's clients, warrants disbarment. People v. Wilson, 832 P.2d 943 (Colo. 1992).

Public censure justified where attorney failed to attend to bankruptcy proceeding and scheduled meetings, failed to timely file pleadings and responses, and allowed his paralegal to engage in unauthorized practice of law. People v. Fry, 875 P.2d 222 (Colo. 1994).

Attorney who continued to practice law while under suspension but did not harm any client was suspended. Attorney had been suspended from practice for three years when the court imposed an additional three-year suspension. People v. Ross, 873 P.2d 728 (Colo. 1994).

Conduct violating this rule sufficient to justify suspension. People v. Macy, 789 P.2d 188 (Colo. 1990).

Continuing to practice law while suspended is conduct justifying disbarment. People v. James, 731 P.2d 698 (Colo. 1987).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Pilgrim, 802 P.2d 1084 (Colo. 1990); People v. Mannix, 936 P.2d 1285 (Colo. 1997); People v. Madigan, 938 P.2d 1162 (Colo. 1997).

Conduct violating this rule sufficient to justify disbarment. People v. Bealmear, 655 P.2d 402 (Colo. 1982); People v. Rice, 728 P.2d 714 (Colo. 1986).

Rule 5.6. Restrictions on Right to Practice

A lawyer shall not participate in offering or making:

(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

Source: (a) and Comment amended and adopted June 12, 1997, effective July 1, 1997; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

[2] Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

[3] This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

ANNOTATION

Law reviews. For formal opinion of the Colorado Bar Association Ethics Committee on Practice Restrictions in Settlement Agreements, see 22 Colo. Law. 1673 (1993). For article, "Settlement Ethics", see 30 Colo. Law. 53 (December 2001). For article, "Non-Compete Agreements in Colorado", see 40 Colo. Law. 63 (June 2011).

Rule 5.7. Responsibilities Regarding Law-related Services

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are

provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008; Comment [9] amended and effective November 6, 2008.

COMMENT

[1] When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case.

[2] Rule 5.7 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed and whether the law-related services are performed through a law firm or a separate entity. The Rule identifies the circumstances in which all of the Rules of Professional Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those Rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. See, e.g., Rule 8.4.

[3] When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer in providing the law-related services must adhere to the requirements of the Rules of Professional Conduct as provided in paragraph (a)(1). Even when the law-related and legal services are provided in circumstances that are distinct from each other, for example through separate entities or different support staff within the law firm, the Rules of Professional Conduct apply to the lawyer as provided in paragraph (a)(2) unless the lawyer takes reasonable measures to assure that the recipient of the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not apply.

[4] Law-related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity's operations, the Rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Rules of Professional Conduct that relate to the client-lawyer relationship do not apply. A lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case.

[5] When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with Rule 1.8(a).

[6] In taking the reasonable measures referred to in paragraph (a)(2) to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Rules of Professional Conduct, the lawyer should communicate to the person receiving the law-related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be made before entering into an agreement for provision of or providing law-related services, and preferably should be in writing.

[7] The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding. For instance, a sophisticated user of law-related services, such as a publicly held corporation, may require a lesser

explanation than someone unaccustomed to making distinctions between legal services and law-related services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.

[8] Regardless of the sophistication of potential recipients of law-related services, a lawyer should take special care to keep separate the provision of law-related and legal services in order to minimize the risk that the recipient will assume that the law-related services are legal services. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter. Under some circumstances the legal and law-related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by paragraph (a)(2) of the Rule cannot be met. In such a case a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by Rule 5.3, that of nonlawyer employees in the distinct entity that the lawyer controls complies in all respects with the Rules of Professional Conduct.

[9] A broad range of economic and other interests of clients maybe served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.

[10] When a lawyer is obliged to accord the recipients of such services the protections of those Rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the Rules addressing conflict of interest (Rules 1.7 through 1.11, especially Rules 1.7(a)(2) and 1.8(a), (b) and (f)), and to scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential information. The promotion of the law-related services must also in all respects comply with Rules 7.1 through 7.3, dealing with advertising and solicitation. In that regard, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction's decisional law.

[11] When the full protections of all of the Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the Rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. See also Rule 8.4 (Misconduct).

ANNOTATION

Law reviews. For article, "The New Rules of Professional Conduct: Significant Changes for In-House Counsel", see 36 Colo. Law. 71 (November 2007).

PUBLIC SERVICE

Rule 6.1. Voluntary Pro Bono Publico Service

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least fifty hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the fifty hours of legal services without fee or expectation of fee to:

(1) persons of limited means or

(2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and

(b) provide any additional legal or public services through:

(1) delivery of legal services at no fee or a substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

Where constitutional, statutory or regulatory restrictions prohibit government and public sector lawyers or judges from performing the pro bono services outlined in paragraphs (a)(1) and (2), those individuals should fulfill their pro bono publico responsibility by performing services or participating in activities outlined in paragraph (b).

Source: Entire rule repealed and readopted November 2, 1999, effective January 1, 2000; Comment amended and effective November 23, 2005; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] Every lawyer, regardless of professional prominence or professional workload, has a responsibility to provide legal services to those unable to pay. Indeed, the oath that Colorado lawyers take upon admittance to the Bar requires that a lawyer will never "reject, from any consideration personal to myself, the cause of the defenseless or oppressed." In some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on average per year, the number of hours set forth in this Rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.

[2] Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the disadvantaged be furnished without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means.

[3] Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless, cannot afford counsel. Legal services can be rendered to individuals or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means. The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

[4] Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono under paragraph (a) if an anticipated fee is uncollected, but the award of statutory lawyers' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means.

[5] While it is possible for a lawyer to fulfill the annual responsibility to perform pro bono services exclusively through activities described in paragraphs (a)(1) and (2), to the extent that any hours of service remain unfulfilled, the lawyer may satisfy the remaining commitment in a variety of ways as set forth in paragraph (b).

[6] Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono lawyer to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.

[7] Paragraph (b)(2) covers instances in which lawyers agree to and receive a modest fee for furnishing legal services to persons of limited means. Acceptance of court appointments in which the fee is substantially below a lawyer's usual rate is encouraged under this section.

[8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession. Serving on bar association committees, serving on boards of pro bono or legal services pro-

grams, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession are a few examples of the many activities that fall within this paragraph.

[9] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. However, in special circumstances, such as death penalty cases and class action cases, it is appropriate to allow collective satisfaction by a law firm of the pro bono responsibility. There may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided.

[10] Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.

[11] The responsibility set forth in this Rule is not intended to be enforced through disciplinary process.

Recommended Model Pro Bono Policy for Colorado Licensed Attorneys and Law Firms

Preface. Providing pro bono legal services to persons of limited means and organizations serving persons of limited means is a core value of Colorado licensed attorneys enunciated in Colorado Rule of Professional Conduct 6.1. Adoption of a law firm pro bono policy will commit the firm to this professional value and assure attorneys of the firm that their pro bono work is valued in their advancement within the firm.

The Colorado Supreme Court has adopted the following recommended Model Pro Bono Policy that can be modified to meet the needs of individual law firms. References are made to provisions that may not apply in a small firm setting. Adoption of such a policy is entirely voluntary.

At the least, a pro bono policy would:

(1) clearly set forth an aspirational goal for attorneys, as well as the number of hours for which billable credit will be awarded for firms that operate on a billable hour system (the attached model policy uses the figure of at least 50 hours per attorney per year, which mirrors the aspirational goal set out in Rule 6.1);

(2) demonstrate that pro bono service will be positively considered in evaluation and compensation decisions; and

(3) include a description of the processes that will be used to match attorneys with projects and monitor pro bono service, including tracking pro bono hours spent by lawyers and others in the firm.

The Colorado Supreme Court will recognize those firms that make a strong commitment to pro bono work by adopting a policy that includes:

(1) an annual goal of performing 50 hours of pro bono legal service by each Colorado licensed attorney in the firm, pro-rated for part-time attorneys, primarily for persons of limited means and/or organizations serving persons of limited means consistent with the definition of pro bono services as set forth in this Model Pro Bono Policy; and

(2) a statement that the firm will value at least 50 hours of such pro bono service per year by each Colorado licensed attorney in the firm, for all purposes of attorney evaluation, advancement, and compensation in the firm as the firm values compensated client representation.

The Colorado Supreme Court will also recognize on an annual basis those Colorado law firms that voluntarily advise the Court by February 15 that their attorneys, on average, during the previous calendar year, performed 50 hours of pro bono legal service, primarily for persons of limited means or organizations serving persons of limited means consistent with the definition of pro bono services as set forth in this Model Pro Bono Policy.

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I. Introduction

The firm recognizes that the legal community has a unique responsibility to ensure that all citizens have access to a fair and just legal system. In recognizing this responsibility, the firm encourages each of its attorneys to actively participate in some form of pro bono legal representation.

This commitment mirrors the core principles enunciated in the Colorado Rules of Professional Conduct:

> A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest . . . A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.
>
> Preamble, Colorado Rules of Professional Conduct.

The firm understands there are various ways to provide pro bono legal services in our community. In selecting among the various pro bono opportunities, the firm encourages and expects that attorneys (both partners and associates or other designation) will devote a minimum of fifty (50) hours each year to pro bono legal services, or a proportional amount of pro bono hours by attorneys on alternative work schedules. In fulfilling this responsibility, firm attorneys should provide a substantial majority of the fifty (50) hours of pro bono legal services to (1) persons of limited means, or (2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means. Rule 6.1. The firm strongly believes that this level of participation lets our attorneys make a meaningful contribution to our legal community, and provides important opportunities to further their professional development.

II. Firm Pro Bono Committee/Coordinator (see suggested change for small firms below)

The firm has established a Pro Bono Committee responsible for implementing and administering the firm's pro bono policies and procedures. The Pro Bono Committee consists of a representative group of attorneys of the firm. In addition, the firm has designated a Pro Bono Coordinator. The Pro Bono Committee/Pro Bono Coordinator has the following principal responsibilities:

1 encouraging and supporting pro bono legal endeavors;

2 reviewing, accepting and/or rejecting pro bono legal projects;

3 coordinating and monitoring pro bono legal projects, ensuring, among other things, that appropriate assistance, supervision and resources are available;

4 providing periodic reports on the firm's pro bono activities; and

5 creating and maintaining a pro bono matter tracking system.

Attorneys are encouraged to seek out pro bono matters that are of interest to them.

****[Small firms may wish to designate only a Pro Bono Coordinator and can introduce the above paragraph as follows:** "The firm has designated a Pro Bono Coordinator responsible for implementing and administering the firm's pro bono policies and procedures" and then delete the next two sentences.]

III. Pro Bono Services Defined

The foremost objective of the firm pro bono policy is to provide legal services to persons of limited means and the nonprofit organizations that assist them, in accordance with Rule 6.1. The firm recognizes there are a variety of ways in which the firm's attorneys and paralegals can provide pro bono legal services in the community. The following, while not intended to be an exhaustive list, reflects the types of pro bono legal services the firm credits in adopting this policy:

A. Representation of Low Income Persons. Representation of individuals who cannot afford legal services in civil or criminal matters of importance to a client;

B. Civil Rights and Public Rights Law. Representation or advocacy on behalf of individuals or organizations seeking to vindicate rights with broad societal implications (class action suits or suits involving constitutional or civil rights) where it is inappropriate to charge legal fees; and

C. Representation of Charitable Organizations. Representation or counseling to charitable, religious, civic, governmental, educa-

tional, or similar organizations in matters where the payment of standard legal fees would significantly diminish the resources of the organization, with an emphasis on service to organizations designed primarily to meet the needs of persons of limited income or improve the administration of justice.

D. Community Economic Development. Representation of or counseling to micro-entrepreneurs and businesses for community economic development purposes, recognizing that business development plays a critical role in low income community development and provides a vehicle to help low income individuals to escape poverty;

E. Administration of Justice in the Court System. Judicial assignments, whether as pro bono counsel, or a neutral arbiter, or other such assignment, which attorneys receive from courts on a mandatory basis by virtue of their membership in a trial bar;

F. Law-related Education. Legal education activities designed to assist individuals who are low-income, at risk, or vulnerable to particular legal concerns or designed to prevent social or civil injustice.

G. Mentoring of Law Students and Lawyers on Pro Bono Matters. Colorado Supreme Court Rule 260.8 provides that an attorney who acts as a mentor may earn two (2) units of general credit per completed matter in which he/she mentors a law student. An attorney who acts as a mentor may earn one (1) unit of general credit per completed matter in which he/she mentors another lawyer. However, mentors shall not be members of the same firm or in association with the lawyer providing representation to the client of limited means.

Because the following activities, while meritorious, do not involve direct provision of legal services to the poor, the firm will not count them toward fulfillment of any attorney's, or the firm's, goal to provide pro bono legal services to persons of limited means or to nonprofits that serve such persons' needs: participation in a non-legal capacity in a community or volunteer organization; services to non-profit organizations with sufficient funds to pay for legal services as part of their normal expenses; client development work; non-legal service on the board of directors of a community or volunteer organization; bar association activities; and non-billable legal work for family members, friends, or members or staff of the firm who are not eligible to be pro bono clients under the above criteria.

IV. Firm Recognition of Pro Bono Service (see suggested change for small firms below).

A. Performance Review and Evaluation. The firm recognizes that the commitment to pro bono involves a personal expenditure of time. In acknowledgment of this commitment and to support firm goals, an attorney's efforts to meet this expectation will be considered by the firm in measuring various aspects of the attorney's performance, such as yearly evaluations and bonuses where applicable. An attorney's pro bono legal work will be subject to the same criteria of performance review and evaluation as those applied to client-billable work. As with all client work, there should be an emphasis on effective results for the client and the efficient and cost-effective use of firm resources.

B. Credit for Pro Bono Legal Work. The firm will give full credit for at least fifty (50) hours of pro bono legal services, and additional hours as approved by the Pro Bono Committee and/or Coordinator, in considering annual billable hour goals, bonuses and other evaluative criteria based on billable hours.

****[Small firms may wish to only include the following paragraph in lieu of the above provisions:** The firm recognizes that the commitment to pro bono involves a personal expenditure of time. In acknowledgment of this commitment and to support firm goals, your pro bono service will be considered a positive factor in performance evaluations and compensation decisions and will be subject to the same criteria of performance review and evaluation as those applied to client-billable work. As with all client work, there should be an emphasis on effective results for the client and the efficient and cost-effective use of firm resources.]

V. Administration of Pro Bono Service (see suggested change for small firms below).

A. Approval of Pro Bono Matters. The Pro Bono Committee/Coordinator will review all proposed pro bono legal matters to ensure that:

1. there is no client or issue conflict or concern;
2. the legal issue raised is not frivolous or untenable;
3. the client does not have adequate funds to retain an attorney; and
4. the matter is otherwise appropriate for pro bono representation.

All persons seeking approval of a pro bono project must: (1) submit a request identifying the client and other entity involved; (2) describe the nature of the work to be done; and (3) identify who will be working on the matter. Once the firm undertakes a pro bono matter, the matter is treated in the same manner as the firm's regular paying work.

B. Opening a Pro Bono Matter. It is the responsibility of the attorney seeking to provide pro bono legal services to complete the conflicts check and open a new matter in accordance with regular firm procedures.

C. Pro Bono Engagement Letter. After a matter has received initial firm approval, the principal attorney on a pro bono legal matter must send an engagement letter to the pro bono

client. Typically, the engagement letter should be sent after the initial client meeting during which the nature and terms of the engagement are discussed.

D. Staffing of Pro Bono Matters. Pro bono legal matters are initially staffed on a voluntary basis. It may become necessary to assign additional attorneys to the matter if the initial staffing arrangements prove to be inadequate, and the firm reserves the right to make such assignments.

E. Supervision of Pro Bono Matters. As appropriate, partner shall supervise any associate working on a pro bono legal matter and the supervising partner shall remain informed of the status of the matter to ensure its proper handling. In addition, it may be appropriate to use assistance or resources from outside the firm. The firm will assist attorneys in finding a supervisor if necessary.

F. Professional Liability Insurance. Attorneys may provide legal assistance through those pro bono organizations that provide professional liability insurance for their volunteers. The firm also carries professional liability insurance for its attorneys in instances where no coverage is available on a pro bono matter through a qualified legal aid organization. Before undertaking any pro bono legal commitments, the professional liability implications should be reviewed with the Pro Bono Committee or the Pro Bono Coordinator.

G. Paralegal Pro Bono Opportunities. Approved pro bono legal work for paralegals includes: (1) work taken on in conjunction with and under the supervision of an attorney working on a specific pro bono legal matter, or (2) work handled independently for an organization that provides pro bono legal opportunities, provided, however, that such participation does not create an attorney-client relationship and/or involve the paralegal's provision of legal advice.

H. Disbursements in Pro Bono Matters. The firm can and should bill and collect disbursements in pro bono legal matters where it is appropriate to do so based on the client's resources. The firm encourages attorneys to pursue petitions for the waiver of filing fees in civil matters (Chief Justice Directive 98-01) when applicable, and to use pro bono experts, court reporters, investigators and other vendors when available to minimize expenses in pro bono legal matters. The firm may advance or guarantee payment of incidental litigation expenses, and may agree that the repayment of such expenses may be contingent upon the outcome of the matter in accordance with Rule 1.8(e). The Pro Bono Committee/Pro Bono Coordinator must approve in advance any expense of a non-routine, significant nature, such as expert fees or translation costs. The supervising partner in a pro bono legal matter should participate in decisions with respect to disbursements.

I. Attorney Fees in Pro Bono Matters. The firm encourages its attorneys to seek and obtain attorney fees in pro bono legal matters where possible. In the event of a recovery of attorney fees, the firm encourages the donation of these fees to an organized non-profit entity whose purpose is or includes the provision of pro bono representation to persons of limited means.

J. Departing Attorneys. When an attorney handling a pro bono case leaves the firm, he or she should work with the Pro Bono Committee/ Coordinator to (1) locate another attorney in the firm to take over the representation of the pro bono client, or (2) see if the referring organization can facilitate another placement.

****[Small firms may wish to title this section "Pro Bono Procedures" and include only the following paragraph in lieu of the above provisions:** All pro bono legal matters will be opened in accordance with regular firm procedures, including utilization of a conflicts check and a client engagement letter. Pro bono matters should be supervised by a partner, as appropriate. The firm encourages its attorneys to seek and obtain attorney fees in pro bono legal matters whenever possible.]

VI. CLE Credit for Pro Bono Work

C.R.C.P. 260.8 provides that attorneys may be awarded up to nine (9) hours of CLE credit per three-year reporting period for: (1) performing uncompensated pro bono legal representation on behalf of clients of limited means in a civil legal matter, or (2) mentoring another lawyer or law student providing such representation.

A. Amount of CLE Credit. Attorneys may earn one (1) CLE credit hour for every five (5) billable-equivalent hours of pro bono representation provided to the client of limited means. An attorney who acts as a mentor may earn one (1) unit of general credit per completed matter in which he/she mentors another lawyer. Mentors shall not be members of the same firm or in association with the lawyer providing representation to the client of limited means. An attorney who acts as a mentor may earn two (2) units of general credit per completed matter in which he/she mentors a law student.

B. How to Obtain CLE Credit. An attorney who seeks CLE credit under C.R.C.P. 260.8 for work on an eligible matter must submit the completed Form 8 to the assigning court, program or law school. The assigning entity must then report to the Colorado Board of Continuing Legal and Judicial Education its recommendation as to the number of general CLE credits the reporting pro bono attorney should receive.

ANNOTATION

Law reviews. For article, "Like It or Not, Colorado Already Has 'Mandatory' Pro Bono", see 29 Colo. Law. 35 (April 2000).

Rule 6.2. Accepting Appointments

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;

(b) representing the client is likely to result in an unreasonable financial or otherwise oppressive burden on the lawyer; or

(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono publico service. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.

Appointed Counsel

[2] For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, see Rule 1.1, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.

[3] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the Rules.

Rule 6.3. Membership in Legal Services Organization

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or

(b) where the decision or action could have a material adverse effect on the representation of a client of a lawyer provided by the organization whose interests are adverse to a client of the lawyer.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is a director, officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.

[2] It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances.

Rule 6.4. Law Reform Activities Affecting Client Interests

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefited by a decision in which the lawyer participates, the lawyer shall disclose that fact to the organization but need not identify the client.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See also Rule 1.2(b). For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure to the organization when the lawyer knows a private client might be materially benefited.

Rule 6.5. Nonprofit and Court-annexed Limited Legal Services Programs

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] Legal services organizations, courts and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services — such as advice or the completion of legal forms that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-

only clinics or pro se counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7, 1.9 and 1.10.

[2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. See Rule 1.2(c). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.

[3] Because a lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires compliance with Rules 1.7 or 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rules 1.7 or 1.9(a) in the matter.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this Rule except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.

INFORMATION ABOUT LEGAL SERVICES

Rule 7.1. Communications Concerning a Lawyer's Services

(a) A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(2) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated; or

(3) is likely to create an unjustified expectation about results the lawyer can achieve;

(b) No lawyer shall, directly or indirectly, pay all or a part of the cost of communications concerning a lawyer's services by a lawyer not in the same firm unless the communication discloses the name and address of the non-advertising lawyer, the relationship between the advertising lawyer and the non-advertising lawyer, and whether the advertising lawyer may refer any case received through the advertisement to the non-advertising lawyer.

(c) Unsolicited communications concerning a lawyer's services mailed to prospective clients shall be sent only by regular U.S. mail, not by registered mail or other forms of restricted delivery, and shall not resemble legal pleadings or other legal documents.

(d) Any communication that states or implies the client does not have to pay a fee if there is no recovery shall also disclose that the client may be liable for costs. This provision does not apply to communications that only state that contingent or percentage fee arrangements are available, or that only state the initial consultation is free.

(e) A lawyer shall not knowingly permit, encourage or assist in any way employees, agents or other persons to make communications on behalf of the lawyer or the law firm in violation of this Rule or Rules 7.2 through 7.4.

(f) In connection with the sale of a private law practice under Rule 1.17, an opinion of the purchasing lawyer's suitability and competence to represent existing clients shall not violate this Rule if the lawyer complies with Rule 1.17(d).

Source: (f) added and adopted June 12, 1997, effective July 1, 1997; entire rule and comment amended and adopted June 12, 1997, effective January 1, 1998; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2 and solicitations governed by Rule 7.3.

[2] The touchstone of this Rule, as well as Rules 7.2 through 7.4, is that all communications regarding a lawyer's services must be truthful. Truthful communications regarding a lawyer's services provide a valuable public service and, in any event, are constitutionally protected. False and misleading statements regarding a lawyer's services do not serve any valid purpose and may be constitutionally proscribed.

[3] It is not possible to catalog all types and variations of communications that are false or misleading. Nevertheless, certain types of statements recur and deserve special attention.

[4] One of the basic covenants of a lawyer is that the lawyer is competent to handle those matters accepted by the lawyer. Rule 1.1. It is therefore false and misleading for a lawyer to advertise for clients in a field of practice where the lawyer is not competent within the meaning of Rule 1.1.

[5] Characterizations of a lawyer's fees such as "cut-rate", "lowest" and "cheap" are likely to be misleading if those statements cannot be factually substantiated. Similarly, characterizations regarding a lawyer's abilities or skills have the potential to be misleading where those characterizations cannot be factually substantiated. Equally problematic are factually unsubstantiated characterizations of the results that a lawyer has in the past obtained. Such statements often imply that the lawyer will be able to obtain the same or similar results in the future. This type of statement, due to the inevitable factual and legal differences between different representations, is likely to mislead prospective clients.

[6] Statements that a law firm has a vast number of years of experience, by aggregating the experience of all members of the firm, provide little meaningful information to prospective clients and have the potential to be misleading.

[7] Statements such as "no recovery, no fee" are misleading if they do not additionally mention that a client may be obligated to pay costs of the lawsuit. Any communication that states or implies the client does not have to pay a fee if there is no recovery shall also disclose that the client may be liable for costs.

[8] Finally, Rule 7.1(c) proscribes unsolicited communications sent by restricted means of delivery. It is misleading and an invasion of the recipient's privacy for a lawyer to send advertising information to a prospective client by registered mail or other forms of restricted delivery. Such modes falsely imply a degree of exigence or importance that is unjustified under the circumstances.

ANNOTATION

Annotator's note. Rule 7.1 is similar to Rule 7.1 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

The relevant portions of the Colorado Consumer Protection Act are not inconsistent with the prohibition on misleading communications in C.R.P.C. 7.1. Attorney conduct that constitutes deceptive or unfair trade practices is not in compliance with the rules of professional conduct and is not exempted from CCPA liability. Crowe v. Tull, 126 P.3d 196 (Colo. 2006).

Lawyer advertisement containing false, misleading, deceptive, or unfair statements in violation of the rule warrants public, rather than private, censure. Respondent terminated referral service being advertised after the initial request for investigation was filed and cooperated in disciplinary proceedings but had received a past letter of admonition and had substantial experience in the practice of law. Respondent's conduct involved dishonesty and misrepresentation and, in conjunction with prior discipline, foreclosed a private sanction. People v. Carpenter, 893 P.2d 777 (Colo. 1995).

Cases Decided Under Former DR 2-101.

Law reviews. For comment, "A Consumers' Rights Interpretation of the First Amendment Ends Bans on Legal Advertising", see 55 Den. L.J. 103 (1978). For article, "Lawyer Advertising", see 15 Colo. Law. 1819 (1986). For article, "Marketing Your Practice", see 16 Colo. Law. 259 (1987). For article, "Reading Beyond the Labels: Effective Regulation of Lawyers' Targeted Direct Mail Advertising", see 58 U. Colo. L. Rev. 255 (1987). For formal opinion of the Colorado Bar Association Ethics Committee on Lawyer Advertising, Solicitation and Publicity, see 19 Colo. Law. 25 (1990). For comment, "After Shapero v. Kentucky Bar Association:

Much Remains Unresolved About the Allowable Limits of Restrictions on Attorney Advertising", see 61 U. Colo. L. Rev. 115 (1990). For formal opinion of the Colorado Bar Association Ethics Committee on Collaboration with Non-Lawyers in the Preparation and Marketing of Estate Planning Documents, see 19 Colo. Law. 1793 (1990).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Smith, 830 P.2d 1003 (Colo. 1992).

Conduct violating this rule sufficient to justify suspension. People v. Roehl, 655 P.2d 1381 (Colo. 1983).

Cases Decided Under Former DR 2-102.

Law reviews. For formal opinion of the Colorado Bar Association Ethics Committee on Lawyer Advertising, Solicitation and Publicity, see 19 Colo. Law. 25 (1990). For formal opinion of the Colorado Bar Association Ethics Committee on Listing Support Personnel Names on Letterhead and Business Cards, see 19 Colo. Law. 629 (1990).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Smith, 830 P.2d 1003 (Colo. 1992).

Rule 7.2. Advertising

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of communications permitted by this Rule;

(2) pay the usual charges of a not-for-profit lawyer referral service or legal service organization.

(3) pay for a law practice in accordance with Rule 1.17; and

(4) refer clients to another lawyer or a nonlawyer pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if

(i) the reciprocal referral agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement.

(c) Any communication made pursuant to this Rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

Source: (c)(1), (2), and (3) amended and adopted June 12, 1997, effective July 1, 1997; entire rule and comment amended and adopted June 12, 1997, effective January 1, 1998; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008; Comment [8] amended and effective November 6, 2008.

COMMENT

[1] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of informa-

tion about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. Similarly, electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule. But see Rule 7.3 (a) for the prohibition against the solicitation of a prospective client through a real-time electronic exchange that is not initiated by the prospective client.

[4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Paying Others to Recommend a Lawyer

[5] Lawyers are not permitted to pay others for channeling professional work. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. See Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers who prepare marketing materials for them.

[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists prospective clients to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by laypersons to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for prospective clients. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act (requiring that organizations that are identified as lawyer referral services (i) permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable objective eligibility requirements as may be established by the referral service for the protection of prospective clients; (ii) require each participating lawyer to carry reasonably adequate malpractice insurance; (iii) act reasonably to assess client satisfaction and address client complaints; and (iv) do not refer prospective clients to lawyers who own, operate or are employed by the referral service.)

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with prospective clients, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

[8] A lawyer also may agree to refer clients to another lawyer or a nonlawyer in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(d), a lawyer who receives referrals from a lawyer or nonlawyer must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

ANNOTATION

Law reviews. For formal opinion of the Colorado Bar Association on the Applicability of Colo. RPC 7.2 to Internet-Based Lawyer Marketing Programs, see 39 Colo. Law. 65 (August 2010).

Public censure was appropriate where attorney continued to advertise with an unapproved, for-profit attorney referral service and where attorney had previously been disciplined with regard to use of client funds and was on suspension at the time of censure. People v. Mason, 938 P.2d 133 (Colo. 1997) (decided prior to 2007 repeal and readoption of the Colorado rules of professional conduct).

Rule 7.3. Direct Contact with Prospective Clients

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(c) A lawyer shall not solicit professional employment from a prospective client believed to be in need of legal services which arise out of the personal injury or death of any person by written, recorded, or electronic communication. This Rule 7.3(c) shall not apply if the lawyer has a family or prior professional relationship with the prospective client or if the communication is issued more than 30 days after the occurrence of the event for which the legal representation is being solicited. Any such communication must comply with the following:

(1) no such communication may be made if the lawyer knows or reasonably should know that the person to whom the communication is directed is represented resented by a lawyer in the matter; and

(2) if a lawyer other than the lawyer whose name or signature is contained in the communication will actually handle the case or matter, or if the case or matter will be referred to another lawyer or law firm, any such communication shall include a statement so advising the prospective client.

(d) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall:

(1) include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2);

(2) not reveal on the envelope or on the outside of a self-mailing brochure or pamphlet the nature of the prospective client's legal problem.

A copy of or recording of each such communication and a sample of the envelopes, if any, in which the communications are enclosed shall be kept for a period of four years from the date of dissemination of the communication.

(e) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Source: Entire rule and comment amended and adopted and committee comment deleted by amendment June 12, 1997, effective January 1, 1998; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] There is a potential for abuse inherent in direct in-person, live telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

[2] This potential for abuse inherent in direct in-person, live telephone or real-time electronic solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications which may be mailed or autodialed make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct in-person, telephone or real-time electronic persuasion that may overwhelm the client's judgment.

[3] The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to prospective client, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person, live telephone or real-time electronic conversations between a lawyer and a prospective client can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[4] There is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client, or with whom the lawyer has close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

[5] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b).

[6] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[7] The requirement in Rule 7.3(d)(1) that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of

this Rule.

[8] Paragraph (e) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (e) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See Rule 8.4(a).

Rule 7.4. Communication of Fields of Practice

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law or that the lawyer is a specialist in particular fields of law. Such communication shall be in accordance with Rule 7.1.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

(c) A lawyer engaged in admiralty practice may use the designation "admiralty," "proctor in admiralty" or a substantially similar designation.

(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and

(2) the name of the certifying organization is clearly identified in the communication.

(e) In any advertisement in which a lawyer affirmatively claims to be certified in any area of the law, such advertisement shall contain the following disclosure: "Colorado does not certify lawyers as specialists in any field." This disclaimer is not required where the information concerning the lawyer's services is contained in a law list, law directory or a publication intended primarily for use of the legal profession.

Source: (g) added and adopted June 12, 1997, effective July 1, 1997; entire rule and comment amended and adopted and committee comment deleted June 12, 1997, effective January 1, 1998; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] Paragraph (a) of this Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer is a "specialist," practices a "specialty" or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services.

[2] Paragraph (b) recognizes the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before the Office. Paragraph (c) recognizes that designation of Admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.

[3] Paragraph (d) permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate state authority or accredited by the American Bar Association or another organization, such as a state bar association, that has been approved by the state authority to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards

of experience, knowledge and proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

[4] A claim of certification contained in a lawyer's letterhead does not require the disclaimer in Rule 7.4(e) unless the letterhead is used in an advertisement.

ANNOTATION

Law reviews. For formal opinion of the Colorado Bar Association Ethics Committee on Lawyer Advertising, Solicitation and Publicity, see 19 Colo. Law. 25 (1990).

Rule 7.5. Firm Names and Letterheads

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

Source: (b) amended October 17, 1996, effective January 1, 1997; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer.

[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm.

ANNOTATION

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Reed, 955 P.2d 65 (Colo. 1998) (decided prior to 2007 repeal and readoption of the Colorado rules of professional conduct).

Rule 7.6. Political Contributions to Obtain Legal Engagements or Appointments by Judges

A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] Lawyers have a right to participate fully in the political process, which includes making and soliciting political contributions to candidates for judicial and other public office. Nevertheless, when lawyers make or solicit political contributions in order to obtain an engagement for legal work awarded by a government agency, or to obtain appointment by a judge, the public may legitimately question whether the lawyers engaged to perform the work are selected on the basis of competence and merit. In such a circumstance, the integrity of the profession is undermined.

[2] The term "political contribution" denotes any gift, subscription, loan, advance or deposit of anything of value made directly or indirectly to a candidate, incumbent, political party or campaign committee to influence or provide financial support for election to or retention in judicial or other government office. Political contributions in initiative and referendum elections are not included. For purposes of this Rule, the term "political contribution" does not include uncompensated services.

[3] Subject to the exceptions below, (i) the term "government legal engagement" denotes any engagement to provide legal services that a public official has the direct or indirect power to award; and (ii) the term "appointment by a judge" denotes an appointment to a position such as referee, commissioner, special master, receiver, guardian or other similar position that is made by a judge. Those terms do not, however, include (a) substantially uncompensated services; (b) engagements or appointments made on the basis of experience, expertise, professional qualifications and cost following a request for proposal or other process that is free from influence based upon political contributions; and (c) engagements or appointments made on a rotational basis from a list compiled without regard to political contributions.

[4] The term "lawyer or law firm" includes a political action committee or other entity owned or controlled by a lawyer or law firm.

[5] Political contributions are for the purpose of obtaining or being considered for a government legal engagement or appointment by a judge if, but for the desire to be considered for the legal engagement or appointment, the lawyer or law firm would not have made or solicited the contributions. The purpose may be determined by an examination of the circumstances in which the contributions occur. For example, one or more contributions that in the aggregate are substantial in relation to other contributions by lawyers or law firms, made for the benefit of an official in a position to influence award of a government legal engagement, and followed by an award of the legal engagement to the contributing or soliciting lawyer or the lawyer's firm would support an inference that the purpose of the contributions was to obtain the engagement, absent other factors that weigh against existence of the proscribed purpose. Those factors may include among others that the contribution or solicitation was made to further a political, social, or economic interest or because of an existing personal, family, or professional relationship with a candidate.

[6] If a lawyer makes or solicits a political contribution under circumstances that constitute bribery or another crime, Rule 8.4(b) is implicated.

MAINTAINING THE INTEGRITY OF THE PROFESSION

Rule 8.1. Bar Admission and Disciplinary Matters

An applicant for admission, readmission, or reinstatement to the bar, or a lawyer in connection with an application for admission, readmission, or reinstatement to the bar or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for

information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] The duty imposed by this Rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. Paragraph (b) of this Rule also requires correction of any prior misstatement in the matter that the applicant or lawyer may have made and affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.

[2] This Rule is subject to the provisions of the fifth amendment of the United States Constitution and corresponding provisions of state constitutions. Rule 8.1(b) does not prohibit a good faith challenge to the demand for such information. A person relying on such a provision or challenge in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.

[3] A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship, including Rule 1.6 and, in some cases, Rule 3.3.

ANNOTATION

Annotator's note. Rule 8.1 is similar to Rule 8.1 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

Recklessly making a false statement of material fact in a disciplinary matter, in conjunction with violation of other disciplinary rules, sufficient to justify suspension. People v. Porter, 980 P.2d 536 (Colo. 1999).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. In re Demaray, 8 P.3d 427 (Colo. 1999); People v. Edwards, 201 P.3d 555 (Colo. 2008).

Cases Decided Under Former DR 1-101.

Law reviews. For article, "Update on Ethics and Malpractice Avoidance in Family Law — Part I", see 19 Colo. Law. 465 (1990). For article, "Update on Ethics and Malpractice Avoidance in Family Law — Part II", see 19 Colo. Law. 647 (1990).

Submission of false transcript to obtain admission to law school and to qualify for admission as a member of the bar is a violation of this rule and requires that respondent's admission to the bar be voided. People v. Culpepper, 645 P.2d 5 (Colo. 1982).

Failure to disclose a misdemeanor conviction in another state when applying for the bar and subsequent disbarment from the other state constitutes conduct involving fraud, deceit, and misrepresentation prejudicial to the administration of justice. People v. Mattox, 639 P.2d 397 (Colo. 1982).

Bar reinstatement requires demonstration of possession of moral and professional qualifications. Where a state attorney had been convicted of failing to file his federal income tax return and making false representations to a special agent of the Internal Revenue Service regarding the filing of income tax returns, and where the attorney was later found to have made a false statement in his application to the Arizona State Bar by answering in the negative an inquiry as to whether he had ever been questioned regarding the violation of any law, he was suspended from the practice of law in Colorado for three years, and was required to demonstrate upon application for reinstatement that he possessed moral and professional qualifications for admission to the bar of this state. People v. Gifford, 199 Colo. 205, 610 P.2d 485 (1980).

Public censure appropriate where attorney acted recklessly in failing to disclose prior investigations for alleged criminal conduct on his application to the bar, but where attorney had practiced law in Colorado for five years without any other discipline and had cooperated in the disciplinary proceedings. People v. North, 964 P.2d 510 (Colo. 1998).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Mannix, 936 P.2d 1285 (Colo. 1997).

Rule 8.2. Judicial and Legal Officials

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer or of a candidate for election, or appointment to, or retention in, judicial or legal office.

(b) A lawyer who is a candidate for retention in judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

[2] When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

[3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

ANNOTATION

Respondent's motion to recuse was not supported by an affidavit as required by C.R.C.P. 97, thus the statements made therein were made with reckless disregard as to their truth or falsity. People v. Thomas, 925 P.2d 1081 (Colo. 1996) (decided prior to 2007 repeal and readoption of the Colorado rules of professional conduct).

Cases Decided Under Former DR 8-102.

Falsely accusing judicial officers and others of conspiracy warranted disbarment where respondent violated other disciplinary rules and had been previously suspended for similar conduct. People v. Bottinelli, 926 P.2d 553 (Colo. 1996).

Disbarment warranted where attorney filed false pleadings and disciplinary complaints, disclosed information concerning the filing of the disciplinary complaints, offered to withdraw a disciplinary complaint filed against a judge in exchange for a favorable ruling, failed to serve copies of pleadings on opposing counsel, revealed client confidences and material considered derogatory and harmful to the client aggravated by a repeated failure to cooperate with the investigation of misconduct, disruption of disciplinary proceedings, and a record of prior discipline. People v. Bannister, 814 P.2d 801 (Colo. 1991).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Bannister, 814 P.2d 801 (Colo. 1991).

Applied in People v. Harfmann, 638 P.2d 745 (Colo. 1981).

Rule 8.3. Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while serving as a member of a lawyers' peer assistance program that has been approved by the Colorado Supreme Court initially or

upon renewal, to the extent that such information would be confidential if it were communicated subject to the attorney-client privilege.

Source: Entire rule amended and adopted June 19, 2003, effective July 1, 2003; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.

ANNOTATION

Law reviews. For article, "Policing the Legal System: The Duty to Report Misconduct", see 30 Colo. Law. 85 (September 2001). For article, "The New Rules of Professional Conduct: Significant Changes for In-House Counsel", see 36 Colo. Law. 71 (November 2007).

Rule 8.4. Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

(g) engage in conduct, in the representation of a client, that exhibits or is intended to

appeal to or engender bias against a person on account of that person's race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether that conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process; or

(h) engage in any conduct that directly, intentionally, and wrongfully harms others and that adversely reflects on a lawyer's fitness to practice law.

Source: Committee comment amended October 17, 1996, effective January 1, 1997; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer who, in the course of representing a client, knowingly manifests by word or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (g) and also may violate paragraph (d). Legitimate advocacy respecting the foregoing factors does not violate paragraphs (d) or (g). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

ANNOTATION

Law reviews. For article, "Settlement Ethics", see 30 Colo. Law. 53 (December 2001). For article, "Improper Recording of an Attorney's Charging Lien", see 32 Colo. Law. 61 (February 2003). For article, "Discipline Against Lawyers for Conduct Outside the Practice of Law", see 32 Colo. Law. 75 (April 2003). For article, "Enforcing Civility: The Rules of Professional Conduct in Deposition Settings", see 33 Colo. Law. 75 (March 2004). For article, "Metadata: Hidden Information Microsoft Word Documents Its Ethical Implications", see 33 Colo. Law. 53 (October 2004). For comment, "Should a Lawyer Ever Be Allowed to Lie? People v. Pautler and a Proposed Duress Exception", see 75 U. Colo. L. Rev. 301 (2004). For article, "The Duty of Loyalty and Preparations to Compete", see 34 Colo. Law. 67 (November 2005). For article, "Investigative Tactics: They May Be Legal, But Are They Ethical?", see 35 Colo. Law. 43 (January 2006). For article, "The New Rules of Professional Conduct: Significant Changes for In-House Counsel", see 36 Colo. Law. 71 (November 2007). For article, "Ethics in Family Law and the New Rules of Professional Conduct", see 37 Colo. Law. 47 (October 2008).

Annotator's note. Rule 8.4 is similar to Rule 8.4 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

Attorney's refusal to return documents be-

longing to client's parents and assertion of a retaining lien constitute conduct which is prejudicial to the administration of justice. People v. Brown, 840 P.2d 1085 (Colo. 1992).

Lawyer violated paragraph (c) when he represented loan documents to be investment agreements to circumvent a provision in the Colorado Liquor Code that restricts the cross-ownership of businesses holding liquor licenses. In re Lopez, 980 P.2d 983 (Colo. 1999).

Attorneys are responsible for ethical violation when their investigator surreptitiously recorded his telephone interview with employee of defendant. Even if lawyers had no prior knowledge of the investigator's recording, once they learned that the interview was done without the employee's consent, they should not have listened to or used the recording without the employee's consent. McClelland v. Blazin' Wings, Inc., 675 F. Supp. 2d 1074 (D. Colo. 2009).

Lawyer violated paragraph (c) when he failed to disclose the fact of his client's death during settlement negotiations. People v. Rosen, 199 P.3d 1241 (Colo. O.P.D.J. 2007).

Failure of former district attorney to make ordered child support payments constitutes conduct prejudicial to the administration of justice and conduct that adversely reflects upon a lawyer's fitness to practice law. People v. Primavera, 904 P.2d 883 (Colo. 1995).

Attorney who conditioned settlement agreement on plaintiffs not pursuing a grievance against him violated paragraph (d) and constituted conduct prejudicial to the administration of justice. In re Lopez, 980 P.2d 983 (Colo. 1999).

Attorney signing substitute counsel's name to pleadings in a style different from his own signature, without authority to sign in a representative capacity and without any indication that he was signing in a representative capacity, violated this rule and warranted a six-month suspension. People v. Reed, 955 P.2d 65 (Colo. 1998).

A noble motive does not justify departure from any rule of professional conduct. A prosecutor trying to protect public safety is not immune from the code of professional conduct when he or she chooses deception as means for protecting public safety. In re Pautler, 47 P.3d 1175 (Colo. 2002).

There is no imminent public harm, duress, or choice of evils exception or defense for a prosecutor to the rules of professional conduct. In re Pautler, 47 P.3d 1175 (Colo. 2002).

Suspension appropriate where prosecutor engaged in intentional deception in order to secure a suspect's arrest. The prosecutor's conduct violated the public and professional trust, was intentional, created potential harm, and involved aggravating factors, thus, justifying suspension. In re Pautler, 47 P.3d 1175 (Colo. 2002).

When considering discipline of attorneys who criticize judges, the New York Times standard should be applied because of the interests in protecting attorney speech critical of judges. Under the New York Times standard (New York Times Co. v. Sullivan, 376 U.S. 254 (1964)), a two-part inquiry applies in determining whether an attorney may be disciplined for statements criticizing a judge: (1) Whether the disciplinary authority has proven that the statement was a false statement of fact (or a statement of opinion that necessarily implies an undisclosed false assertion of fact); and (2) assuming the statement is false, whether the attorney uttered the statement with actual malice—that is, with knowledge that it was false or with reckless disregard as to its truth. In re Green, 11 P.3d 1078 (Colo. 2000).

Public censure was appropriate for attorney who violated this rule by simultaneously representing, as defendants in a quantum meruit and lis pendens suit initiated by a subcontractor, the homeowners, the general contractor, the bank holding deed of trust on homeowners property, and two other parties who had contracted with contractor. Balancing the seriousness of the misconduct with the factors in mitigation, and taking into account the respondent's mental state when he entered into the conflicts in representation, public censure is appropriate. People v. Fritze, 926 P.2d 574 (Colo. 1996).

Public censure warranted where, although respondent did not notify his clients and opposing counsel of his suspension, he did notify the court early in proceedings, did not go forward with court proceedings while on suspension and no actual harm was demonstrated to any of his clients. People v. Dover, 944 P.2d 80 (Colo. 1997).

Stipulated agreement and recommendation of public censure with certain conditions and monitoring based upon conditional admission of misconduct were warranted for attorney who required that his associates sign a covenant that hindered a client's right to choose his or her own lawyer by interfering with the client's right to discharge his or her lawyer at any time, with or without cause. People v. Wilson, 953 P.2d 1292 (Colo. 1998).

Public censure was appropria6te where attorney falsely testified that he had automobile insurance at the time of an accident, but outcome of case was not thereby affected. People v. Small, 962 P.2d 258 (Colo. 1998).

Knowingly deceiving a client by altering a settlement check generally would warrant a 30-day suspension, however, because the client was uninjured by the deception and the respondent had no previous discipline in 13 years of practice, public censure was adequate. People v.

Waitkus, 962 P.2d 977 (Colo. 1998).

One-year and one-day suspension warranted where respondent failed to serve a cross-claim, failed to respond to several motions, failed to keep client informed, advanced defense that was not warranted by the facts and existing law, and misrepresented to client the basis for the judgment in favor of the opposing party. People v. Genchi, 849 P.2d 28 (Colo. 1993).

Six-month penalty justified for attorney pleading guilty to making and altering a false and forged prescription for a controlled substance and of criminal attempt to obtain a controlled substance by forgery and alteration, where mitigating factors included: (1) No prior disciplinary history; (2) personal or emotional problems at time of misconduct; (3) full and free disclosure by attorney to grievance committee; (4) imposition of other penalties and sanctions resulting from criminal proceeding; (5) demonstration of genuine remorse; and (6) relative inexperience in the practice of law. People v. Moore, 849 P.2d 40 (Colo. 1993).

Six-month suspension appropriate for respondent convicted of drunken driving offense and assault. People v. Shipman, 943 P.2d 458 (Colo. 1997); People v. Reaves, 943 P.2d 460 (Colo. 1997).

Multiple criminal and traffic convictions demonstrate a pattern of misconduct, and the presence of multiple offenses warrants suspension for six months with the requirement of reinstatement proceedings. People v. Van Buskirk, 962 P.2d 975 (Colo. 1998).

Demonstration of four conditions required for attorney publicly censured after conviction of driving while ability impaired: Continue psychotherapy, remain on antabuse, submit monthly reports regarding progress on antabuse, and execute written authorization to therapist to release medical information regarding status on antabuse. People v. Rotenberg, 911 P.2d 642 (Colo. 1996).

Thirty-day suspension warranted where lawyer, who represented an individual accused of first-degree murder, communicated with co-defendant who also was charged with first-degree murder and whose interests were adverse to the lawyer's client, without the knowledge or consent of the co-defendant's lawyers. The potential for harm was high in a first-degree murder case and the number of unauthorized contacts demonstrated more than negligence on the lawyer's part. People v. DeLoach, 944 P.2d 522 (Colo. 1997).

Stipulated agreement and recommendation of suspension for 30 days based upon conditional admission of misconduct were warranted for attorney who committed unfair insurance claim settlement practices and tortious conduct in handling insurance investigation of fire claim that he was not competent to handle. People v. McClung, 953 P.2d 1282 (Colo. 1998).

Forty-five-day suspension warranted for attorney's professional misconduct involving the improper collection of attorney's fees in six instances. People v. Peters, 849 P.2d 51 (Colo. 1993).

Suspension of three months is appropriate when attorney engaged in sexual intercourse with dissolution of marriage client on one occasion, had a history of disciplinary sanctions, but cooperated with the disciplinary investigation. People v. Barr, 929 P.2d 1325 (Colo. 1996).

Suspension for one year and one day, with conditional stay of all but 60 days, warranted for attorney's backdating of brief and certificate of service, after which attorney voluntarily reported misconduct, attempted to rectify the violation, cooperated in disciplinary proceedings, and showed genuine remorse. People v. Maynard, 219 P.3d 430 (Colo. O.P.D.J. 2008).

Suspension for one year and one day appropriate where attorney, among other disciplinary rule violations, violated paragraph (d) by failing to pay attorney fees until two years after a malpractice action against the attorney and paragraph (h) by engaging in two non-sufficient funds transactions involving his "special" account, and twenty-two non-sufficient funds transactions in his personal account. People v. Johnson, 944 P.2d 524 (Colo. 1997).

Suspension for one year and one day appropriate where attorney had a selfish or dishonest motive in retaining fees he received from clients that rightfully belonged to his law firm, but had no prior disciplinary record and made a timely good faith effort to provide restitution. People v. Bronstein, 964 P.2d 514 (Colo. 1998) (overruled in In the Matter of Thompson, 991 P.2d 820 (Colo. 1999)).

Suspension for one year and one day warranted where attorney violated paragraph (c) by knowingly submitting a false statement to the small business administration for the purpose of obtaining a loan. People v. Mitchell, 969 P.2d 662 (Colo. 1998).

Suspension of one year and one day appropriate where attorney committed offense of third-degree sexual assault on a client and recklessly accused a lawyer and judge of having an improper ex parte communication. In re Egbune, 971 P.2d 1065 (Colo. 1999).

Two-year suspension warranted when attorney entered Alford plea to defer judgment on a charge of soliciting for child prostitution. People v. Gritchen, 908 P.2d 70 (Colo. 1995).

Driving while under the influence of alcohol with an expired driver's license and no proof of insurance, and accepting one ounce of cocaine as payment for legal services from a person believed to be a client facing drug charges, warranted a three-year suspension. People v. Madrid, 967 P.2d 627 (Colo. 1998).

Suspension for three years was appropriate in case involving violation of this rule and others, together with attorney's breach of his duty as client's trustee to protect his client, who was a particularly vulnerable victim that was recuperating from a serious head injury. People v. DeRose, 945 P.2d 412 (Colo. 1997).

Suspension of three years was appropriate for attorney who drove a vehicle on at least four occasions after his driver's license was revoked and who also failed to appear in two cases involving his illegal driving. People v. Hughes, 966 P.2d 1055 (Colo. 1998).

Suspension for one year and one day warranted where attorney failed to appear in county court on a charge of driving under the influence. People v. Myers, 969 P.2d 701 (Colo. 1998).

A long period of suspension, rather than disbarment, is warranted when acts complained of occurred before an earlier disciplinary action against the attorney and mitigating factors exist. Attorney's actions were more properly viewed as a pattern of misconduct. In re Van Buskirk, 981 P.2d 607 (Colo. 1999).

Thirty-day suspension appropriate where attorney overdrew his Colorado Lawyer Trust Account Foundation (COLTAF) account but shortly thereafter deposited sufficient funds to cure the deficiency, negligently failed to keep adequate trust account records, knowingly and repeatedly failed to respond to several requests for information from the office of attorney regulation counsel, eventually provided bank records that revealed no further misconduct on his part, and faced a number of challenges in his personal life at the time he knowingly failed to cooperate with the office of attorney regulation counsel. People v. Edwards, 201 P.3d 555 (Colo. 2008).

Behavior toward client that precipitated conflict on day of client's criminal trial, forcing client's newly appointed public defender to seek a continuance to have adequate time to prepare violates this rule. People v. Brenner, 852 P.2d 456 (Colo. 1993).

Pushing another attorney in the courtroom, resulting in a conviction for third-degree assault, warranted a 30-day suspension. People v. Nelson, 941 P.2d 922 (Colo. 1997).

Lawyer who imposed unauthorized charging lien and subsequently failed to release such lien, and who testified at grievance proceedings that he kept documents belonging to third parties in order to protect his client's financial interests, which was the first instance at which such a theory was raised, violated this rule. Although the attorney's motives were dishonest and selfish, the grievance against the attorney involved in multiple offenses, the attorney violated a disciplinary rule at the grievance proceedings, and the attorney failed to acknowledge wrongful nature of his conduct, the mitigating factors included the fact that the attorney had not been subject to prior grievances and the attorney was relatively inexperienced. Thus, the appropriate sanction is public censure. People v. Brown, 840 P.2d 1085 (Colo. 1992).

In determining appropriate sanction, it is not important whether injured party was attorney's client, when attorney-respondent was appointed conservator. People v. Vigil, 929 P.2d 1311 (Colo. 1996).

Conduct warranted one-year extension of attorney's suspension. People v. Silvola, 933 P.2d 1308 (Colo. 1997).

Disbarment warranted for respondent who continued to practice law while under suspension. Respondent was suspended based upon conviction for possession of cocaine, a class 3 felony, and upon release from prison represented to several persons that he was a licensed attorney and provided legal services to those persons. Board's finding that respondent had a history of prior discipline, a dishonest or selfish motive, displayed a pattern of misconduct, had committed multiple offenses, had engaged in a bad faith obstruction of the disciplinary process, had refused to acknowledge any wrongful conduct on his part, had substantial experience in law, and could offer no mitigating factors warranted disbarment. People v. Stauffer, 858 P.2d 694 (Colo. 1993).

Disbarment appropriate remedy where attorney neglected a legal matter, misappropriated funds and property, abandoned client, engaged in fraud, evaded process, and failed to cooperate in disciplinary investigation. People v. Hindman, 958 P.2d 463 (Colo. 1998).

Disbarment is the presumed sanction for knowing misappropriation of funds from clients or one's law firm, barring significant mitigating circumstances. People v. Guyerson, 898 P.2d 1062 (Colo. 1995); People v. Varallo, 913 P.2d 1 (Colo. 1996); In the Matter of Thompson, 991 P.2d 820 (Colo. 1999) (overruling People v. Bronstein, 964 P.2d 514 (Colo. 1998)); People v. Sweetman, 218 P.3d 1123 (Colo. O.P.D.J. 2008).

Disbarment appropriate when attorney accepted legal fees, performed limited services, abandoned the client, and then misappropriated the unearned fees. People v. Kuntz, 942 P.2d 1206 (Colo. 1997).

Aiding client to violate custody order sufficient to justify disbarment. People v. Chappell, 927 P.2d 829 (Colo. 1996).

Structuring financial transaction to enable client to avoid reporting requirements, a felony under federal law, warranted disbarment. In re DeRose, 55 P.3d 126 (Colo. 2002).

Conduct violating this rule sufficient to justify disbarment where attorney continued to practice law when under suspension. People v. Redman, 902 P.2d 839 (Colo. 1995).

One-year and one-day suspension plus

payment of restitution and costs proper for attorney who induced a loan through misrepresentations, assigned a promissory note obtained with proceeds of such loan without lender's knowledge or consent, and misrepresented that sufficient funds were in trust account to cover check. People v. Kearns, 843 P.2d 1 (Colo. 1992).

False statements by attorney in connection with an accident in which the attorney was at fault adversely reflects on attorney's fitness to practice law. People v. Dieters, 935 P.2d 1 (Colo. 1997).

Pleading guilty to a single count of bank fraud evidences serious criminal conduct warranting disbarment. People v. Terborg, 848 P.2d 346 (Colo. 1993).

Attorney's repeated assurances to client that he would file a motion for reconsideration, his failure to do so, and his neglect of a legal matter entrusted to him constitute disciplinary violations warranting suspension for 30 days where there are mitigating factors. People v. LaSalle, 848 P.2d 348 (Colo. 1993).

Attorney's neglect resulting in an untimely filing of an inadequate certificate of review and dismissal of his client's case, combined with fact that certificate contained false statements of material fact that attorney later repeated to an investigative counsel with the office of disciplinary counsel, constituted disciplinary violations warranting a 45-day suspension, despite mitigating factors. People v. Porter, 980 P.2d 536 (Colo. 1999).

Ninety-day suspension justified where attorney's failure to respond to discovery requests resulted in default and entry of judgment against client for $816,613. People v. Clark, 927 P.2d 838 (Colo. 1996).

Ninety-day suspension and order of restitution as a condition of reinstatement was justified where attorney failed to pay court-ordered award of attorney's fees resulting from his filing of a frivolous motion and then failed to appear at a deposition. People v. Huntzinger, 967 P.2d 160 (Colo. 1998).

Thirty-day suspension appropriate where attorney failed to inform U.S. bankruptcy court in Colorado, in a hearing on a motion to remand the matter to U.S. bankruptcy court in Massachusetts, that an order of dismissal of the bankruptcy proceeding between the same parties had been entered in California. People v. Farry, 927 P.2d 841 (Colo. 1996).

Suspension stayed, in view of respondent's cooperation and remorse, conditioned upon successful completion of six-month probationary period and ethics refresher course. People v. Rosen, 199 P.3d 1241 (Colo. O.P.D.J. 2007).

Lawyer advertisement containing false, misleading, deceptive, or unfair statements violates this rule and warrants public censure where respondent terminated referral service being advertised after the initial request for investigation was filed and cooperated in disciplinary proceedings but had received a past letter of admonition and had substantial experience in the practice of law. People v. Carpenter, 893 P.2d 777 (Colo. 1995).

Public censure appropriate where attorney misrepresented the status of a dismissed case to his client, the resultant actual harm to the client was only the cost of hiring a new lawyer to pursue an appeal of the dismissal, the attorney's law firm reimbursed the client for all fees it had collected, the attorney reimbursed the firm for such fees, the only aggravating factor was a 1994 letter of admonition given to the attorney for improperly communicating with a represented person, and mitigating factors included the absence of a dishonest or selfish motive, remorse, and full and free disclosure in the disciplinary proceedings. People v. Johnston, 955 P.2d 1051 (Colo. 1998).

Public censure appropriate where harm suffered by attorney's client was speculative, attorney retracted his misrepresentations and admitted to his client before the institution of disciplinary proceedings that he had done nothing on the client's appeal, attorney had no prior discipline, he made full and free disclosure of his misconduct to the grievance committee, and he expressed remorse for his misconduct. People v. Nelson, 848 P.2d 351 (Colo. 1993).

Public censure appropriate where attorney neglected and made misrepresentations in two separate legal matters. People v. Eagan, 902 P.2d 841 (Colo. 1995).

Public censure appropriate in light of mitigating circumstances for possession of cocaine in violation of state and federal controlled substance laws. People v. Gould, 912 P.2d 556 (Colo. 1996).

Public censure appropriate where respondent was convicted of driving while ability impaired and had also appeared in court while intoxicated on two consecutive days. People v. Coulter, 950 P.2d 176 (Colo. 1998).

Public censure appropriate for attorney who had been reprimanded in Connecticut for failure to file federal income tax return and attorney had not been disciplined before in Colorado. People v. Perkell, 969 P.2d 703 (Colo. 1998).

Public censure was warranted where attorney twice requested arresting officers in driving under the influence cases not to appear at license revocation hearings before the department of motor vehicles. People v. Carey, 938 P.2d 1166 (Colo. 1997).

Public censure was appropriate where significant mitigating factors were present. Attorney was convicted of vehicular assault, a class 4 felony, and two counts of driving under the influence of alcohol. The crimes are strict liability offenses for which attorney must serve

three years in the custody of the department of corrections, followed by a two-year mandatory period of parole. Section 18-1-105(3) provides that, while he is serving his sentence, attorney is disqualified from practicing as an attorney in any state courts. The sentence and disqualification from practicing law are a significant "other penalty[] or sanction[]" and therefore a mitigating factor in determining the level of discipline. In re Kearns, 991 P.2d 824 (Colo. 1999) (decided under former C.R.C.P. 241.6(5)).

Public censure was warranted for attorney who prepared motions to dismiss for his client's wife to sign when proceedings had been brought by the client's wife against the client and the client's wife was represented by counsel and was not advised that she should contact her own lawyer before signing the motions, nor asked if she wished to discuss the motions with her lawyer before signing. Three letters of admonition for unrelated misconduct also were an aggravating factor for purposes of determining the appropriate level of discipline. People v. McCray, 926 P.2d 578 (Colo. 1996).

Public censure warranted for attorney's solicitation of prostitution during telephone call with wife of client whom he was representing in a dissolution of marriage proceeding. People v. Bauder, 941 P.2d 282 (Colo. 1997).

Public censure was warranted where attorney made inappropriate, harmful, offensive, harassing, and sexually abusive comments to potential client. The mitigating factors found by the hearing board do not compel a different result. People v. Meier, 954 P.2d 1068 (Colo. 1998).

Chief deputy district attorney's theft of less than $50 constitutes conduct warranting public censure where significant mitigating factors exist. People v. Buckley, 848 P.2d 353 (Colo. 1993).

Two-year suspension was an adequate sanction where attorney neglected client matters by representing that he would file a lawsuit and neglected to do so, engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation by agreeing to represent client and thereafter failing to advise the client of attorney's suspension, and where attorney further engaged in misrepresentation by collecting legal fees and costs from client while attorney was under suspension. People v. de Baca, 948 P.2d 1 (Colo. 1997).

Transferring various ownership interests to lawyer employees of firm who did not receive profits and were not managers warranted suspension of one year and a day. Suspension appropriate because attorney made misrepresentations and was dishonest in such transfers. People v. Reed, 942 P.2d 1204 (Colo. 1997).

Thirty-day suspension was appropriate discipline where attorney advised client to take action in violation of child custody order but failed to warn her of criminal consequences of such action. People v. Aron, 962 P.2d 261 (Colo. 1998).

Depositing personal funds into a COLTAF account to hide personal assets from creditors supports a 90-day suspension with conditions of reinstatement. People v. Alster, 221 P.3d 1088 (Colo. O.P.D.J. 2009).

Suspension of one year and one day was appropriate based on evidence of three separate incidents in which the attorney physically assaulted his girlfriend. It was immaterial that no charges had been filed in any of the incidents, because the acts alone reflected adversely on the attorney's fitness to practice law. The fact that the attorney's behavior was not directly related to his practice of law was a factor to be considered, but was not conclusive. The attorney had failed to take any steps toward rehabilitation following the incidents, and the three separate assaults showed a pattern of misconduct. Therefore, it was appropriate to suspend the attorney and require him to demonstrate rehabilitation and completion of a certified domestic violence treatment program as a condition of reinstatement. People v. Musick, 960 P.2d 89 (Colo. 1998).

Attorney conduct violating this rule, in conjunction with other rules, sufficient to justify suspension when violation did not arise from neglect or willingness to take advantage of client's vulnerability and is mitigated by her inexperience in the practice of law, her lack of any prior disciplinary record, the fact that she had already been held in contempt and punished by the district court, and the fact that there is no suggestion of selfish motivation. Attorney's failure to appreciate the serious nature of conduct and the jurisdiction of the hearing board to discipline her is a serious matter meriting a period of suspension and a redetermination of her fitness before being permitted to practice law again. In re Roose, 69 P.3d 43 (Colo.), cert. denied, 540 U.S. 1053, 124 S. Ct. 815, 157 L. Ed. 2d 705 (2003).

Suspension for three years, rather than disbarment, was appropriate where violation of this rule and others caused serious harm to attorney's clients, but mitigating factors were present, including no previous discipline in 14 years of practice, personal and emotional problems, and cooperation and demonstrated remorse in proceedings. People v. Henderson, 967 P.2d 1038 (Colo. 1998).

Conduct violating this rule in conjunction with other disciplinary rules, where mitigating factors were present, warrants public censure. People v. Davis, 950 P.2d 586 (Colo. 1998).

Pleading guilty to one count of bribery evidences conduct warranting disbarment. People v. Viar, 848 P.2d 934 (Colo. 1993).

Disbarment is warranted where attorney was convicted of felony offense of forging a federal bankruptcy judge's signature and had engaged in multiple types of other dishonest conduct and where there was an insufficient showing of mental disability. People v. Goldstein, 887 P.2d 634 (Colo. 1994).

Disbarment is warranted where attorney was convicted in Hawaii of second-degree murder. People v. Draizen, 941 P.2d 280 (Colo. 1997).

Disbarment appropriate sanction for attorney who intentionally killed another person. Despite a lack of prior discipline in this state, giving full faith and credit to another state's law and its jury finding that attorney intentionally took her husband's life by shooting him 10 times with a firearm, disbarment is an appropriate sanction. People v. Sims, 190 P.3d 188 (Colo. O.P.D.J. 2008).

Disbarment is warranted for attorney convicted of one count of sexual assault on a child, notwithstanding lack of a prior record of discipline. People v. Espe, 967 P.2d 159 (Colo. 1998).

Disbarment was appropriate, despite existence of mitigating factors, where attorney violated paragraph (c) of this rule by misappropriating bar association funds for his personal use and where such misappropriation was knowing. People v. Motsenbocker, 926 P.2d 576 (Colo. 1996).

Disbarment was appropriate for knowing misappropriation of funds despite fact respondent had not been previously disciplined. People v. Dice, 947 P.2d 339 (Colo. 1997).

Disbarment is appropriate when a lawyer knowingly misappropriates client funds in the absence of extraordinary mitigating factors. Mitigating factors such as stress due to prolonged divorce, personal financial losses, a serious motor vehicle accident, filing for bankruptcy, a deteriorating law practice, and alcohol abuse were insufficient to deviate from the rule that a clear and convincing showing of a knowing misappropriation of client funds warrants disbarment. People v. Torpy, 966 P.2d 1040 (Colo. 1998).

Disbarment is warranted where attorney knowingly converted funds belonging to law firm and where attorney knowingly acted dishonestly toward the firm and the disciplinary board investigator. People v. Bardulis, 203 P.3d 632 (Colo. O.P.D.J. 2009).

Disbarment is only appropriate remedy for knowingly misappropriating client funds, unless significant extenuating circumstances are present. In re Cleland, 2 P.3d 700 (Colo. 2000).

Disbarment warranted for knowingly abandoning clients, converting their funds, and causing actual financial and emotional harm to them. Attorney violated duty to preserve clients' property, to diligently perform services on their behalf, to be candid with them during the course of the professional relationship, and to abide by the legal rules of substance and procedure that affect the administration of justice. People v. Martin, 223 P.3d 728 (Colo. O.P.D.J. 2009).

Disbarment warranted for attorney convicted of conspiracy to commit tax fraud, tax evasion, and aiding and assisting in the preparation of a false income tax return. People v. Evanson, 223 P.3d 735 (Colo. O.P.D.J. 2009).

Attorney conduct violating this rule, in conjunction with other rules, sufficient to justify disbarment when attorney knowingly commingled and misappropriated clients' funds for his personal use, neglected filing a complaint in a case until it was barred by the statute of limitations, failed to comply with court orders applicable to his child support payments, and neglected two other cases causing default judgments to be entered against his client, despite fact that one of the judgments was subsequently set aside. People v. Gonzalez, 967 P.2d 156 (Colo. 1998).

Attorney who was the trustee of client's trust violated paragraph (h) by utilizing the trust's funds to loan money to his daughter and to purchase his son-in-law's parents' former residence for the purpose of leasing it back to them, and by then failing to take any legal action against them when they did not make lease payments. People v. DeRose, 945 P.2d 412 (Colo. 1997).

Previously disbarred attorney who violated this rule would be forced to pay restitution to clients as a condition of readmission. People v. Vigil, 945 P.2d 1385 (Colo. 1997).

Prior discipline for conduct violating this rule is an important factor in determining the proper level of discipline, therefore disbarment is merited where attorney continues to engage in misconduct. In re C de Baca, 11 P.3d 426 (Colo. 2000).

Court erred when it ordered special advocate to refund fees without determining whether conduct violated paragraph (c). In re Redmond, 131 P.3d 1167 (Colo. App. 2005).

Conduct violating this rule, in conjunction with other disciplinary rules, sufficient to justify disbarment where the attorney continued to practice law while on suspension, repeatedly neglecting his clients and failing to take reasonable steps to protect clients' interests. People v. Fager, 938 P.2d 138 (Colo. 1997).

Conduct found to violate disciplinary rules. People v. Brenner, 852 P.2d 452 (Colo. 1993).

Attorney who knowingly violated rule but without intent to deceive court is justifiably sanctioned. People v. Trogani, 203 P.3d 643 (Colo. O.P.D.J. 2008).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to

justify public censure. People v. Doherty, 908 P.2d 1120 (Colo. 1996); People v. Woodrum, 911 P.2d 640 (Colo. 1996); People v. Pooley, 917 P.2d 712 (Colo. 1996); People v. Newman, 925 P.2d 783 (Colo. 1996); People v. Yates, 952 P.2d 340 (Colo. 1998); People v. Barr, 957 P.2d 1379 (Colo. 1998); People v. Rolfe, 962 P.2d 981 (Colo. 1998).

Conduct violating this rule sufficient to justify public censure. People v. Gonzalez, 933 P.2d 1306 (Colo. 1997); People v. Meier, 954 P.2d 1068 (Colo. 1998); In re Wilson, 982 P.2d 840 (Colo. 1999).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Barr, 855 P.2d 1386 (Colo. 1993); People v. Crews, 901 P.2d 472 (Colo. 1995); People v. Kuntz, 908 P.2d 1110 (Colo. 1996); People v. Sigley, 917 P.2d 1253 (Colo. 1996); People v. McCaffrey, 925 P.2d 269 (Colo. 1996); People v. Fager, 925 P.2d 280 (Colo. 1996); People v. Hohertz, 926 P.2d 560 (Colo. 1996); People v. Bates, 930 P.2d 600 (Colo. 1997); People v. Reynolds, 933 P.2d 1295 (Colo. 1997); People v. White, 935 P.2d 20 (Colo. 1997); People v. McGuire, 935 P.2d 22 (Colo. 1997); People v. Mason, 938 P.2d 133 (Colo. 1997); People v. Kotarek, 941 P.2d 925 (Colo. 1997); People v. Primavera, 942 P.2d 496 (Colo. 1997); People v. Field, 944 P.2d 1252 (Colo. 1997); People v. Wotan, 944 P.2d 1257 (Colo. 1997); People v. Johnson, 946 P.2d 469 (Colo. 1997); People v. Barnthouse, 948 P.2d 534 (Colo. 1997); People v. Blunt, 952 P.2d 356 (Colo. 1998); People v. Easley, 956 P.2d 1257 (Colo. 1998); People v. Hanks, 967 P.2d 144 (Colo. 1998); People v. Harding, 967 P.2d 153 (Colo. 1998); In re Nangle, 973 P.2d 1271 (Colo. 1999); In re Corbin, 973 P.2d 1273 (Colo. 1999); In re Bobbitt, 980 P.2d 538 (Colo. 1999); In re Meyers, 981 P.2d 143 (Colo. 1999); In re Demaray, 8 P.3d 427 (Colo. 1999); In re Hickox, 57 P.3d 403 (Colo. 2002); In re Fischer, 89 P.3d 817 (Colo. 2004); People v. Rosen, 199 P.3d 1241 (Colo. O.P.D.J. 2007); People v. Beecher, 224 P.3d 442 (Colo. O.P.D.J. 2009); People v. Maynard, 238 P.3d 672 (Colo. O.P.D.J. 2009); People v. Brennan, 240 P.3d 887 (Colo. O.P.D.J. 2009).

Conduct violating this rule sufficient to justify suspension. People v. Farrant, 852 P.2d 452 (Colo. 1993); People v. Graham, 933 P.2d 1321 (Colo. 1997); People v. Dieters, 935 P.2d 1 (Colo. 1997); People v. Rudman, 948 P.2d 1022 (Colo. 1997); In re Van Buskirk, 981 P.2d 607 (Colo. 1999); In re Sather, 3 P.3d 403 (Colo. 2000); People v. Trogani, 203 P.3d 643 (Colo. O.P.D.J. 2008).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Kelley, 840 P.2d 1068 (Colo. 1992); People v. Walsh, 880 P.2d 766 (Colo. 1994); People v. Marsh, 908 P.2d 1115 (Colo. 1996); People v. Jenks, 910 P.2d 688 (Colo. 1996); People v. Jamrozek, 921 P.2d 725 (Colo. 1996); People v. Ebbert, 925 P.2d 274 (Colo. 1996); People v. Steinman, 930 P.2d 596 (Colo. 1997); People v. Wallace, 936 P.2d 1282 (Colo. 1997); People v. Mannix, 936 P.2d 1285 (Colo. 1997); People v. Madigan, 938 P.2d 1162 (Colo. 1997); People v. Odom, 941 P.2d 919 (Colo. 1997); People v. McDowell, 942 P.2d 486 (Colo. 1997); People v. Sousa, 943 P.2d 448 (Colo. 1997); People v. Jackson, 943 P.2d 450 (Colo. 1997); People v. Schaefer, 944 P.2d 78 (Colo. 1997); People v. Clyne, 945 P.2d 1386 (Colo. 1997); People v. Crist, 948 P.2d 1020 (Colo. 1997); People v. Roybal, 949 P.2d 993 (Colo. 1997); People v. Holmes, 951 P.2d 477 (Colo. 1998); People v. Singer, 955 P.2d 1005 (Colo. 1998); People v. Holmes, 955 P.2d 1012 (Colo. 1998); People v. Valley, 960 P.2d 141 (Colo. 1998); People v. Skaalerud, 963 P.2d 341 (Colo. 1998); In re Bilderback, 971 P.2d 1061 (Colo. 1999); In re Hugen, 973 P.2d 1267 (Colo. 1999); In re Tolley, 975 P.2d 1115 (Colo. 1999); In re Lopez, 980 P.2d 983 (Colo. 1999); In re Haines, 177 P.3d 1239 (Colo. 2008); People v. Rasure, 212 P.3d 973 (Colo. O.P.D.J. 2009); People v. Sweetman, 218 P.3d 1123 (Colo. O.P.D.J. 2008); People v. Gallegos, 229 P.3d 306 (Colo. O.P.D.J. 2010); People v. Edwards, 240 P.3d 1287 (Colo. O.P.D.J. 2010).

Conduct violating this rule sufficient to justify disbarment. People v. Kelly, 840 P.2d 1068 (Colo. 1992); People v. Townshend, 933 P.2d 1327 (Colo. 1997); People v. Sichta, 948 P.2d 1018 (Colo. 1997); People v. Nearen, 952 P.2d 371 (Colo. 1998).

Rule 8.5. Disciplinary Authority; Choice of Law

(a) A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise;

and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

Source: Entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

Disciplinary Authority

[1] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. See, Rules 6 and 22, ABA Model Rules for Lawyer Disciplinary Enforcement. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

[1A] The second sentence of Rule 8.5(a) does not preclude prosecution for the unauthorized practice of law of a lawyer who is not admitted in this jurisdiction, and who does not comply with C.R.C.P. 220, C.R.C.P. 221, C.R.C.P. 221.1, or C.R.C.P. 222, but who provides or offers to provide any legal services in this jurisdiction.

Choice of Law

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.

[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule.

[6] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this Rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

[7] The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agree-

ments between competent regulatory authorities in the affected jurisdictions provide otherwise.

ANNOTATION

Law reviews. For article, "Negotiations and the Unauthorized Practice of Law", see 23 Colo. Law. 361 (1994). For article, "The New Rules of Professional Conduct: Significant Changes for In-House Counsel", see 36 Colo. Law. 71 (November 2007). For article, "Temporal and Substantive Choice of Law Under the Colorado Rules of Professional Conduct", see 39 Colo. Law. 35 (April 2010).

Rule 9. Title — How Known and Cited

These rules shall be known and cited as the Colorado Rules of Professional Conduct or Colo. RPC.

Source: Entire rule amended and adopted April 10, 1997, effective July 1, 1997; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

INDEX TO APPENDIX
TO CHAPTERS 18 TO 20
COLORADO RULES OF PROFESSIONAL CONDUCT

CHAPTER 21

Library

CHAPTER 21

LIBRARY

Cross references: For the supreme court librarian and the supreme court library fund, see §§ 13-2-117, 13-2-118, and 13-2-120, C.R.S.

Rule 261. Abstracts and Briefs

The Clerk shall file with the Librarian of the Supreme Court Library a complete set of the printed abstracts of record and briefs filed in all cases, which shall be suitably bound in volumes uniform in size, as near as practicable, with the reports of this Court, which shall become a part of the Court Library. The Clerk shall also cause one set of the printed briefs and abstracts to be bound for the files of this Court.

Rule 262. Withdrawal of Books

No books may be withdrawn or removed from the Library by any person, except members of the Court for use in their chambers.

Rule 263. Silence in Library

Silence is required in the Library. Employees shall observe and enforce this Rule.

Rule 264. Proof of Parts of Book

Whenever proof of the laws of any other state, territory or foreign government is required, and the official print thereof is on file in the Supreme Court Library, a verbatim copy thereof, either typewritten or by other duplicating methods, certified by the Librarian or Clerk of this Court to be the same as that contained in the official volume cited, shall have the same force and effect as such printed volume.

CHAPTER 22

Professional Service Companies

Adopted by the

SUPREME COURT OF COLORADO

November 22, 1995,

Effective December 1, 1995

Editor's note: Effective December 1, 1995, these Rules replaced the Rules on Professional Service Corporations and Joint-Stock and Limited Liability Companies.

CHAPTER 22

PROFESSIONAL SERVICE COMPANIES

Rule 265. Professional Service Companies

(a) Rendering Legal Service Through a Professional Company. One or more attorneys who are licensed to practice law in Colorado may render legal services in Colorado through a professional company, as that term is defined in Section (e), provided that such professional company is established and operated in accordance with the provisions of this Rule and the Colorado Rules of Professional Conduct.

(1) Professional Company Name. The name of the professional company shall comply with the provisions of the Colorado Rules of Professional Conduct regarding the names of law firms.

(2) Owners' Liability for Professional Acts, Errors, or Omissions. Each of the owners of the professional company shall be deemed to agree, by reason of the rendering of legal services by any attorney through the professional company, that each of them who is an owner at the time of the commission of any act, error, or omission in the rendering of legal services by any owner or other person for whose acts, errors, or omissions the professional company is liable, assumes, jointly and severally to the extent provided by this Rule the liability of the professional company for such act, error, or omission. Notwithstanding the preceding sentence, any owner who has not directly participated in the act, error, or omission in the rendering of legal services for which liability is incurred by the professional company does not assume such liability, except as provided in subsection (a)(3)(D), if, at the time the act, error, or omission occurs the professional company has professional liability insurance that meets the minimum requirements stated in subsection (a)(3).

(3) Professional Liability Insurance Policy Requirements. The professional liability insurance contemplated in subsection (a)(2) shall meet the following minimum requirements:

(A) Professional Acts Coverage. The professional liability insurance shall insure the professional company against liability imposed upon it arising out of the rendering of legal services by any attorney through the professional company and against the liability imposed upon it arising out of the acts, errors, and omissions of all nonattorney employees assisting in the rendering of legal services by any attorney through the professional company.

(B) Policy Language. The policy or policies for the professional liability insurance may contain reasonable provisions with respect to policy periods, territory, claims, conditions, and other matters.

(C) Limits of Coverage. The professional liability insurance shall be in an amount for each claim of at least the lesser of $100,000 multiplied by the number of attorneys who render legal services through the professional company or $500,000. If the policy or policies for the professional liability insurance provide for an aggregate top limit of liability per year for all claims, the top limit shall not be less than the lesser $300,000 multiplied by the number of attorneys who render legal services through the professional company or $2,000,000.

(D) Deductibles and Defense Costs. The policy or policies for the professional liability insurance may provide for a deductible or self-insured retained amount and may provide for the payment of defense or other costs out of the stated limits of the policy. The liability assumed by each owner of the professional company who has not directly participated in the act, error or omission in the rendering of legal services for which liability is incurred by the professional company shall be the lesser of the actual liability of the professional company in excess of insurance available to pay such damages or the sum

of the following:

(I) such deductible or retained self-insurance; and

(II) the amounts, if any, by which the payment of defense costs has reduced the insurance remaining available for the payment of damages incurred by reason of the liability of the professional company below the minimum limit of insurance required by subsection (a)(3)(C).

(E) Determination of Coverage. An act, error, or omission in the rendering of legal services shall be deemed to be covered by professional liability insurance for the purpose of this Rule if the policy or policies include such act, error, or omission as a covered activity, regardless of whether claims previously made against the policy have exhausted the aggregate top limit for the applicable time period or whether the individual claimed amount or ultimate liability exceeds either the per claim or aggregate top limit.

(F) Limitation of Vicarious Liability. The liability assumed by the owners of a professional company under this Rule is limited to the liability of the professional company for acts, errors, or omissions incurred in the rendering of legal services by any owner or other person for whose acts, errors, or omissions the professional company is liable and shall not extend to any other liability incurred by the professional company. Liability, if any, for any and all acts, errors, and omissions, other than acts, errors, or omissions incurred in the rendering of legal services by any owner or other person for whose acts, errors, or omissions the professional company is liable, shall be as otherwise provided by law and shall not be changed, affected, limited, or extended by this Rule.

(b) Compliance with Rules of Professional Conduct. Nothing in this Rule shall be deemed to diminish or change the obligation of each attorney rendering legal services through a professional company to comply with the Colorado Rules of Professional Conduct promulgated by this Court.

(c) Violation of Rule: Termination of Authority. Any violation of or failure to comply with any of the provisions of this Rule by the professional company may be grounds for this Court to terminate or suspend the right of any attorney who is an owner of such professional company to render legal services in Colorado through a professional company.

(d) Professional Company Constituencies. A professional company may have one or more owners that are professional companies, so long as each such owner that is a professional company and the professional company of which they are owners are both established and operated in accordance with the provisions of this Rule.

(e) "Professional Company" Defined. For purposes of this Rule, a professional company is a corporation, limited liability company, limited liability partnership, limited partnership association, or other entity that may be formed under Colorado law to transact business or any entity that can be formed under the law of any other jurisdiction and through which attorneys may render legal services in that jurisdiction, except that the term excludes a general partnership that is not a limited liability partnership and excludes every other entity the owners of which are subject to personal liability for the obligations of the entity.

Source: Entire chapter repealed and adopted November 22, 1995, effective December 1, 1995; entire rule amended and effective February 26, 2009.

Cross references: For corporations and associations, see title 7, C.R.S.

ANNOTATION

Law reviews. For article, "Law Firm Incorporation in Colorado", see 34 Rocky Mt. L. Rev. 427 (1962). For comment on Empey v. United States appearing below, see 46 Den. L.J. 306 (1969). For article, "Changes in the Rule Authorizing Professional Corporations", see 25 Colo. Law. 67 (March 1996).

This rule authorizes lawyers to organize professional service corporations under the Colorado corporation code and thereafter operate them for the practice of law, provided they organize and operate such corporations in accordance with the provisions of this rule. United States v. Empey, 406 F.2d 157 (10th Cir. 1969).

Such lawyers are entitled to be treated as a corporation for income tax purposes. A cor-

poration organized to practice a learned profession under the general corporation laws of a state which has to meet requirements laid down in this rule is entitled to be treated as a corporation for federal income tax purposes. United States v. Empey, 406 F.2d 157 (10th Cir. 1969).

The definition of a partnership plainly refers to unincorporated organizations; so, to treat as a partnership for federal income tax purposes, a corporation, organized and chartered under state laws as a corporation and operated as such in good faith, does violence to the statutory definitions of the terms "partnership" and "corporation" of the internal revenue statutes. United States v. Empey, 406 F.2d 157 (10th Cir. 1969).

Activities of law firm incorporated as professional corporation in conducting a business of selling television advertising materials go beyond the purpose of conducting a law practice and violate this rule, and, therefore, contracts made by such professional corporation are unenforceable. Network Affiliates, Inc. v. Robert E. Schack, P.A., 682 P.2d 1244 (Colo. App. 1984).

Failure of attorney to register as a professional corporation for the practice of law violated DR 1-102 and subjected attorney to disciplinary proceedings. People v. Dickinson, 903 P.2d 1132 (Colo. 1995).

Requirements contained in this rule are applicable only for the acts, errors, and omissions of the employees of the corporation. Gutrich v. LaPlante, 942 P.2d 1266 (Colo. App. 1996), aff'd on other grounds sub nom. Gutrich v. Cogswell & Wehrle, 961 P.2d 1115 (Colo. 1998).

CHAPTER 23

Group Legal Services

CHAPTER 23

GROUP LEGAL SERVICES

Rule 266. Group Legal Services Committee — Appointment

Repealed September 3, 1987, effective October 1, 1987.

CHAPTER 23.3

Rules Governing Contingent Fees

CHAPTER 23.3

RULES GOVERNING CONTINGENT FEES

Rule 1. Definitions

In this rule, the term "contingent fee agreement" means a written agreement for legal services of an attorney or attorneys (including any associated counsel), under which compensation is to be contingent in whole or in part upon the successful accomplishment or disposition of the subject matter of the agreement.

ANNOTATION

Court may scrutinize contingent fee contracts. Under its general supervisory power over attorneys as officers of the court, a court may and should scrutinize contingent fee contracts and determine the reasonableness of the terms thereof. Anderson v. Kenelly, 37 Colo. App. 217, 547 P.2d 260 (1975).

Oral agreement does not substantially comply with this rule. Beeson v. Indus. Claim Appeals Office, 942 P.2d 1314 (Colo. App. 1997).

Lack of a written agreement does not preclude an attorney from recovering fees based on the theory of quantum meruit. Beeson v. Indus. Claim Appeals Office, 942 P.2d 1314 (Colo. App. 1997).

Reasonableness of an attorney's fee depends on various factors, no one of which is determinative. The existence of a contingent fee contract is determinative only to the extent that it sets the maximum amount permitted. Beeson v. Indus. Claim Appeals Office, 942 P.2d 1314 (Colo. App. 1997).

The rules governing contingent fees do not apply to attorney fees recovered pursuant to the common fund doctrine. In a common fund case, the court takes on the role of fiduciary for the beneficiaries of the fund when awarding attorney fees; thus, the court's oversight provides protection to the beneficiaries comparable to the rules governing contingent fee agreements. Brody v. Hellman, 167 P.3d 192 (Colo. App. 2007).

Rule 2. Construction

Unless expressly prohibited by this rule, no written contingent fee agreement shall be regarded as champertous if made in an effort in good faith reasonably to comply with this rule. The Colorado Rules of Professional Conduct may be considered in reviewing disputed contingent fee agreements.

Source: Amended November 5, 1992, effective January 1, 1993.

Rule 3. Prohibitions

No contingent fee agreement shall be made (a) in respect to the procuring of an acquittal upon any favorable disposition of a criminal charge, (b) in respect of the procuring of a dissolution of marriage, determination of invalidity of marriage or legal separation, (c) in connection with any case or proceeding where a contingency method of a determination of attorneys' fees is otherwise prohibited by law, the Colorado Rules of Professional Conduct, or governmental agency rule, or (d) if it is unconscionable, unreasonable, and unfair.

Source: Amended November 5, 1992, effective January 1, 1993.

Rule 4. Procedure

(a) Before a contingent fee agreement is entered into the attorney shall disclose to the prospective client in writing:

(1) The nature of other types of fee arrangements;
(2) The nature of specially awarded attorney fees;
(3) The nature of expenses and the estimated amount of expenses to handle the matter to conclusion;
(4) The potential for an award of costs and attorneys' fees to the opposing party.
(5) What is meant by "associated counsel"; and
(6) What is meant by "subrogation" and effect of any subrogation interest or lien.

(b) Each contingent fee agreement shall be in writing in duplicate. Each duplicate copy shall be signed both by the attorney and by each client. One signed duplicate copy shall be mailed or delivered to each client within ten days after the making of the agreement. One such copy (and proof that the duplicate copy has been delivered or mailed to the client) shall be retained by the attorney for a period of six years after the completion or settlement of the case or the termination of the services, whichever event first occurs.

(c) A written disbursement statement shall issue to the client at the time of final disbursement.

Source: Entire rule amended and effective January 31, 1992.

ANNOTATION

Rules imposed upon an attorney the absolute burden to ensure that a proper contingent fee agreement is in place. This rule allows for no exception for instances in which an attorney does not comply with the requirement of the rules but simply relies on the client's representation. Fasing v. LaFond, 944 P.2d 608 (Colo. App. 1997); Hansel-Henderson v. Mullens, 39 P.3d 1200 (Colo. App. 2001), rev'd on other grounds, 65 P.3d 992 (Colo. 2002).

Rule 5. Contents

Each contingent fee agreement shall contain (a) the name and mail address of each client; (b) the name and mail address of the attorney or attorneys to be retained; (c) a statement of the nature of the claim, controversy and other matters with reference to which the services are to be performed; (d) a statement of the contingency upon which the client is to be liable to pay compensation otherwise than from amounts collected for him by the attorney; (e) a statement of the precise percentage to be charged subject to the limitations of Rule 3(d); and (f) a stipulation that the client, except as permitted by the Rules of Professional Conduct, including Rule 1.8(e), is to be liable for expenses, such stipulation including an estimate of such expenses, authority of the attorney to incur the expenses and make disbursements, a maximum limitation not to be exceeded without the client's further written authority. The final disbursement statement shall reflect the amount received, expenses incurred in handling of the case and computation of the contingency fee.

Source: Entire rule amended and adopted, effective November 16, 1995.

ANNOTATION

Contract unenforceable where it is silent as to liability when either the attorney unilaterally terminates the agreement or the attorney and the client mutually terminate the agreement, thus failing to expressly include a contingency as required by the rule. Elliott v. Joyce, 889 P.2d 43 (Colo. 1994).

Under section (d) of this rule and rule 6, chapter 23.3 limits recovery to situations in which the contingent fee agreement specifically sets forth circumstances under which the client will be liable. Elliott v. Joyce, 889 P.2d 43 (Colo. 1994).

Attorney may proceed on a quantum meruit claim if outlined in the contingency fee agreement, even if the agreement contains other deficiencies and is unenforceable for purposes of the contingency. As long as the client has some notice of the possibility of equitable recovery should the contingency fail, the agreement cannot prohibit the attorney from seeking such recovery. Language in a contingent fee agreement notifying the client that, upon termination, the attorney may seek recovery based on a predetermined hourly rate provides insufficient notice of the possibility of equitable relief. Dudding v. Norton Frickey & Assocs., 11 P.3d 441 (Colo. 2000).

Attorney earned reasonable attorney fees, despite unenforceable contingency agreement, under quantum meruit. An attorney is entitled to fees under quantum meruit when the agreed upon services are successfully completed but the contingent fee agreement is not in writing. Mullens v. Hansel-Henderson, 65 P.3d 992 (Colo. 2002).

Section (d) applies only to claims in quantum meruit brought against a client. Rule does not bar a claim in quantum meruit against former co-counsel. Hannon Law Firm, LLC v. Melat, Pressman & Higbie, LLP, __ P.3d __ (Colo. App. 2011).

Rule 6. Sanction for Non-Compliance

No contingent fee agreement shall be enforceable by the involved attorney unless there has been substantial compliance with all of the provisions of this Chapter 23.3.

Source: Entire rule amended and adopted May 24, 2001, effective July 1, 2001.

ANNOTATION

Contract unenforceable where it is silent as to liability when either the attorney unilaterally terminates the agreement or the attorney and the client mutually terminate the agreement, thus failing to expressly include a contingency as required by the rule. Elliott v. Joyce, 889 P.2d 43 (Colo. 1994).

Under rule 5(d) and this rule, chapter 23.3 limits recovery to situations in which the contingent fee agreement specifically sets forth circumstances under which the client will be liable. Elliott v. Joyce, 889 P.2d 43 (Colo. 1994).

Rule 7. Forms

The following forms may be used and shall be sufficient. The authorization of these forms shall not prevent use of other forms consistent with this Chapter 23.3.

Source: Entire rule amended and effective January 31, 1992; Form 2 amended and effective November 16, 1995; entire rule, Form 1, and Form 2 amended and adopted and committee comment added and adopted May 24, 2001, effective July 1, 2001.

Form 1
Disclosure Statement

Type of Attorney Fee Agreements:

I have been informed and understand that there are several types of attorney fee arrangements: (1) time based, (2) fixed, (3) contingent, or (4) combinations of these types of fee arrangements. "Time based" means a fee that is determined by the amount of time involved such as so much per hour, day or week. "Fixed" means a fee that is based on an agreed amount regardless of the time or effort involved or the result obtained. "Contingent" means a certain agreed percentage or amount that is payable only upon attaining a recovery regardless of the time or effort involved. I understand that not all attorneys offer all of these different types of fee arrangements, and I acknowledge that I have the right to contact other attorneys to determine if they may provide such other fee arrangements for my case or matter. After such consideration or consultation, I have elected the fee arrangement set forth in the accompanying contingent fee agreement.

Specially Awarded Attorney Fees:

I have been informed and understand that the court or an arbitrator may sometimes award attorney fees in addition to amount of recovery being claimed. I understand that the fee agreement I enter into with my attorney should contain a provision as to how any specially awarded attorney fees will be accounted for and handled.

Expenses:

I have been informed and understand that there may be expenses (aside from any attorney fee) in pursuing my claim. Examples of such expenses are: fees payable to the court, the cost of serving

process, fees charged by expert witnesses, fees of investigators, fees of court reporters to take and prepare transcripts of depositions, and expenses involved in preparing exhibits. I understand that an attorney is required to provide me with an estimate of such expenses before I enter into an attorney fee agreement and that my attorney fee agreement should include a provision as to how and when such expenses will be paid. I understand that the fee agreement should tell me whether a fee payable from the proceeds of the amount collected on my behalf will be based on the "net" or "gross" recovery. "Net recovery" means the amount remaining after expenses and deductions. "Gross recovery" means the total amount of the recovery before any deductions. The estimated amount of the expenses to handle my case will be set forth in the contingent fee agreement.

The Potential of Costs and Attorney's Fees Being Awarded to The Opposing Party:

I have been informed and understand that a court or arbitrator sometimes awards costs and attorney fees to the opposing party. I have been informed and understand that should that happen in my case, I will be responsible to pay such award. I understand that the fee agreement I enter into with my attorney should provide whether an award against me will be paid out of the proceeds of any amount collected on my behalf. I also understand that the agreement should provide whether the fee I am obligated to pay my attorney will be based on the amount of recovery before or after payment of the awarded costs and attorney fees to an opposing party.

Associated Counsel:

I have been informed and understand that my attorney may sometimes hire another attorney to assist in the handling of a case. That other attorney is called an "associated counsel." I understand that the attorney fee agreement should tell me how the fees of associated counsel will be handled.

Subrogation:

I have been informed and understand that other persons or entities may have a subrogation right in what I recover in pursuing my claim. "Subrogation" means the right to be paid back. I understand that the subrogation right may arise in various ways such as when an insurer or a federal or state agency pays money to or on behalf of a claiming party like me in situations such as medicare, medicaid, worker's compensation, medical/health insurance, no-fault insurance, uninsured/underinsured motorist insurance, and property insurance situations. I understand that sometimes a hospital, physician or an attorney will assert a "lien" (a priority right) on a claim such as the one I am pursuing. Subrogation rights and liens need to be considered and provided for in the fee agreement I reach with my attorney. The fee agreement should tell me whether the subrogation right or lien is being paid by my attorney out of the proceeds of the recovery made on my behalf and whether the fee I am obligated to pay my attorney will be based on the amount of recovery before or after payment of the subrogation right or lien.

I acknowledge that I received a complete copy of this Disclosure Statement and read it this _____ of _____, 20_____.

_____
(Signature)

Alternative Attorney Compensation:

I have been informed and understand that if, after entering into a fee agreement with my attorney, I terminate the employment of my attorney or my attorney justifiably withdraws, I may nevertheless be obligated to pay my attorney for the work done by my attorney on my behalf. The fee agreement should contain a provision stating how such alternative compensation, if any, will be handled.

I acknowledge that I received a complete copy of this Disclosure Statement and read it this _____ day of _____, 20_____.

_____
(Signature)

Form 2
CONTINGENT FEE AGREEMENT
(To be Executed in Duplicate)

Dated _____, 20_____

The Client _____ retains the
(Name) (Street & No.) (City or Town)

Attorney_____
(Name) (Street & No.) (City or Town)

to perform the legal services mentioned in paragraph (1) below. The attorney agrees to perform them faithfully and with due diligence.

(1) The claim, controversy, and other matters with reference to which the services are to be performed are:

(2) The contingency upon which compensation is to be paid is:

(3) The client is not to be liable to pay compensation otherwise than from amounts collected for the client by the attorney, except as follows:

In the event the client terminates this contingent fee agreement without wrongful conduct by the attorney which would cause the attorney to forfeit any fee, or if the attorney justifiably withdraws from the representation of the client, the attorney may ask the court or other tribunal to order the client to pay the attorney a fee based upon the reasonable value of the services provided by the attorney. If the attorney and the client cannot agree how the attorney is to be compensated in this circumstance, the attorney will request the court or other tribunal to determine: (1) if the client has been unfairly or unjustly enriched if the client does not pay a fee to the attorney; and (2) the amount of the fee owed, taking into account the nature and complexity of the client's case, the time and skill devoted to the client's case by the attorney, and the benefit obtained by the client as a result of the attorney's efforts. Any such fee shall be payable only out of the gross recovery obtained by or on behalf of the client and the amount of such fee shall not be greater than the fee that would have been earned by the attorney if the contingency described in this contingent fee agreement had occurred.

(4) The client will pay the attorney (including any associated counsel) ____*____ percent of the (gross amount collected) (net amount collected) [indicate which]. ("Gross amount collected" means the amount collected before any subtraction of expenses and disbursements) ("Net amount collected" means the amount of the collection remaining after subtraction of expenses and disbursements [including] [not including] court-awarded costs or attorneys' fees.) [indicate which]. "The amount collected" (includes) (does not include) [indicate which] specially awarded attorneys' fees and costs awarded to the client.

(5) Costs and attorneys' fees awarded to an opposing party against the client before completion of the case will be paid (by the client) (by the attorney) [indicate which] when ordered. Any award of costs or attorneys' fees, regardless of when awarded, (will) (will not) [indicate which] be subtracted from the amount collected before computing the amount of the contingent fee under this agreement.

(6) The client is to be liable to the attorney for reasonable expenses and disbursements. Such expenses and disbursements are estimated to be $ _____. Authority is given to the attorney to incur expenses and make disbursements up to a maximum of $_____ which limitation will not be exceeded without the client's further written authority. The client will reimburse the attorney for such expenditures (upon receipt of a billing), (in specified installments), (upon final resolution), (etc.) [indicate which].

WE HAVE EACH READ THE ABOVE AGREEMENT BEFORE SIGNING IT.

Witnesses to Signatures:

_____
(Signature of Client)

_____ _____
Witness to Client's Signature (Signature of Attorney)

_____
Witness to Attorney's Signature

* [Here insert the percentages to be charged in the event of collection. These may be on a flat basis or on a descending scale in relation to amount collected.]

(7) The client (authorizes) (does not authorize) [indicate which] the attorney to pay from the amount collected the following: (e.g., all physicians, hospitals, subrogation claims and liens, etc.). Where the applicable law specifically requires the attorney to pay the claims of third parties out of any amount collected for the client, the attorney shall have the authority to do so notwithstanding any lack of authorization by the client, but if the amount or validity of the third party claim is disputed by the client, the attorney shall deposit the funds into the registry of an appropriate court for determination. Any amounts paid to third parties (will) (will not) [indicate which] be subtracted from the amount collected before computing the amount of the contingent fee under this agreement.

WE HAVE EACH READ THE ABOVE AGREEMENT BEFORE SIGNING IT.

Witnesses to Signatures:

_____
(Signature of Client)

_____ _____
Witness to Client's Signature (Signature of Attorney)

_____
Witness to Attorney's Signature

* [Here insert the percentages to be charged in the event of collection. These may be on a flat basis or on a descending scale in relation to amount collected.]

FINAL DISBURSEMENT STATEMENT

GROSS RECOVERY $_____

Itemization of expenses incurred in handling of case:

_____ $_____

_____ $_____

_____ $_____

_____ $_____

Total Expenses $_____

Amount of Expenses Advanced by Attorney $_____

Amount of Expenses paid by Client $_____

NET RECOVERY $_____

Computation of Contingent Fee:
_____ % of (Net) (Gross)
Recovery = $_____

Total Fee
(and expenses advanced
by attorney)* $_____

DISBURSEMENT TO CLIENT_____ $_____

_____
(Signature of Attorney)

_____
(Signature of Client)

By signature of client acknowledges receipt
of a copy of this disbursement statement.

*(If fee is on "Net Recovery" and attorney has advanced expenses which are being reimbursed from the "gross recovery.")

COMMITTEE COMMENT

The Rules contained in this Chapter 23.3 set forth the minimum requirements of all enforceable contingency fee agreements in Colorado. The Rules do not prohibit additional terms, provided that such terms are not inconsistent with these Rules or the Colorado Rules of Professional Conduct.

One type of provision that is sometimes included in contingent fee agreements is a "conversion clause." A conversion clause is a provision that converts the fee due from the contingent amount set forth in the contract to some other type of fee, often an hourly based fee, when the contract is terminated before the contingency occurs.

There are a number of factors that must be considered to determine the ethical propriety and legal enforceability of a conversion clause. These factors are set forth and analyzed in detail in Formal Opinion 100, issued by the Colorado Bar Association Ethics Committee. Opinions of the CBA Ethics Committee are available on the Internet at www.cobar.org. This Committee notes that any conversion clause that purports to remove the contingency by making the attorney's fees payable without regard to the occurrence of the contingency, is presumptively invalid, unless the client is relatively sophisticated, has the demonstrated means to pay the attorney's fee even before the occurrence of the contingency, and has specifically negotiated the conversion clause.

The Colorado Supreme Court has held that an attorney cannot recover a fee based upon quantum meruit or unjust enrichment, unless the contingent fee agreement provides notice to the client of the possibility of such a fee. *Dudding v. Norton Frickey & Associates*, 11 P.3d 441 (Colo. 2000). Section (3) of the form Contingent Fee Agreement, which is a part of Chapter 23.3, provides notice to the client of the possibility of a quantum meruit or unjust enrichment fee recovery.

INDEX TO RULES GOVERNING CONTINGENT FEES

CHAPTER 23.5

Rules of Procedure for Judicial Bypass of Parental Notification Requirements

CHAPTER 23.5

RULES OF PROCEDURE FOR JUDICIAL BYPASS OF PARENTAL NOTIFICATION REQUIREMENTS

Rule 1. Applicability

This rule applies to proceedings instituted pursuant to Section 12-37.5-107 (2) (g), C.R.S. which allows for judicial bypass of the parental notification requirements set forth in the Colorado Parental Notification Act, Sections 12-37.5-101, *et. seq.* concerning abortions to be performed on unemancipated minors.

Source: Entire chapter added and effective September 18, 2003.

Rule 2. Petition for Waiver of Parental Notification Requirements

(a) Procedure. An unemancipated minor who seeks waiver of the parental notification requirements for an abortion shall file on her own, or have filed on her behalf, a "petition" with any district court or Denver Juvenile Court (both hereinafter referred to as "district court"), as provided in Rule 6 (Form 1) of these rules. These rules of procedure and forms, as well as instructions for using the judicial bypass procedure, shall be available free of charge at the offices of all clerks of the state district courts and on the Judicial Department's official website (www.courts.state.co.us). The clerk of court's office shall provide assistance to minors seeking to file a judicial bypass petition in a manner that protects the minor's right to anonymity and confidentiality in the proceedings.

(b) Expedited Proceedings. Court proceedings under this rule shall be given preference over other pending matters and shall be heard and decided as soon as practicable but in no event later than four calendar days after the petition was filed. If the court fails to act within four calendar days, the court in which the proceeding is pending shall immediately issue an order setting forth that the parental notification requirements have been dispensed with by operation of law, pursuant to Section 12-37.5-107 (2) (f), C.R.S.

(c) Setting. At the time the petition is filed, the clerk shall immediately transfer the court file to the assigned judge for setting and inform the person filing the petition of the date, time and location of the hearing. The hearing shall be set as soon as practicable but in no event later than four calendar days after the date of filing. The hearing time shall accommodate the minor's schedule as practicable and shall be set before a district court or Denver juvenile court judge, and not a magistrate.

(d) Transfer of Court File. At the time the petition is filed, the clerk shall place the petition in a sealed envelope marked "SEALED MATERIALS - CONFIDENTIAL" identifying the file by case number only. The envelope shall be date stamped and forwarded immediately to the assigned judge for setting of the hearing. The clerk shall inform the judge of the four-day time limitation for the case and of any request for counsel and/or a guardian ad litem at that time.

(e) Contents of Petition. The petition shall include the following:

(1) the name and age of the minor;

(2) the length of the pregnancy;

(3) information to establish that the minor is unemancipated;

(4) a statement concerning whether the minor has been informed of the risks and consequences of the abortion;

(5) a statement that the minor seeks to have an abortion without notifying her parent(s), guardian or foster parent;

(6) the name, address and telephone number of the attending physician should the minor request to have the court inform the physician directly of its decision;

(7) a statement that the minor is sufficiently mature to decide whether to have an abortion without the notification of her parent(s), guardian or foster parent, and/or that parental notification would not be in her best interest;

(8) any request for court appointed counsel and/or a guardian ad litem; and

(9) contact information for confidential notification by the court of any court proceedings and/or rulings.

(f) Grounds for waiver. In review of the petition, the court shall enter an order dispensing with the notice requirements of Section 12-37.5-104, C.R.S. if:

(1) the court determines, by clear and convincing evidence, that the minor is sufficiently mature to decide whether to have an abortion; or

(2) the court determines, by a preponderance of the evidence, that the giving of parental notice would not be in the best interest of the minor.

(g) Orders. Any order allowing for or denying a waiver of the parental notification requirements, either on the record or in writing, shall include specific factual and legal conclusions in support of the decision. The order shall issue within four calendar days of the filing of the petition. If the court fails to act within four days, an order shall immediately be issued by the court setting forth that the parental notification requirements have been dispensed with by operation of law. A certified copy of any order issued shall be provided to the minor by the method requested in the petition, the minor's attorney, if represented, and the guardian ad litem, if one has been appointed. A certified copy of the order also shall be provided to the attending physician of the minor, as set forth in the petition. If the court denies the petition, the minor and/or her attorney, if she is represented, shall be notified of the right to appeal and provided with a copy of the notice of appeal form (Form 3) contained in Rule 6 of these rules.

(h) Appointment of Counsel and/or Guardian Ad Litem. The court may appoint counsel for the minor, if she is not represented. In addition, the court may appoint a guardian ad litem for the minor. Any appointed attorney or guardian ad litem shall be retained at no cost to the minor, shall act within the time frames provided in these rules and shall maintain the confidentiality of the court record and proceedings.

Source: Entire chapter added and effective September 18, 2003.

Rule 3. Appeal to the Court of Appeals

(a) Procedure. An appeal of an order denying a petition filed under these rules may be made to the Colorado Court of Appeals by the minor, or someone acting on her behalf, by promptly filing a "notice of appeal," as provided in Rule 6 (Form 3) of these rules. A copy of the district court order shall be attached to the notice of appeal. An advisory copy of the notice of appeal shall be filed with the district court. The appeal shall be decided on the record. A petitioner brief may be filed but is not required. Oral argument may be held at the discretion of the court.

(b) Setting. Upon receipt of the notice of appeal, the clerk of the Court of Appeals shall immediately request a transcript or any analog or digital recording of the district court proceedings. The clerk of the district court shall arrange for preparation of the transcript directly with the reporter if the proceeding was stenographically recorded. The clerk of the district court shall certify the contents and forward the entire district court file, including any prepared transcript or recording, in its sealed envelope to the clerk of the Court of Appeals via overnight or hand delivery forthwith, to be received in no event later than 48 hours after the notice of appeal was filed.

(c) Decision. A decision shall issue no later than five calendar days after the notice of appeal was filed. If no decision is rendered within five days, the court shall immediately issue an order setting forth that the parental notification requirements have been dispensed with by operation of law, pursuant to Section 12-37.5-107 (2) (f), C.R.S. A certified copy of any order issued shall be provided to the minor by the method requested in the petition,

the minor's attorney, if represented, and the guardian ad litem, if one has been appointed. A certified copy of the order also shall be provided to the attending physician of the minor, as set forth in the petition.

Source: Entire chapter added and effective September 18, 2003.

Rule 4. No Fees or Costs

No court fees or costs of any kind, including transcript fees, shall be assessed against the minor in connection with the filing of the petition or an appeal pursuant to these rules.

Source: Entire chapter added and effective September 18, 2003.

Rule 5. Confidentiality of Court Record and Proceedings

(a) Court proceedings. All district court and appellate court proceedings shall be closed to the public. All hearings shall be held in a location where there is privacy and limited access.

(b) Court record. The entire district court and appellate court record relating to the petition, excluding any published decisions but including, without limitation, the petition, pleadings, submissions, transcripts, court reporter notes and tapes, tape recordings, exhibits, orders, evidence, findings, conclusions, and any other material to be maintained, shall be stored in a closed file contained in a sealed envelope and conspicuously marked "SEALED MATERIALS - CONFIDENTIAL." The envelope shall be identified within the clerk's office only through reference to the case number. Access to the court file shall be limited to essential court personnel, the minor, the minor's attorney, any appointed guardian ad litem, and/or the court for use only in connection with court proceedings conducted under these rules. The court record shall not be open to public inspection or public disclosure, unless otherwise ordered by the court.

Source: Entire chapter added and effective September 18, 2003.

Rule 6. Forms

The following forms may be used and shall be sufficient. The authorization of these forms shall not prevent the use of other forms which substantively comply with the requirements of these rules of procedure.

Source: Entire chapter and Forms 1, 2, and 3 added and effective September 18, 2003.

❑ District Court ❑ Denver Juvenile Court _____ County, Colorado Court Address: IN THE MATTER OF THE PETITION OF: _____ [Name of Minor] **For a Waiver of Parental Notification Requirements Concerning an Abortion**	▲ **COURT USE ONLY** ▲
Attorney, if Minor Represented (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom
PETITION FOR WAIVER OF PARENTAL NOTIFICATION REQUIREMENTS OF §12-37.5-104, C.R.S.	

The Petitioner, a minor, states:

1. I am ___ years old.
2. I am approximately ____ weeks pregnant and desire to terminate the pregnancy by abortion.
3. I want to have the abortion without telling my parent(s), guardian or foster parent.
4. I am ❑ am not ❑ married.
5. I do ❑ do not ❑ financially support myself.
6. I live with my:
   - ❑ parent(s)
   - ❑ guardian
   - ❑ foster parent(s)
   - ❑ relative: _____ (state relationship)
   - ❑ other: _____(state relationship)
7. I have ❑ have not ❑ been informed about the risks and consequences of having the abortion.
8. (Check one or both):
   - ❑ I believe I am mature enough to decide on my own to have an abortion without telling my parent(s), guardian or foster parent.
   - ❑ It would not be in my best interest to tell my parent(s), guardian or foster parent of the abortion.
9. The name, business address and telephone number of the clinic or doctor who would perform the abortion are (this information is optional if you want to have the court's decision sent directly to the clinic or doctor):

   _____

   _____.
10. ❑ I ask the Court to appoint a lawyer to represent me at no cost to me.

- ☐ I have a lawyer and ask the Court to appoint that person to continue to represent me. My lawyer's name, business address, telephone and fax numbers are: _____

  _____

- ☐ I do not want to be represented by a lawyer.

11. I understand that the court proceedings and my court file are confidential and cannot be disclosed to anyone, including my parent(s), guardian or foster parent.

12. The Court can let me know of any Court proceedings or decisions in the following way:

- ☐ Via Fax: #_____; Attn:_____
- ☐ Via Telephone: #_____; Attn:_____
- ☐ Via E-mail: _____
- ☐ Via Beeper or Pager #_____
- ☐ Via First Class Mail: _____

  _____

- ☐ Via My Attorney

13. I ask that the Court provide me with a certified copy of the court's order in the following way (check one):

- ☐ Via First Class Mail: _____

  _____

- ☐ Via My Attorney
- ☐ Via the Court File for pickup by me or _____ who has my permission to pick up the certified copy on my behalf from the court file at the courthouse

14. The best days and times for me to come to court are:

_____

_____

WHEREFORE, I request to the Court enter an order allowing me to have the abortion without telling my parent(s), guardian or foster parent.

Respectfully submitted this ____ day of _____, 20___.

_____
Signature of Minor

_____
Signature of Attorney, if Petitioner is represented

☐ District Court ☐ Denver Juvenile Court _____County, Colorado Court Address: IN THE MATTER OF THE PETITION OF: _____ [Name of Minor] **For a Waiver of Parental Notification Requirements Concerning an Abortion**	▲ **COURT USE ONLY** ▲
Attorney, if Minor Represented (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom
SETTING NOTICE	

The hearing in the above-captioned matter has been set as follows:

Judge _____ of Division ____ will hold a hearing on the Petition at _____ a.m./p.m. on _____. The hearing will be held at: _____

_____.

If you need to change the date or time of your hearing, you or your lawyer must contact the court at _____ to reschedule the hearing.

A copy of this Setting Notice shall be placed by the clerk in the court file.

LAWYER ASSIGNMENT
(To be filled out by the Judge)

The name, address, and telephone of the court-appointed lawyer assigned to represent the minor is:

_____

_____.

The judge will notify the lawyer of his/her appointment and the date of the hearing.

Colorado Court of Appeals 2 East Fourteenth Avenue, Suite 300 Denver, Colorado 80203-2115 _____ District Court, Judge _____, Case # _____	
IN THE MATTER OF THE PETITION OF: _____ **[Name of Minor]** **For a Waiver of Parental Notification Requirements Concerning an Abortion**	▲ **COURT USE ONLY** ▲
Attorney, if Minor Represented (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom
NOTICE OF APPEAL	

The Petitioner, a minor, states:

1. The district court has denied my petition to have an abortion without telling my parent(s), guardian or foster parent.
2. I ask that I be given permission by this court to have the abortion without telling my parent(s), guardian or foster parent on the grounds stated in the Petition filed with the district court on _____, 20__.
3. I believe the district court was wrong in its decision because:_____
   _____
   _____
   _____
   _____.
4. A copy of the district court's decision is attached to this Notice of Appeal.
5. ❑ I ask the court to appoint a lawyer to represent me at no cost to me.
   ❑ I have a lawyer and ask the court to appoint that person to continue to represent me. My lawyer's name, business address, telephone and fax numbers are: _____
   _____
   ❑ I do not want to be represented by a lawyer.
6. I understand that the court proceedings and my court file are confidential and cannot be disclosed to anyone, including my parent(s), guardian or foster parent.
7. I request that the court contact me about its decision in the following way (check one):
   ❑ Via Fax: #_____; Attn:_____
   ❑ Via Telephone: #_____; Attn:_____
   ❑ Via E-mail: _____
   ❑ Via Beeper or Pager #_____
   ❑ Via First Class Mail: _____
   _____

❑ Via My Attorney

8. I request that the Court provide me with a certified copy of the court's order in the following way (check one):

❑ Via First Class Mail: _____

_____

❑ Via My Attorney

❑ Via the Court File for pickup by me or _____ who has my permission to pick up the certified copy from the court file at the courthouse

9. The name, business address, and telephone number of the clinic or doctor who would perform the abortion are (this information is not necessary but optional if you want to have the court's decision sent directly to the clinic or doctor): _____

_____.

WHEREFORE, I request that this court reverse the district court and allow me to have the abortion without telling my parents.

Respectfully submitted this ____ day of _____, 20__.

_____

Signature of the Minor

_____

Signature of Attorney, if minor is represented

INDEX TO RULES OF PROCEDURE FOR JUDICIAL BYPASS OF PARENTAL NOTIFICATION REQUIREMENTS

CHAPTER 24

The Colorado Rules of Judicial Discipline

Repealed and Reenacted by the

SUPREME COURT OF COLORADO

March 22, 2012,

Effective Immediately

ANALYSIS BY RULE

PART D. DISPOSITIONS AND SANCTIONS

PART E. SUPREME COURT ACTION

CHAPTER 24

COLORADO RULES OF JUDICIAL DISCIPLINE

PART A. GENERAL PROVISIONS

Rule 1. Scope, Objectives and Title

(a) Scope. The Colorado Rules of Judicial Discipline (the "Rules") apply to all of the responsibilities and proceedings of the Colorado Commission on Judicial Discipline (the "Commission"), pursuant to Article VI, Section 23(3) of the Colorado Constitution (the "Constitution"), involving the removal, retirement, suspension, censure, reprimand, or other discipline of judges, and disabilities affecting the performance of their judicial duties.

(b) Constitutional Mandate. The Constitutional mandate of the Commission is to protect the public from improper conduct of judges; preserve the integrity of the judicial process; maintain public confidence in the judiciary; create a greater awareness of proper judicial behavior on the part of the judiciary and the public; and provide for the fair and expeditious disposition of complaints of judicial misconduct or judicial disabilities.

(c) Title. These Rules shall be known and cited as the Colorado Rules of Judicial Discipline or Colo. RJD.

ANNOTATION

Law reviews. For article, "The New Commission on Judicial Discipline", see 38 Colo. Law. 85 (November 2009).

Rule 2. Definitions

In these rules, unless the context or subject matter otherwise requires:

(a) The term **"Judge"** means any justice or judge of any court of record of this state serving on a full time, part-time, senior, or retired basis against whom a complaint has been filed or initiated or who has been convicted of a felony or other offense involving moral turpitude. This definition does not include judges of the county court of the City and County of Denver, municipal judges, or magistrates. The conduct of municipal judges and magistrates is subject to the disciplinary and disability jurisdiction of Attorney Regulation under Colo. RPC 251.1(b).

(b) **"Attorney Regulation"** means the Office of Attorney Regulation Counsel.

(c) **"Chair"** means a member selected by the Commission to administer the business of the Commission and preside at all meetings of the Commission, any member selected to preside at a hearing, or any person designated as "acting chair."

(d) **"Code"** means the Colorado Code of Judicial Conduct, as amended.

(e) **"Colo. RPC"** means the Colorado Rules of Professional Conduct.

(f) **"Complaint"** means information in any form from any source received by the Commission that alleges, or from which a reasonable inference can be drawn, that a Judge may have committed misconduct or may have a disability that is adversely affecting the Judge's performance.

(g) **"Complainant"** means a person who files a complaint.

(h) **"C.R.C.P."** means the Colorado Rules of Civil Procedure.

(i) **"Executive director"** means the person appointed by the Commission to serve as its executive director.

(j) **"Hearing"** means a meeting of the Commission or special masters convened for the purpose of taking evidence or considering legal arguments.

(k) **"Mail"** or **"mailed"** means first-class mail, personal delivery, or delivery by commercial mail service.

(l) **"Meeting"** means an assembly of the Commission or special masters in person or by conference call or any combination thereof.

(m) **"Member"** means a member or special member of the Commission.

(n) **"Notice"** means a letter or other writing sent by mail, unless otherwise specified in the Rules, to a Judge at the Judge's chambers or last known residence, to an address designated by the Judge, or to the Judge's counsel of record.

(o) **"Participant"** means a member, special member, the executive director, Commission staff, complainant, Judge, the Judge's counsel, special counsel, special master, witness, investigator, or any other person who obtains knowledge of a proceeding in the course of an investigation or prosecution by the Commission.

(p) **"Presenter"** means one or more members who are designated by the Commission or by the executive director to evaluate and report on a complaint to the Commission.

(q) **"Proceedings"** include a complaint, a response to a complaint, an investigation of a complaint, a meeting, a hearing, a disciplinary disposition, a disciplinary sanction, a disability disposition, or a communication with respect thereto.

(r) **"Special counsel"** means an attorney or attorneys appointed by the Commission with respect to the investigation or disposition of a complaint or the prosecution of a complaint in formal proceedings.

(s) **"Special master"** means a person appointed by the Supreme Court to preside over hearings.

(t) **"Special members"** are persons appointed by the Commission to serve as alternates to members.

Rule 3. Organization and Administration

(a) **Composition.** The Commission shall be made up of ten members as provided in the Constitution.

(b) **Officers.** The Commission shall elect from its membership a chair, a vice-chair, and a secretary, each of whom shall serve renewable one-year terms. The vice-chair shall act as chair in the absence of the chair, and in the absence of both, the members present may select an acting chair.

(c) **Special Members.** The Commission may appoint a special member to serve in the place of a member who recuses or is disqualified with respect to a complaint, or who may be temporarily unable to perform his or her duties as a member.

(d) **Executive Director.** The Commission shall appoint an executive director whose duties and responsibilities, subject to general oversight by the Commission, shall be:

(1) To establish and maintain a permanent office;

(2) To receive information, allegations, and complaints;

(3) To screen complaints under Rule 13 and refer screened complaints to the Commission for consideration;

(4) To conduct investigations;

(5) To recommend dispositions;

(6) To maintain Commission records;

(7) To maintain statistics concerning the operation of the Commission and make them available to the Commission and to the Supreme Court;

(8) To prepare the Commission's budget and administer its funds;

(9) To employ the Commission's staff;

(10) To prepare an annual report of the Commission's activities for presentation to the Commission, to the Supreme Court, and to the public;

(11) To employ special counsel, investigators, or other experts as necessary to investigate and process matters before the Commission and before the Supreme Court; and

(12) To perform such other duties as the Commission or the Supreme Court may require.

(e) **Meetings.** Meetings shall be held at the call of the chair, the vice-chair, or the executive director, or at the request of three members of the Commission. The Commission

may conduct meetings in person or by conference call.

(f) **Quorum.** Six members must be present in person or by conference call for the transaction of business by the Commission.

Rule 4. Jurisdiction and Powers

(a) Jurisdiction.

(1) Filing Date. The Commission has jurisdiction over a Judge regarding allegations of misconduct or a disability and the application of dispositions and sanctions thereto, based on events that occurred while the Judge was an active or senior judge, if a complaint is filed by a complainant (or commenced on the Commission's motion) while the Judge is an active or senior judge, or within one year following (A) the end of the Judge's term of office, (B) the effective date of the Judge's retirement or resignation, or (C) the end of the Judge's participation in the senior judge program.

(2) Continuing Jurisdiction. The jurisdiction of the Commission to fulfill its Constitutional mandate under of Rule 1(b) regarding a pending disciplinary or disability proceeding shall not terminate upon the expiration of the Judge's term of office, the Judge's retirement or resignation, or the appointment or reappointment of the Judge to the senior judge program. Such jurisdiction shall continue until a disposition or sanction is determined.

(b) Attorney Regulation. Conduct by a Judge or former Judge that involves grounds for disciplinary action under Rule 5 and/or may involve grounds for a violation of Colo. RPC may be referred by the Commission to Attorney Regulation. Such referral shall not preclude the Commission from proceedings concerning conduct under its jurisdiction coincident with Attorney Regulation's jurisdiction over violations of Colo. RPC. Nothing in these Rules shall be construed to limit the jurisdiction of Attorney Regulation over an attorney with respect to conduct subject to Colo. RPC, which occurred before, during, or after the attorney's service as a judge.

(c) General Powers. The Commission shall have the authority and duty to investigate and resolve complaints in accordance with the Constitution and these Rules.

(d) Evidentiary Powers. Any member or special master may administer oaths and affirmations, compel by subpoena the attendance and testimony of witnesses, including the Judge as a witness, and provide for the inspection of documents, books, accounts, and other records.

(e) Contempt Powers. A Judge's refusal to comply with a disposition ordered under Colo.RJD 35 or the willful misconduct of a Judge or any other person during any stage of the Commission's investigation or consideration of a complaint in preliminary, formal, or disability proceedings, including, but not limited to, misrepresentation of a material fact, resistance to or obstruction of any lawful process, disruptive behavior, breach of confidentiality, or failure to comply with any of these Rules, may be grounds for direct or indirect contempt, as provided in C.R.C.P.107. In formal proceedings or disability proceedings, direct contempt may be addressed summarily by the special masters. To address allegations of indirect contempt, the Commission shall request the Supreme Court to appoint a special master. The Commission shall be represented in contempt proceedings by special counsel who shall file a motion with the special master, verified by the executive director or a member of the Commission, alleging the grounds for contempt. The special master may ex parte order a citation to issue to the person charged to appear and show cause at a designated date, time, and place why the person should not be held in contempt. The motion and citation shall be served on the person charged at least seven days before the time required for the person to appear before the special master. The special master shall conduct a hearing and file recommended findings of fact and conclusions of law regarding the alleged contempt with the Supreme Court. The Supreme Court shall consider the special master's recommendations and dismiss the citation or order remedial or punitive sanctions as it deems appropriate under C.R.C.P. 107.

(f) Administrative Powers. The Commission may adopt administrative policies, procedural rules, or forms for its internal operation or proceedings that do not conflict with the provisions of these Rules.

(g) Communications. The Commission may distribute information to the judiciary and the public concerning its authority and procedures.

Rule 5. Grounds for Discipline

(a) In General. Grounds for judicial discipline shall include:

(1) Willful misconduct in office, including misconduct which, although not related to judicial duties, brings the judicial office into disrepute or is prejudicial to the administration of justice;

(2) Willful or persistent failure to perform judicial duties, including incompetent performance of judicial duties;

(3) Intemperance, including extreme or immoderate personal conduct; recurring loss of temper or control; abuse of alcohol, prescription drugs, or other legal substances; or the use of illegal or non-prescribed narcotic or mind-altering drugs; or

(4) Any conduct that constitutes a violation of the Code.

(b) Failure to Cooperate During Proceedings. A Judge's failure to cooperate with the Commission during the investigation or consideration of a complaint may be grounds for discipline.

(c) Failure to Comply with a Commission Order. A Judge's failure or refusal to comply with an order issued under these Rules during disciplinary proceedings or with a disciplinary order resulting from such proceedings may be (i) grounds for initial or supplemental disciplinary measures or (ii) probable cause to proceed with formal action.

(d) Contempt Proceedings not Precluded. Determinations by the Commission under sections (b) and (c) of this Rule are in addition to and do not preclude contempt proceedings under Colo. RJD 4(e).

(e) Misconduct Distinguished from Disputed Rulings. Complaints that dispute a Judge's pre-trial orders, evidentiary or procedural rulings, findings of fact, conclusions of law, sentencing, or other matters that are under the jurisdiction of the trial court or which are subject to appellate review shall not constitute grounds for judicial discipline, unless the Judge's conduct includes one or more of the grounds provided in section 5(a) of this Rule.

ANNOTATION

Delay by district court judge in issuing a decision constituted a willful or persistent failure to perform judicial duty in violation of paragraph (a)(2). In re Jones, 728 P.2d 311 (Colo. 1986).

Rule 6. Confidentiality and Privilege

Rule deleted and replaced by Rule 6.5.

Rule 6.5. Confidentiality and Privilege

(a) Confidentiality. The proceedings of the Commission and special masters, including all papers, investigative notes and reports, pleadings, and other written or electronic records, shall be confidential unless and until the Commission files a recommendation with the Supreme Court for one or more sanctions of a Judge's conduct under Rule 36, at which time the recommendation together with the supporting record of the proceedings shall no longer be confidential.

(b) Privilege. Papers or pleadings filed with the Commission, the work product of investigations, testimony given in proceedings, minutes and decisions of the Commission, records of special counsel, hearings conducted by the special masters, and the report of the special masters are privileged and, therefore, cannot be the subject of any legal action against a participant, including a claim for defamation.

(c) Disability Proceedings. In disability proceedings, all orders transferring a Judge to or from disability inactive status shall be matters of public record; otherwise, disability proceedings shall remain confidential and shall not be made public, except by order of the

Supreme Court.

(d) Disclosures. Subject to certification, when required by subsection (e)(2) of this Rule, confidentiality does not apply to (i) the disclosure of the records and proceedings reasonably necessary for the Commission or its executive director to fulfill the Commission's Constitutional mandate under Rule 1(b); or (ii) disclosures in the interest of justice or public safety, including the following:

(1) Disclosure of the allegations in a complaint and related materials reasonably necessary to conduct the investigation of the complaint;

(2) When the Commission has determined that there is a demonstrated need to notify another person in order to protect that person; or to notify an appropriate government agency, including law enforcement or Attorney Regulation, in order to protect the public or the judiciary or to further the administration of justice;

(3) In response to an inquiry by the Supreme Court concerning the qualifications of a Judge for appointment or reappointment to other judicial responsibilities (including the senior judge program), by an agency or official authorized to investigate the qualifications of a Judge who has applied for or has been nominated for another judicial position, or by the Governor with respect to the qualifications of a Judge recommended by a nominating commission for appointment to another judicial position, the Commission shall disclose disciplinary dispositions under Rule 35 (other than complaints resulting in dismissals) and sanctions under Rule 36, together with the status of any pending complaints directed at the Judge which the Commission, as of the date of such request, is investigating under Rule 14;

(4) In response to an inquiry by the executive director of the Office of Judicial Performance Evaluation ("Judicial Performance") if the Commission determines, in its discretion, that disclosure to Judicial Performance is consistent with its Constitutional mandate under Rule 1(b) and on the condition that Judicial Performance will not publicly disclose such information or its source without independent verification by Judicial Performance;

(5) If a Judge has been convicted of a crime or public discipline has been imposed on a Judge by Attorney Regulation or by a foreign jurisdiction and the Commission determines that public disclosure is appropriate;

(6) Upon request of an agency authorized to investigate the qualifications of persons for admission to practice law;

(7) Upon request of any attorney discipline enforcement agency;

(8) Upon request of any law enforcement agency;

(9) Upon a Judge's written waiver of confidentiality and consent to disclosure; or

(10) When the Commission or the executive director has knowledge of potential grounds for misconduct under state or federal law, a chief justice directive, or other rule applicable to the conduct of an employee of the state judicial branch (other than a judge) and provides such information to the Office of the State Court Administrator;

(e) When Certification Required.

(1) The Commission is permitted to disclose nonpublic information pursuant to subsections (d)(1) through (d)(5) of this Rule without prior notice to, or waiver and consent by, the Judge.

(2) The Commission is permitted to provide nonpublic information requested pursuant to subsections (d)(6) through (d)(8) of this Rule without prior notice to, or waiver and consent by, the Judge, only if a senior official of the requesting agency provides a verified certificate to the Commission on the agency's letterhead in support its request, which addresses:

(i) Whether there is an ongoing investigation of (A) alleged misconduct by the Judge, (B) an alleged violation of federal or state law, or (C) the Judge's qualifications to practice law;

(ii) The reasons the information is essential to that investigation;

(iii) Whether the agency has attempted to obtain the Judge's waiver of confidentiality and consent to disclosure or why a request for waiver and consent would be inappropriate or impractical;

(iv) Why disclosure of the existence of the investigation to the Judge would signifi-

cantly prejudice the investigation; and

(v) Other factors relevant to the request.

(3) If an agency authorized to request disclosure by subsections (d)(6) through (d)(8) of this Rule has not obtained a waiver and consent from the Judge or provided the certification required in subsection (e)(2), then the Commission may decline the request or may notify the Judge in writing of the request which identifies the requesting agency and describes the information proposed to be released. The notice shall advise the Judge that the Commission will release the information, unless the Judge objects to the disclosure within fourteen days after mailing of the notice. If the Judge objects to the disclosure, then the information shall remain confidential unless, upon motion by the requesting agency or the Commission with notice to the Judge, the Supreme Court enters an order requiring release.

(f) Public Knowledge. The Commission may, by motion filed with the Supreme Court, assert that the allegations of a complaint have become generally known to the public and that, in the interests of justice, the nature of the disciplinary proceedings should be disclosed. The Judge shall have fourteen days after the filing of such motion within which to object to such disclosure or to propose conditions or limitations on such disclosure. The Supreme Court, in its discretion, may deny such motion or order disclosure of the nature of the allegations, the Judge's response, and, when determined, the disposition of the complaint, subject to such terms as it deems appropriate.

(g) Available Records. After the filing of a recommendation with the Supreme Court pursuant to section (a) of this Rule, the record of proceedings shall be available to the public unless the Supreme Court enters a protective order concerning specifically identified information, but only upon a showing of good cause for such protective order by the Commission, special counsel, special masters, or the Judge.

(h) Prior Discipline. In investigating a complaint, determining a disposition under Rule 35, or in recommending a sanction under Rule 36, the Commission and special masters may consider the nature of any discipline previously imposed on the Judge by the Commission or the Supreme Court.

(i) Summaries. In the annual report required by Rule 3(d)(10), the Commission may publish summaries of proceedings which have resulted in disciplinary dispositions or sanctions. A summary may include a brief statement of facts, references to the applicable canons and rules in the Code, and a description of the disciplinary action taken, but shall not disclose the date or location of the factual basis for the disciplinary measures or the identity of the Judge, the complainant, witnesses, or other parties to the proceedings.

(j) Duty of Officials and Employees. All officials and employees within the Commission, executive director's office, special counsel's office, special masters' offices, and the Supreme Court shall conduct themselves in a manner that maintains the confidentiality mandated by these Rules.

Editor's note: This rule was previously numbered as Rule 6.

Rule 7. Notice of Action

Upon termination of any proceedings hereunder, the Judge, the Judge's counsel, special counsel, and the complainant shall be notified of the action taken by the Commission or the Supreme Court and all participants shall be advised of the confidentiality of Commission proceedings.

Rule 8. Service

(a) Service on Judge. All papers and pleadings in proceedings may be served on a Judge in person or by mail, except that a notice of formal charges served by mail must be served by certified mail. Mail shall be sent to the chambers or last known residence of a Judge, or to an address designated by the Judge. If counsel has been designated for a Judge, all notices, papers, and pleadings may be served on the Judge's counsel in lieu of service upon the Judge.

(b) Service on Commission. Service of papers and pleadings on the Commission or

any member shall be by delivering or mailing the papers to the Commission's office.

(c) Service on Special Counsel. Service of papers and pleadings on special counsel shall be by delivering or mailing to special counsel's office.

(d) When Service Accomplished. When service is by mail, a pleading or other document is timely served if mailed within the time permitted for service.

Rule 8.5. Procedural Rights of Judge

(a) Counsel. A Judge may confer with and be represented by counsel at any stage of disciplinary or disability proceedings. If counsel has entered an appearance, all communications and pleadings from the Commission, executive director, and special counsel shall be directed to the Judge's counsel. In formal proceedings and disability proceedings, a Judge may testify, introduce evidence, and examine and cross-examine witnesses, and the Judge's counsel may introduce evidence and examine and cross-examine witnesses.

(b) Guardian ad litem. If it appears to the Commission at any time that a Judge may not be competent to act, the Commission shall appoint a guardian ad litem for the Judge at the Commission's expense. The guardian ad litem may claim and exercise any right or privilege that could be claimed or exercised by the Judge, including the selection of counsel, a request for an independent medical examination, or the commencement of disability proceedings under Rule 33.5. Any notice to be served on the Judge shall also be served on the guardian ad litem.

Editor's note: This rule was previously numbered as Rule 28(a) and 28(c).

Rule 9. Disqualification of an Interested Party

A Judge who is a member shall be disqualified from participation in any proceedings involving the Judge's own discipline or disability. A justice of the Supreme Court shall be disqualified from participating in formal proceedings concerning the justice's own discipline or disability. A member or the executive director may recuse himself or herself in any proceeding involving a Judge who is a close personal acquaintance, their current or recent professional or business associate, or where there are other actual or potential conflicts of interest.

Rule 10. Immunity

Members, the executive director, Commission staff, its investigators, special counsel, and special masters shall be absolutely immune from suit for all conduct in the course of their official duties.

Rule 11. Amendment of Rules

The Commission may petition the Supreme Court to amend or alter these Rules as may be necessary to implement the Commission's Constitutional mandate. Any person may request the adoption, amendment, or repeal of a Rule by filing a petition with the Commission describing the proposed change.

PART B. PRELIMINARY PROCEEDINGS

Rule 12. Filing a Complaint

Any organization or person may file a complaint with the Commission alleging judicial misconduct or disability on the part of a Judge. The Commission on its own motion may initiate a complaint against a Judge. A complaint need not be in any specific form; however, the Commission shall prepare and distribute printed forms for the convenience of complainants. Complaints must include allegations of facts which, if true, would constitute one or more grounds for discipline of a Judge.

Rule 13. Screening of Complaints

The Commission, or, at its discretion, the executive director, shall determine whether a complaint provides sufficient cause to warrant further investigation and evaluation. The Commission or the executive director shall dismiss complaints that (a) do not include allegations of facts which, if true, would constitute grounds for disciplinary action; (b) are based on disputed rulings under the jurisdiction of the trial or appellate courts; (c) are frivolous; or (d) are otherwise beyond the jurisdiction of the Commission. If a complaint survives screening, the executive director or one or more presenters shall provide an evaluation of the complaint to the Commission. A Judge need not be notified of the action taken by the Commission at this stage of the proceedings.

Rule 14. Preliminary Investigation

(a) Investigation and Notice. The Commission shall consider the evaluation provided by the executive director or presenter(s) and if it finds that there are sufficient grounds to initiate disciplinary proceedings, it shall commence a preliminary investigation which may be conducted by one or more presenters, the executive director, the Commission staff, and/or one or more investigators. The Judge shall be given notice of the preliminary investigation, the nature of the charge, and the name of the complainant or a statement that the preliminary investigation was commenced on the Commission's own motion. The Judge shall be afforded a reasonable opportunity during the course of the investigation to respond to or appear before the Commission. A copy of the Rules shall be included with the notice or incorporated by reference into the notice. The Commission or the executive director, in their discretion, may determine when the complainant should be notified of the preliminary investigation.

(b) Investigations by State Court Administrator. The results of an investigation by the Office of the State Court Administrator regarding the conduct of a Judge and/or other employees of the judicial branch may be considered by the Commission in its preliminary investigation and in subsequent proceedings.

Rule 15. Independent Medical Examination

If the preliminary investigation indicates that a Judge may have a physical or mental disability which seriously impairs the performance of judicial duties, the Commission may order the Judge to submit to one or more independent examinations by physicians or other persons with appropriate professional qualifications to evaluate the Judge's physical and/or mental condition.

Rule 16. Determination

(a) Report. The presenter(s) shall report their observations and findings regarding a complaint to the other members.

(b) Decision. The Commission shall consider the report of the presenter(s) and all other relevant evidence regarding the complaint and by majority vote:

(1) Dismiss the complaint under Rule 35(a);

(2) Apply a disciplinary disposition under subsections (b) or (d) through (h) of Rule 35;

(3) Initiate disability proceedings under Rule 33.5; or

(4) Determine that there is probable cause to proceed with formal action against the Judge, in which case it shall appoint special counsel, who upon further investigation and evaluation of the allegations, may initiate formal proceedings as provided in these Rules or recommend a disposition under Rule 35.

(c) Voting. The standard of proof for a decision under section (b) of this Rule shall be the preponderance of the evidence. A decision shall require a majority vote of those members present or participating by conference call, provided that no member who served as a presenter on the complaint may vote on a section (b) decision.

Rule 17. Disqualification of a Judge

When a complaint is filed against a Judge, the Commission may order the Judge disqualified, on request of the complainant or the Commission's own motion, in any litigation in which the complainant is involved. Disqualification will be ordered only when the circumstances warrant such relief. After completion of the disqualifying litigation, the order for disqualification shall terminate unless extended by the Commission.

PART C. FORMAL PROCEEDINGS

Rule 18. Statement of Charges, Notice and Pleadings in Formal Proceedings

Special counsel shall commence formal proceedings against the Judge by filing a statement of charges with the Commission and serving a copy of the statement of charges together with a notice of formal charges upon the Judge. The statement of charges shall state in ordinary and concise language the grounds for the charges. The notice shall advise the Judge of his or her right to file a written response to the statement of charges. Pleadings in formal proceedings shall follow the general format for civil pleadings, and the original of all pleadings and a copy of the notice of formal charges shall be filed in the office of the executive director.

Rule 18.5. Special Masters

(a) Appointment. After special counsel has filed a statement of charges, the Commission shall request the Supreme Court to appoint three special masters to preside over formal proceedings, including hearings to receive evidence and consider legal arguments, in accordance with these Rules. The special masters may be active, senior, or retired judges of courts of record, and, unless otherwise designated, the judge first named in the Supreme Court's order shall be the presiding special master. The presiding special master is authorized to act on behalf of the special masters in resolving pre-hearing issues, including but not limited to discovery disputes; conducting pre-hearing conferences; and ruling on evidentiary, procedural, and legal issues that arise during hearings.

(b) One Special Master. The Commission may request the Supreme Court to appoint one special master for designated purposes in any proceeding.

Editor's note: This rule was previously numbered as Rule 24.

Rule 19. Response of Judge

The Judge shall file a response to the statement of charges with the executive director within twenty-one days after service of the statement of charges and notice of formal charges. The special masters may consider the failure or refusal to respond as an admission of the charges.

Rule 20. Setting for Hearing

After the filing of the Judge's response or the expiration of the time for its filing, the special masters shall order a hearing to be held, without unreasonable delay, before the special masters regarding the matters contained in the statement of charges and the response, if any. The special masters shall set the date and location of the hearing and shall serve notice thereof on all parties within a reasonable time before the date set.

Rule 21. Discovery

Rule deleted and replaced by Rule 21.5.

Rule 21.5. Discovery

(a) Purpose and Scope. Except as provided herein, Rule 26 of the Colorado Rules of Civil Procedure shall not apply to proceedings conducted pursuant to these Rules. This

Rule shall govern discovery in judicial discipline and disability proceedings.

(b) Meeting. A meeting of the parties shall be held no later than 14 days after the case is at issue to confer with each other about the nature and basis of the claims and defenses and discuss the matters to be disclosed.

(c) Disclosures. No later than 21 days after the case is at issue, the parties shall disclose:

(1) The name and, if known, the address, and telephone number of each person likely to have discoverable information relevant to disputed facts alleged in the pleadings, and the nature of the information;

(2) A listing, together with a copy or description of all documents, written or electronic records, and tangible things in the possession, custody, or control of the Commission or the Judge that are relevant to the disputed facts in the proceedings; and

(3) A statement of whether the parties anticipate the use of expert witnesses, identifying the subject areas of the proposed experts.

(d) Limitations. Except upon order by the presiding special master for good cause shown, discovery shall be limited as follows:

(1) Special counsel may take one deposition of the Judge and two other persons in addition to the depositions of experts. The Judge or the Judge's counsel may take one deposition of the complaining witness and two other persons in addition to the depositions of experts. The scope and manner of proceeding by way of deposition and the use thereof shall otherwise be governed by C.R.C.P. 26, 28, 29, 30, 31, 32, and 45.

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

(3) When the mental or physical condition of the Judge has become an issue in the proceeding, the presiding special master, on motion of any party or any of the special masters, may order the Judge to submit to a physical or mental examination by a suitable licensed or certified examiner. The order may be made only upon a determination that reasonable cause exists and after notice to the Judge. The Judge will be provided the opportunity to respond to the motion; and the Judge may request a hearing before the special masters. The hearing shall be held within 14 days of the date of the Judge's request, and shall be limited to the issue of whether reasonable cause exists for such an order.

(4) A party may serve the adverse party requests for production of documents pursuant to C.R.C.P. 34, except such requests for production shall be limited to 20 in number, each of which shall consist of a single request.

(5) A party may serve on the adverse party 20 requests for admission, each of which shall consist of a single request. The scope and manner of proceeding by means of requests for admission and the use thereof shall otherwise be governed by C.R.C.P. 36.

(e) Good Cause. In determining good cause pursuant to section (d) of this Rule, the presiding special master shall consider the following:

(1) Whether the scope of the proposed discovery is reasonable and likely to produce evidence that is material to the issues in the proceedings;

(2) Whether the discovery sought is unreasonably cumulative, unreasonably duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(3) Whether the burden or expense of the proposed discovery outweighs its likely benefit; and

(4) Whether the party seeking discovery has had ample opportunity by disclosure or discovery in the proceedings to obtain the information sought.

(f) Supplementation of Disclosures and Discovery Responses. A party is under a duty to supplement its disclosures under section (c) of this Rule when the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the disclosure or discovery process. A party is under a duty to amend a prior response to an interrogatory, request for production, or request for admission when the party learns that the prior response is in some material respect incomplete or incorrect and

if the additional or corrective information has not otherwise been made known to the other parties during the discovery process. With respect to experts, the duty to supplement or correct extends to information contained in the expert's report or summary disclosed in pre-hearing proceedings and to information provided through any deposition of or interrogatory responses by the expert. Supplementation shall be provided in a timely manner.

(g) Protective Orders. Upon motion by a party or by the person from whom disclosure is due or discovery is sought, accompanied by a certificate that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute, and for good cause shown, the special masters may take any action which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden of expense, including the issuance of one or more of the following orders:

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

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

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

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

(5) That discovery be conducted with no one present except persons designated by the special masters; and

(6) That a deposition, if sealed, be opened only by order of the special masters.

If the motion for a protective order is denied in whole or in part, the special masters, on such terms and conditions as are just, may order that any party or other person provide or permit discovery. The provisions of C.R.C.P. 37(a)(4) apply to an award of expenses incurred with regard to the motion.

Editor's note: This rule was previously numbered as Rule 21.

Rule 22. Subpoena and Inspection

The Judge and the Commission shall be entitled to compel by subpoena the attendance and testimony of witnesses, including the Judge as witness, and to provide for the inspection of documents, books, accounts, and other records. Subpoenas may be issued by the chair, the executive director, or a special master and shall be served in the manner provided by law for the service of subpoenas in a civil action.

Rule 23. Witness Fees and Expenses

All witnesses in formal proceedings shall receive fees and expenses in the amount allowed by law for civil litigation in the district courts, except as provided in this Rule. Fees and expenses of witnesses shall be borne by the party calling them. The Commission may, upon a showing of good cause, reimburse a Judge for reasonable expenses incurred for consultations with or testimony by a physician or mental health professional with respect to whether the Judge's conduct is adversely affected by a physical or mental disability. If the Judge is exonerated of allegations of misconduct in a matter that does not involve disability issues and the Commission determines that the Judge's payment of witness fees and expenses would work a financial hardship or injustice upon the Judge, then it may pay or reimburse such fees and expenses.

Rule 24. Special Masters

Rule deleted and replaced by Rule 18.5.

Rule 25. Prehearing Procedures

The Commission or special masters may direct the parties to appear for prehearing procedures which shall generally follow C.R.C.P. 16, but in a manner suitable for formal proceedings.

Rule 26. Hearing

(a) In General. At the time and place disclosed by notice, the special masters shall proceed with the hearing, whether or not the Judge has filed a response or appears at the hearing. Special counsel shall present the case in support of the formal charges. The presiding special master shall rule on all motions and objections made during the hearing, subject to the right of the Judge, the Judge's counsel, or special counsel to appeal a ruling to all of the special masters. The vote of the majority of special masters shall prevail on all findings of fact and conclusions of law.

(b) Failure to Appear. The special masters may determine, in their discretion, whether the failure of the Judge to appear at the hearing may be considered an admission of the allegations in the statement of charges, unless such failure was due to circumstances beyond the Judge's control.

Rule 27. Procedures and Rules

Formal proceedings shall be conducted in accordance with C.R.C.P., except where the special masters determine that certain provisions of C.R.C.P. would be impractical or unnecessary. The order of presentation in a hearing shall be the same as in civil cases. All witnesses shall give testimony under oath, and rules of evidence applicable in civil proceedings shall apply. Procedural errors or defects not affecting the substantial rights of a Judge shall not be grounds for invalidation of the proceedings.

Rule 28. Procedural Rights of Judge

Rule deleted. Rule 28(a) and (28)(c) were replaced by Rule 8.5. Rule 28(b) regarding the record was relocated to Rule 33.

Rule 29. Amendment to Pleadings

The special masters may in the interest of justice allow or require amendments to pleadings at any time in accordance with C.R.C.P.

Rule 30. Additional Evidence

The special masters may order a hearing for the taking of additional evidence at any time while the matter is pending before it. The order shall set the time and place of the hearing and shall indicate matters on which the evidence is to be taken. A copy of such order shall be served on the Judge and special counsel at least fourteen days prior to the date of hearing.

Rule 31. Standard of Proof

The standard of proof in all formal proceedings and disability proceedings shall be clear and convincing evidence.

ANNOTATION

Applied in In re Jones, 728 P.2d 311 (Colo. 1986).

Rule 32. Report of the Special Masters

At the conclusion of the hearing in formal proceedings, the special masters shall issue and file with the executive director a report which shall include written findings of fact regarding the evidence in support of and in defense to the allegations in the complaint, a report of any prior disciplinary action by the Commission against the Judge, and conclusions of law; and shall propose a dismissal of the charges or one or more dispositions or sanctions. The Commission shall consider the special masters' report, in accordance with

Rule 36. The executive director shall certify the special masters' report as part of the record of proceedings to be filed with the Supreme Court, in accordance with Rule 37.

Rule 33. Record of Proceedings

The record of proceedings shall consist of the pleadings, verbatim electronic or written transcripts of proceedings, affidavits, exhibits, findings of fact and conclusions of law, legal briefs, and any other documentation designated by the Commission for the Supreme Court's consideration. The special masters shall determine whether the verbatim record will be made by court reporter or electronic recording. The Judge shall be provided, on request and without cost, copies of electronic recordings that are made of any portion of the proceedings. The Judge may, in addition, have all or any portion of the testimony in the proceedings transcribed at the Judge's own expense. Special counsel's work product, the investigation file, discovery, and deliberations of the Commission or the special masters shall not be included in the record of proceedings unless so ordered by the Supreme Court.

Rule 33.5. Disability Proceedings

(a) Initiation of a Disability Proceeding. A disability proceeding can be initiated by a complaint, by a claim of inability to defend in a disciplinary proceeding, by an order of involuntary commitment or adjudication of incompetency, or as a result of information discovered during the course of disciplinary proceedings.

(b) Proceedings to Determine Disability Generally. The Commission shall conduct all disability proceedings in accordance with the procedures for disciplinary proceedings, except:

(1) The purpose of the disability proceedings shall be to determine whether the Judge suffers from a physical or mental condition that adversely affects the Judge's ability to perform judicial functions or to assist with his or her defense in disciplinary proceedings;

(2) All of the proceedings shall be confidential;

(3) The Commission may appoint a lawyer to represent the Judge if the Judge is without representation;

(4) In lieu of a Rule 18.5 appointment of three special masters, the Supreme Court may, in its discretion, appoint one special master, who is qualified to oversee disability proceedings (and who need not be a judge of a court of record), to conduct a hearing to take and consider evidence, promptly transmit a report concerning the alleged disability to the Supreme Court, and otherwise act as provided in this Rule for action by three special masters; and

(5) If the Supreme Court concludes that the Judge is incapacitated to hold judicial office, it may enter orders appropriate to the nature and probable length of the period of disability, including:

(i) Retirement of the Judge for a disability interfering with the performance of his or her duties which is, or is likely to become, of a permanent character;

(ii) Transfer of the Judge to temporary judicial disability inactive status. Such transfer shall be for a period of 182 days (26 weeks) (the "temporary transfer period"). The special master(s) shall take appropriate measures to review the Judge's disability status during the temporary transfer period, and issue a report to the Supreme Court on the degree of the Judge's disability no later than 70 days (10 weeks) after the beginning of the temporary transfer period. If the special master(s) find that the Judge remains disabled, the special master(s) shall again review the Judge's condition within the 35 days (5 weeks) preceding the end of the temporary transfer period and report to the Supreme Court on or before expiration of the 182 days. The Court may order more frequent reports during the temporary transfer period, in its discretion. For good cause, the Court may extend the temporary transfer period, but not to exceed an additional 182 days, and require periodic reports from the special master(s) during and at the end of the extension. In each report, the special master(s) shall determine whether the Judge is no longer disabled or that the disability is continuing, and shall recommend whether the Judge should be returned to active status or, retired due to a disability under subsection (b)(5)(i) of this Rule. The Court shall consider the recommendations and enter any order appropriate under the

circumstances;

(iii) Transfer of the Judge to lawyer disability inactive status, if the Supreme Court concludes that the Judge is unable to practice law; or

(iv) Suspension of the disciplinary proceeding, pursuant to subsection (c)(2) of this Rule.

(c) Inability to Properly Defend in a Disciplinary Proceeding.

(1) If, in the course of a disciplinary proceeding, a Judge, the Judge's counsel or personal representative, or special counsel, if appointed, alleges that the Judge is unable to assist in his or her defense due to mental or physical disability, the Commission shall promptly notify the Supreme Court and suspend the disciplinary proceeding. The Supreme Court shall immediately transfer the Judge to lawyer and judicial disability inactive status and appoint a special master, or special masters, under subsection (b)(4) of this Rule, who shall consider all relevant factors and/or stipulations of the parties, conduct a hearing if necessary, and report to the Supreme Court concerning the Judge's alleged disability. The 182 day temporary transfer period, provided in subsection (b)(5)(ii) of this Rule, shall not commence until and unless the special master(s) determine that the Judge cannot assist with his or her defense under subsection (c)(2) of this Rule.

(2) The Supreme Court shall consider the report of the special master(s) to determine whether the Judge can assist in such defense. If it finds that the Judge can assist, the disciplinary proceeding shall be resumed but the Judge shall remain on lawyer and judicial inactive status, pending the results of the disciplinary proceeding. If it finds that the Judge cannot assist, the disciplinary proceeding shall remain in suspension and the Judge shall be placed on (i) temporary judicial disability inactive status, subject to the provisions of subsection (b)(5)(ii) of this Rule, and (ii) on lawyer disability inactive status. If the Supreme Court, under subsection (b)(5(ii), subsequently determines that the Judge is no longer disabled, the Judge shall be restored to lawyer and judicial active status and the Commission may resume the disciplinary proceeding.

(d) Involuntary Commitment or Adjudication of Incompetency. If a Judge has been declared incompetent by judicial order or has been involuntarily committed to an institution by judicial order on the grounds of incompetency or disability, the Supreme Court shall, after considering all relevant factors, enter an order appropriate in the circumstances, including but not limited to: (i) retiring the Judge under subsection (b)(5)(i) of this Rule; (ii) transferring the Judge to temporary judicial disability inactive status and evaluating the Judge's disability under provisions of subsection (b)(5)(ii); and/or (iii) transferring the Judge to lawyer disability inactive status under subsection (b)(5)(iii). A copy of the order shall be served on the Judge, his or her guardian, and the director of such institution.

(e) Stipulated Disposition for Disability.

(1) The special masters may designate one or more experts whom the special masters deem, in their discretion, to be appropriately qualified in medicine, psychiatry, or psychology, and who shall examine the Judge prior to considering evidence of the alleged disability.

(2) After receipt of the examination report, the Commission or special counsel and the Judge may agree upon a stipulated disposition which includes proposed findings of fact, conclusions of law, and an order. The stipulated disposition shall be submitted to the special master(s) who shall forward it to the Supreme Court for approval or rejection.

(3) If the Supreme Court approves the stipulated disposition, it shall enter an order in accordance with its terms. If the stipulated disposition is rejected by the Supreme Court, the disability proceedings shall resume, but any statements by or on behalf of the Judge in the proposed disposition shall not be used as an admission of any material fact.

(f) Interim Appointment. The Supreme Court may designate another judge to assume the Judge's duties during the Judge's disability inactive status.

(g) Reinstatement from Judicial Disability Inactive Status.

(1) A Judge may petition the Court at any time, on good cause, for reinstatement to active judicial and lawyer status.

(2) Upon the filing of a petition for transfer to active judicial status, the Supreme Court may take or direct whatever action it deems necessary or proper to determine whether the

disability has been removed, including but not limited to an examination of the Judge by a physician or mental health practitioner designated by the Supreme Court or consideration of the findings of the special master(s) under subsection (b)(5)(ii) of this Rule.

(3) With the filing of a petition for reinstatement to active judicial status, the Judge shall be required to disclose the name of each physician or mental health practitioner and hospital or other institution by whom or in which the Judge has been examined or treated since the transfer to judicial disability inactive status. The Judge shall furnish to the Supreme Court written consent to the release of information and records relating to the disability, if requested by the Supreme Court or by court-appointed experts. The Judge shall bear the burden of proof to establish grounds for reinstatement.

(4) A Judge who is returned to active judicial status will be eligible to apply for another judicial position or for the senior judge program.

(5) Reinstatement to active lawyer status shall be under the jurisdiction of Attorney Regulation, pursuant to C.R.C.P. 251.30.

(h) Waiver of Medical Privilege. Asserting a mental or physical condition as a defense to or in mitigation of judicial misconduct constitutes a waiver of medical privilege in any disciplinary proceeding.

(i) Public Orders. All recommendations of the special master(s) and orders of the Supreme court under this Rule shall be public. However, the pleadings, briefs, and evidence considered by the special master(s), including but not limited to testimony, medical reports, and other documentation, shall remain confidential.

PART D. DISPOSITIONS AND SANCTIONS

Rule 34. Temporary Suspension

(a) Request to Supreme Court. The Commission, the chair, or the executive director (if so authorized by the Commission) may request the Supreme Court to order temporary suspension of a Judge, with pay, pending the resolution of preliminary or formal proceedings. The request shall include a statement of the reasons in support of the suspension, which may include the Judge's failure to cooperate with the Commission. Upon receipt of such a request, the Supreme Court may require additional information from the Commission.

(b) Order to Show Cause. Upon a finding that the Supreme Court has been fully advised and that a temporary suspension is appropriate, the Supreme Court (1) shall issue an order for temporary suspension and (2) direct the Commission to issue an order to the Judge to show cause to the Commission why the Judge should not continue to be temporarily suspended from any or all judicial duties pending the outcome of preliminary or formal proceedings before the Commission. The Supreme Court may issue an order for temporary suspension and an order to show cause to the Commission on its own motion.

(c) Hearing. The Commission shall hold a hearing on the order to show cause within twenty-one days of its issuance or such later time as mutually agreed by the Commission and the Judge, and then advise the Supreme Court of its findings and conclusions with respect to temporary suspension.

(d) Further Order. The Supreme Court may issue further orders concerning the suspension, as it may deem appropriate.

(e) Voluntary Suspension. The Commission may inquire whether a Judge will voluntarily submit to temporary suspension, and a written consent, if obtained, shall be filed with the Supreme Court.

Rule 35. Dispositions

Upon consideration of all the evidence and the report of the presenter(s), the Commission may order any of the following dispositions:

(a) Dismissal. Dismiss an unjustified or unfounded complaint, which may include an appropriate expression of concern by the Commission regarding the circumstances;

(b) Diversion Plan. Direct the Judge to follow a diversion plan, including but not

limited to education, counseling, drug and alcohol testing, medical treatment, medical monitoring, or docket management, which may be accompanied by the deferral of final disciplinary proceedings;

(c) Disability Proceedings. Initiate disability proceedings under Rule 33.5 or stipulate to voluntary retirement by the Judge for a disability under Rule 33.5(e);

(d) Private Admonishment. Admonish the Judge privately for an appearance of impropriety, even though the Judge's behavior otherwise meets the minimum standards of judicial conduct;

(e) Private Reprimand. Reprimand the Judge privately for misconduct that does not meet the minimum standards of judicial conduct;

(f) Private Censure. Censure the Judge privately for misconduct which involves a substantial breach of the standards of judicial conduct;

(g) Costs and Fees. Assess costs or fees of an investigation, examination or proceeding; or

(h) Other Action. Take or direct such other action, including any combination of dispositions that the Commission believes will reasonably improve the conduct of the Judge. A Judge who disagrees with a disposition under this Rule has the right to request that the complaint be resolved through formal proceedings.

Rule 36. Sanctions

The Commission, including any member who was a presenter with respect to the complaint, shall consider the report issued by the special masters under Rule 32 and recommend that the Supreme Court dismiss the charges or order one or more of the following sanctions:

(a) **Removal.** Remove the Judge from office;

(b) **Suspension.** Suspend the Judge without pay for a specified period;

(c) **Disability Proceedings.** Remand the matter to the Commission for disability proceedings or stipulate to voluntary retirement by the Judge for a disability under Rule 33.5(e);

(d) **Public Reprimand or Censure.** Reprimand or censure the Judge publicly, either in person or by written order;

(e) **Diversion or Deferred Discipline.** Require compliance with a diversion plan or deferred discipline plan;

(f) **Costs and Fees.** Assess costs and expenses against the Judge; or

(g) **Other Discipline.** Impose any other sanction or combination of sanctions, including dispositions under Rule 35, that the Supreme Court determines will curtail or eliminate the Judge's misconduct.

(h) **Voting.** The Commission's recommendation of one or more sanctions shall require a majority vote of the members participating in person or by conference call, except that a recommendation for removal shall require a majority vote of all members of the Commission.

Rule 36.5. Conviction of a Crime

(a) Suspension. Whenever a Judge has been convicted in any court of Colorado, any other state, or the United States of a felony or other offense involving moral turpitude, the Supreme Court on its own motion or upon petition filed by any person and a finding that such a conviction was had, shall enter an order suspending the Judge from office until such time as the judgment of conviction becomes final, and the payment of the Judge's salary shall also be suspended from the date of such order.

(b) Final Conviction. If the judgment of conviction becomes final, the Supreme Court shall enter an order removing the Judge from office and declaring the Judge's office vacant. The Judge's salary from the date of suspension to the date of removal from office shall be forfeited.

(c) Reversal or Acquittal. If the judgment of conviction is reversed with directions to enter a judgment of acquittal or a judgment of dismissal, or acquittal is entered following remand for a new trial, the Judge shall be entitled to receive the salary that was forfeited pursuant to Rule 36.5(b). While reversal of a conviction does not entitle the Judge to

resume his or her previous judicial office or to be paid a salary after removal from office, the Judge will be eligible for consideration by a judicial nominating commission for open positions and will be eligible to apply for the Senior Judge program.

(d) Effect of Pleas. A plea of guilty or *nolo contendere* to such a charge, including a plea involving a deferred judgment or deferred sentence, shall be equivalent to a final conviction for the purpose of this Rule.

PART E. SUPREME COURT ACTION

Rule 37. Recommendation and Notice

Upon consideration of the report of the special masters, the Commission shall file the record of proceedings and recommend sanctions or a private disposition to the Supreme Court.

(a) Filing the Record of Proceedings. The executive director shall file the record of the proceedings, as defined under Rule 33, with the clerk of the Supreme Court, and the clerk shall docket the record under the caption "In re [name and title of judge].

(b) Recommendation for Sanctions. The Commission shall file a recommendation for sanctions under Rule 36 with the Supreme Court. The executive director shall promptly serve a copy of the recommendation and notice of the date of its filing on the Judge (or the Judge's counsel) and on special counsel. The Commission's recommendation and the record of proceedings shall become public upon filing with the Court and the clerk shall docket the recommendation for the Supreme Court's expedited consideration. The notice of filing shall specify the period during which a party may file exceptions to the recommendation, as provided in Rule 38. The executive director shall file proof of service of the recommendation and the notice with the clerk.

(c) Private Disposition. The Commission may recommend a private disposition under Rule 35, which may include dismissal. It shall notify the Judge (or the Judge's counsel) and the Supreme Court of its recommendation. The record of proceedings shall be sealed until the Supreme Court determines whether to approve the disposition. If the Supreme Court approves the disposition, the record shall remain sealed and the disposition shall remain confidential, except for the case number and caption. If the Supreme Court does not approve the disposition, the case shall be remanded to the Commission for recommendation of appropriate sanctions and the record shall remain sealed until such a recommendation is filed.

(d) Stipulated Resolution. The Commission and the Judge may stipulate to a resolution of formal proceedings, subject to approval by the Supreme Court.

Rule 38. Exceptions

Exceptions to the recommendation shall be filed by the Judge, the Judge's counsel, or special counsel with the clerk of the Supreme Court and served on each other party to the proceedings within 21 days after service of the notice required by Rule 37. Exceptions shall be supported by an opening brief based on the record of the proceedings. A party opposing the exceptions shall have 21 days after the filing of the opening brief within which to file an answer brief, a copy of which shall be served all parties. A party shall have 14 days after the filing of the answer brief within which to file a reply brief, a copy of which shall be served on all parties. If no exceptions are filed, the matter will stand submitted upon the special masters' recommendation and the record. In other respects, the filing and consideration of exceptions to the special masters' recommendation shall be governed by the Colorado Appellate Rules, unless the Supreme Court determines that the application of a particular rule would be impracticable, inappropriate, or inconsistent in disciplinary proceedings.

Rule 39. Additional Findings

If the Supreme Court desires an expansion of the record or additional findings as to certain issues or the entire matter, it may remand the proceedings to the Commission with

appropriate directions and continue the proceedings pending receipt of the additional information. The Commission shall refer the remand to the special masters for additional findings and forward the additional findings to the Supreme Court. The Supreme Court may order oral argument, in its discretion.

Rule 40. Decision

The Supreme Court shall consider the evidence and the law, including the record of the proceedings and additions thereto; the special masters' report; the Commission's recommendation; and any exceptions filed under Rule 38. The Supreme Court shall issue a written decision, in which it may dismiss the complaint; adopt or reject the recommendation of the Commission; adopt the recommendation of the Commission with modifications; or remand the proceedings to the Commission for further action. The decision of the Supreme Court, including such sanctions as may be ordered, shall be final and shall be published. A stipulated resolution of formal proceedings shall be published and the record of proceedings shall be public, unless the Court finds good cause for the resolution to remain confidential and the record of proceedings to be sealed.

ANNOTATION

Standard of review. Factual findings of the commission on judicial discipline must be upheld unless, after considering record as a whole, court concludes that they are clearly erroneous or unsupported by substantial evidence. In re Jones, 728 P.2d 311 (Colo. 1986).

However, the court is not bound by the commission's conclusions of law. In re Jones, 728 P.2d 311 (Colo. 1986).

INDEX TO
COLORADO RULES OF JUDICIAL DISCIPLINE

APPENDIX TO CHAPTER 24

Colorado Code of Judicial Conduct

Repealed and Readopted by the

SUPREME COURT OF COLORADO

May 27, 2010,

Effective July 1, 2010

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APPENDIX TO CHAPTER 24

COLORADO CODE OF JUDICIAL CONDUCT

Editor's note: All ethics opinions and some annotations within the Colorado Code of Judicial Conduct were written by the Colorado Supreme Court.

Preamble

[1] An independent, fair and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law. Inherent in all the Rules contained in this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system.

[2] Judges should maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives. They should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence.

[3] The Colorado Code of Judicial Conduct establishes standards for the ethical conduct of judges and judicial candidates. It is not intended as an exhaustive guide for the conduct of judges and judicial candidates, who are governed in their judicial and personal conduct by general ethical standards as well as by the Code. The Code is intended, however, to provide guidance and assist judges in maintaining the highest standards of judicial and personal conduct, and to provide a basis for regulating their conduct through disciplinary agencies.

Scope

[1] The Colorado Code of Judicial Conduct consists of four Canons, numbered Rules under each Canon, and Comments that generally follow and explain each Rule. Scope and Terminology sections provide additional guidance in interpreting and applying the Code. An Application section establishes when the various Rules apply to a judge or judicial candidate.

[2] The Canons state overarching principles of judicial ethics that all judges must observe. Although a judge may be disciplined only for violating a Rule, the Canons provide important guidance in interpreting the Rules. Where a Rule contains a permissive term, such as "may" or "should," the conduct being addressed is committed to the personal and professional discretion of the judge or candidate in question, and no disciplinary action should be taken for action or inaction within the bounds of such discretion.

[3] The Comments that accompany the Rules serve two functions. First, they provide guidance regarding the purpose, meaning, and proper application of the Rules. They contain explanatory material and, in some instances, provide examples of permitted or prohibited conduct. Comments neither add to nor subtract from the binding obligations set forth in the Rules. Therefore, when a Comment contains the term "must," it does not mean that the Comment itself is binding or enforceable; it signifies that the Rule in question, properly understood, is obligatory as to the conduct at issue.

[4] Second, the Comments identify aspirational goals for judges. To implement fully the principles of this Code as articulated in the Canons, judges should strive to exceed the standards of conduct established by the Rules, holding themselves to the highest ethical standards and seeking to achieve those aspirational goals, thereby enhancing the dignity of

the judicial office.

[5] The Rules of the Colorado Code of Judicial Conduct are rules of reason that should be applied consistent with constitutional requirements, statutes, other court rules, and decisional law, and with due regard for all relevant circumstances. The Rules should not be interpreted to impinge upon the essential independence of judges in making judicial decisions.

[6] Although the black letter of the Rules is binding and enforceable, it is not contemplated that every transgression will result in the imposition of discipline. Whether discipline should be imposed should be determined through a reasonable and reasoned application of the Rules, and should depend upon factors such as the seriousness of the transgression, the facts and circumstances that existed at the time of the transgression, the extent of any pattern of improper activity, whether there have been previous violations, and the effect of the improper activity upon the judicial system or others.

[7] The Code is not designed or intended as a basis for civil or criminal liability. Neither is it intended to be the basis for litigants to seek collateral remedies against each other.

ANNOTATION

By expressing approval of the canons of ethics, the supreme court did not enact them into law. In re Petition of Colo. Bar Ass'n, 137 Colo. 357, 325 P.2d 932 (1958).

Nevertheless, they are recognized as principles of exemplary conduct. Although the canons employing language of wide coverage cannot be given the effect of law, they nevertheless are recognized generally as a system of principles of exemplary conduct and good character. In re Petition of Colo. Bar Ass'n, 137 Colo. 357, 325 P.2d 932 (1958).

Neither the supreme court nor the grievance committee has the power or authority to institute or conduct disciplinary proceedings of any kind involving the conduct of a duly elected judge, he being responsible solely to the people, the constitution fixing the remedy at impeachment. In re Petition of Colo. Bar Ass'n, 137 Colo. 357, 325 P.2d 932 (1958).

Terminology

The first time any term listed below is used in a Rule in its defined sense, it is followed by an asterisk (*).

"Appropriate authority" means the authority having responsibility for initiation of disciplinary process in connection with the violation to be reported. In Colorado, the Commission on Judicial Discipline is the authority responsible for investigating judicial misconduct and disciplining judges, except with respect to Denver County court and municipal judges, over whom it has no jurisdiction pursuant to Colo. Const. Article VI § 26; § 13-10-105, C.R.S.; C.J.R.D. 4(a). See Rules 1.1, 2.14 and 2.15.

"Contribution" means both financial and in-kind contributions, such as goods, professional or volunteer services, advertising, and other types of assistance which, if obtained by the recipient otherwise, would require a financial expenditure. See Rule 3.7.

"De minimis," in the context of interests pertaining to disqualification of a judge, means an insignificant interest that could not raise a reasonable question regarding the judge's impartiality. See Rule 2.11.

"Domestic partner" means a person with whom another person maintains household and an intimate relationship, other than a person to whom he or she is legally married. See Rules 2.11, 3.13, and 3.14.

"Economic interest" means ownership of more than a one percent legal or equitable interest in a party, or a legal or equitable interest in a party of a fair market value exceeding $5,000, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(1) Ownership in a mutual or common investment fund that holds securities, or of securities held in a managed fund, is not an "economic interest" in such securities unless the judge participates in the management of the fund;

(2) securities held by an educational, religious, charitable, fraternal, or civic organization in which the judge or the judge's spouse, domestic partner, parent, or child serves as

a director, an officer, an advisor, or other participant is not an "economic interest" in securities held by the organization;

(3) the proprietary interest of a policy holder in a mutual insurance company, of a depositer in a financial institution, or deposits or proprietary interests the judge may maintain as a member of a mutual savings association or credit union, or a similar proprietary interest is an "economic interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest; and

(4) ownership of government securities is an "economic interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

See Rules 1.3 and 2.11.

"Fiduciary" includes relationships such as executor, administrator, trustee, or guardian. See Rules 2.11, 3.2, and 3.8.

"Impartial," "impartiality," and **"impartially"** mean absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge. See Canons 1, 2, and 4, and Rules 1.2, 2.2, 2.10, 2.11, 2.13, 3.1, 3.12, 3.13, 4.1, and 4.2.

"Impending matter" is a matter that is imminent or expected to occur in the near future. See Rules 2.9, 2.10, 3.13, and 4.1.

"Impropriety" includes conduct that violates the law, court rules, or provisions of this Code, and conduct that undermines a judge's independence, integrity, or impartiality. See Canon 1 and Rule 1.2.

"Independence" means a judge's freedom from influence or controls other than those established by law. See Canons 1 and 4, and Rules 1.2, 3.1, 3.12, 3.13, and 4.2.

"Integrity" means probity, fairness, honesty, uprightness, and soundness of character. See Canon 1 and Rule 1.2.

"Judicial candidate" means a sitting judge who is seeking selection for judicial office by appointment or retention. See Rules 2.11, 4.1, 4.2, and 4.3.

"Knowingly," "knowledge," "known," and **"knows"** mean actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances. See Rules 2.11, 2.15, 2.16, 3.6, and 4.1.

"Law" encompasses court rules and orders as well as statutes, constitutional provisions, and decisional law. See Rules 1.1, 2.1, 2.2, 2.6, 2.7, 2.9, 3.1, 3.4, 3.9, 3.12, 3.13, 3.14, 3.15, 4.1, 4.2, and 4.4.

"Member of the judge's family" means a spouse, domestic partner, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship. See Rules 3.7, 3.8, 3.10, and 3.11.

"Member of a judge's family residing in the judge's household" means any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge's family, who resides in the judge's household. See Rules 2.11 and 3.13.

"Nonpublic information" means information that is not available to the public. Nonpublic information may include, but is not limited to, information that is sealed by statute or court order or impounded or communicated in camera, and information offered in grand jury proceedings, presentencing reports, dependency cases, or psychiatric reports. See Rule 3.5.

"Pending matter" is a matter that has commenced. A matter continues to be pending through any appellate process until final disposition. See Rules 2.9, 2.10, 3.13, and 4.1.

"Personally solicit" means a direct request made by a judge or judicial candidate for financial support or in kind services, whether made by letter, telephone, or any other means of communication. See Rule 4.1.

"Political organization" means a political party or other group sponsored by or affiliated with a political party or candidate, the principal purpose of which is to further the election or appointment of candidates for political office. For purposes of this Code, the term does not include a judicial candidate's retention committee created as authorized by Rule 4.3. See Rule 4.1.

"Public election" includes primary and general elections, partisan elections, nonpartisan elections, and retention elections. See Rule 4.2.

"Third degree of relationship" includes the following persons: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, and niece. See Rule 2.11.

Application

The Application section establishes when the various Rules apply to a judge or judicial candidate.

I. Applicability of This Code

(A) The provisions of the Code apply to all full-time judges. Parts II through V of this section identify those provisions that apply to three distinct categories of part-time judges. The three categories of judicial service in other than a full-time capacity are necessarily defined in general terms because of the widely varying forms of judicial service. Canon 4 applies to judicial candidates.

(B) A judge, within the meaning of this Code, is anyone who is authorized to perform judicial functions, including an officer such as a magistrate, referee, or member of the administrative law judiciary.

COMMENT

[1] The Rules in this Code have been formulated to address the ethical obligations of any person who serves a judicial function, and are premised upon the supposition that a uniform system of ethical principles should apply to all those authorized to perform judicial functions.

[2] The determination of which category and, accordingly, which specific Rules apply to an individual judicial officer, depends upon the facts of the particular judicial service.

[3] This code does not apply to a person appointed by the court to serve as a master in a particular case. This code does not apply to municipal judges except to the extent it is made applicable by statute, municipal charter or ordinance. However, reference to the code by all judicial officers, including municipal judges, is recommended to provide guidance concerning the proper conduct for judges.

II. Senior and Retired Judges

Senior judges, while under contract pursuant to the senior judge program, and retired judges, while recalled and acting temporarily as a judge, are not required to comply:

(A) with Rule 3.9 (Service as Arbitrator or Mediator); or

(B) with Rule 3.8 (Appointments to Fiduciary Positions).

III. Part-Time Judges

A judge who serves on a part-time basis

(A) is not required to comply:

(1) with Rules 3.8 (Appointments to Fiduciary Positions), 3.9 (Service as Arbitrator or Mediator), 3.10 (Practice of Law), 3.11 (A) and (B) (Financial, Business, or Remunerative Activities); and

(B) shall not practice law in the court on which the judge serves or in any comparable level court in the same judicial district on which the judge serves or in any court subject to the appellate jurisdiction of the court on which the judge serves, and shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto;

(C) shall not practice law with respect to any controversies which will or appear likely to come before the court on which the judge serves or any court of the same or comparable jurisdiction within the same judicial district on which the judge serves.

COMMENT

[1] This Canon limits a part-time judge from practicing law in any comparable level court in the same judicial district as the judge serves. However, this prohibition shall not ap-

ply to any temporary assignment of a part-time judge to a comparable level court outside the judicial district the judge serves. In addition, this prohibition shall not apply to a one-time assignment of a part-time judge to a court of higher jurisdiction (such as a one-time assignment under order in a district court case) either within, or outside of, the judicial district in which the judge serves. A part-time judge serving on temporary assignment is not thereby precluded from practicing law in the court to which that judge may be temporarily assigned. During such period of temporary assignment, however, the judge shall not actively participate as counsel in any case pending before the court to which the judge is temporarily assigned.

[2] A part-time judge who practices law must avoid undertaking or continuing any relationship which precludes the judge from maintaining the integrity of the bench which he or she serves and at the same time providing the undivided loyalty to clients which the exercise of professional judgment on behalf of a client demands. Being "of counsel" is deemed to be the practice of law, whereas acting as a mediator or arbitrator is not deemed to be the practice of law. Necessarily, the professional responsibilities of a part-time judge who practices law limit the practice of law by the judge's partners and associates.

ETHICS OPINIONS

A part-time county court judge with authority by chief judge order to preside over cases in the district court may not appear as a lawyer in the district court in the judicial district. In this case, the part-time judge had continuing authority to hear district court criminal cases, but never exercised his authority. The opinion precludes the judge from appearing in district court civil cases in the same judicial district. CJEAB Op. 07-06.

IV. Appointed Judges

An Appointed Judge who serves pursuant to C.R.C.P. 122 and section 13-3-111, C.R.S., for the period of the appointment, and in his or her capacity as Appointed Judge,

(A) is not required to comply with the following canons:

(1) 2.10 (A) (Judicial Statements on Pending and Impending Cases), except as to the case where he or she is appointed, and should require similar abstention from comment on the part of those personnel who are subject to the Appointed Judge's direction and control;

(2) 3.2 (Appearances Before Governmental Bodies and Consultation with Governmental Officials); 3.3 (Testifying as a Character Witness); 3.4 (Appointments to Governmental Positions); 3.7 (Participation in Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities); 3.8 (Appointments to Fiduciary Positions); 3.9 (Service as Arbitrator of Mediator); 3.10 (Practice of Law); 3.11 (Financial, Business, or Remunerative Activities); 3.12 (Compensation for Extrajudicial Activities); 3.13 (C) (Reporting of Certain Gifts, Loans, Bequests, Benefits, or Other things of Value); 3.14 (Reimbursement of Expenses and Waivers of Fees or Charges); and 3.15 (Reporting Requirements);

(3) 4.1 (A)(5, 12, 13) (Political and Campaign Activities of Judges in General); 4.2 (Political and Campaign Activities of a Judge Standing for Retention); and 4.4 (Campaign Committees).

(B) should refrain as follows:

(1) from financial and business dealings that relate directly to any issues in the case to which the Appointed Judge is appointed;

(2) from accepting any gift, bequest, favor or loan from any party to or the lawyer appearing in the case to which the appointed judge is appointed, and should require a spouse, domestic partner or family member residing in the judge's household to refrain from accepting gifts, bequests, favors, or loans in the same manner as the judge.

V. Time for Compliance

A person to whom this Code becomes applicable shall comply immediately with its provisions, except that those judges to whom Rules 3.8 (Appointments to Fiduciary Positions) and 3.11 (Financial, Business, or Remunerative Activities) apply shall comply with those Rules as soon as reasonably possible, but in no event later than one year after the Code becomes applicable to the judge.

COMMENT

[1] If serving as a fiduciary when selected as judge, a new judge may, notwithstanding the prohibitions in Rule 3.8, continue to serve as fiduciary, but only for that period of time necessary to avoid serious adverse consequences to the beneficiaries of the fiduciary relationship and in no event longer than one year. Similarly, if engaged at the time of judicial selection in a business activity, a new judge may, notwithstanding the prohibitions in Rule 3.11, continue in that activity for a reasonable period but in no event longer than one year.

CANON 1

A JUDGE SHALL UPHOLD AND PROMOTE THE INDEPENDENCE, INTEGRITY, AND IMPARTIALITY OF THE JUDICIARY, AND SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY.

Rule 1.1: Compliance with the Law

(A) A judge shall comply with the law,* including the Code of Judicial Conduct.

(B) Conduct by a judge that violates a criminal law may, unless the violation is minor, constitute a violation of the requirement that a judge must comply with the law.

(C) Every judge subject to the Code of Judicial Conduct, upon being convicted of a crime, except misdemeanor traffic offenses or traffic ordinance violations not including the use of alcohol or drugs, shall notify the appropriate authority* in writing of such conviction within ten days after the date of the conviction. In addition, the clerk of any court in this state in which the conviction was entered shall transmit to the appropriate authority within ten days after the date of the conviction a certificate thereof. This obligation to self-report convictions is a parallel but independent obligation of judges admitted to the Colorado bar to report the same conduct to the Office of Attorney Regulation pursuant to C.R.C.P. 251.20.

ANNOTATION

Violations by a judge of federal or state criminal law may constitute a violation of the requirement that a judge must comply with the law, unless the violation is trivial. Matter of Vandelinde, 366 S.E.2d 631, 633 (W. Va. 1988) (involving a magistrate judge's misconduct in the form of excess election contributions).

Violation of law, however trivial, harmless or isolated, is not necessarily a violation of the judicial canons. However, conduct that is grave, intentional and threatening, such as criminal mischief in third degree, falls on censurable side of line. In re Conduct of Roth, 645 P.2d 1064 (Or. 1982) (disciplining a judge for third degree criminal mischief).

Some violations of law (such as minor traffic infractions) may be of such a nature as to not come within the intended meaning of [this Rule]. In re Sawyer, 594 P.2d 805, 811 (Or. 1979) (concluding that a judge who is regularly-employed as a part-time teacher for pay by a state-funded college violates a state constitutional prohibition against officials of one state department exercising functions of another).

Rule 1.2: Promoting Confidence in the Judiciary

A judge shall act at all times in a manner that promotes public confidence in the independence,* integrity,* and impartiality* of the judiciary, and shall avoid impropriety and the appearance of impropriety.

COMMENT

[1] Public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety. This principle applies to both the professional and personal conduct of a judge.

[2] A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens, and must accept the restrictions imposed by the Code.

[3] Conduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public con-

fidence in the judiciary. Because it is not practicable to list all such conduct, the Rule is necessarily cast in general terms.

[4] Judges should participate in activities that promote ethical conduct among judges and lawyers, support professionalism within the judiciary and the legal profession, and promote access to justice for all.

[5] Impropriety occurs when the conduct compromises the ability of the judge to carry out judicial responsibilities with integrity, impartiality and competence. Actual improprieties include violations of law, court rules or provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge.

[6] A judge should initiate and participate in community outreach activities for the purpose of promoting public understanding of and confidence in the administration of justice. In conducting such activities, the judge must act in a manner consistent with this Code.

ANNOTATION

Law reviews. For article, "From the Cloister to the Street: Judicial Ethics and Public Expression", see 64 Den. U. L. Rev. 549 (1988).

One meaning of impartiality in the judicial context is lack of bias for or against any party to a proceeding. Impartiality may also involve open-mindedness, not in the sense that judges should have no preconceptions on legal issues, but rather that judges should be willing to consider views that oppose those preconceptions and remain open to persuasion when those issues arise in a pending case. Republican Party of Minn. v. White, 536 U.S. 765, 775, 779 (2002).

Role of judiciary is one of impartiality. The role of the judiciary, if its integrity is to be maintained, is one of impartiality. People v. Martinez, 185 Colo. 187, 523 P.2d 120, aff'd, 186 Colo. 225, 526 P.2d 1325 (1974).

Courts must meticulously avoid any appearance of partiality, not merely to secure the confidence of the litigants immediately involved, but to retain public respect and secure willing and ready obedience to their judgments. Wood Bros. Homes v. City of Fort Collins, 670 P.2d 9 (Colo. App. 1983).

The duty to be impartial cannot be fulfilled where, by his active role in the presentation of the prosecution's case, a trial judge calls witnesses, presents evidence, and cross-examines defense witnesses, because these are the acts of an advocate and not a judge. People v. Martinez, 185 Colo. 187, 523 P.2d 120, aff'd, 186 Colo. 225, 526 P.2d 1325 (1974).

Such conduct constitutes reversible error. The assumption by the court of the role of advocate for the prosecution is inconsistent with the proper function of the judiciary and constitutes reversible error. People v. Martinez, 185 Colo. 187, 523 P.2d 120, aff'd, 186 Colo. 225, 526 P.2d 1325 (1974).

Judge's advice to prosecution not error unless defendant denied fair trial. While it may be ill-advised for a trial judge to point out a possible deficiency in the prosecution's case, such conduct is not reversible error where it does not so depart from the required standard of impartiality as to deny the defendant a fair trial. People v. Adler, 629 P.2d 569 (Colo. 1981).

Judge is ill-advised to be expert witness and judge on same issue in two proceedings. The actions of a retired judge in becoming an expert witness in a case concerning the same issue — size of attorney fees in an estate proceeding — as in another dispute raises the specter of an appearance of impropriety. The judge is ill-advised to place himself in this position and then preside at the trial of the latter case. However, when the judge does not actually testify in the former case, and the record contains no indication that the judge acted with prejudice, the judge does not have such an interest as to require disqualification. Colo. State Bd. of Agriculture v. First Nat'l Bank, 671 P.2d 1331 (Colo. Ct. App. 1983).

Actual bias arises where a prejudice in all probability prevents a judge from dealing fairly with a party. People v. Julien, 47 P.3d 1194 (Colo. 2002).

Disqualification requires more than mere relationship. Determining factors are closeness of the relationship and its bearing on the underlying case. Schupper v. People, 157 P.3d 516 (Colo. 2007).

Existence of a marriage relationship between a judge and a deputy district attorney in the same county is sufficient to establish grounds for disqualification even though no other facts call into question the judge's impartiality. Smith v. Beckman, 683 P.2d 1214 (Colo. App. 1984).

While a dissent may be written in a succeeding case or two, the code of judicial conduct should bury the idea of a judge dissenting on the same issue ad infinitum. People v. Steed, 189 Colo. 212, 540 P.2d 323 (1975).

Public reprimand ordered based upon appearance of impropriety arising from judge's conduct hiring the judicial district's coroner. Appointee did not apply during application period, selection was made on basis of criteria not stated in official announcement, including

known friendship with the Chief Justice, and on terms significantly different from those advertised to general public. In re Johnstone, 2 P.3d 1226 (Alaska 2000).

ETHICS OPINIONS

A judge whose spouse is running for city council, which exercises supervisory responsibility over the chief of police and city manager, would not be required to disqualify himself in all cases charged by the police department. The existence of this relationship would not, in the usual case, cause the judge's impartiality to be questioned. Colo. J.E.A.B. Op. 07-09.

A part-time county judge who maintains a part-time civil practice may not exercise discretionary authority to sit as a district judge in criminal matters and also continue to appear in the same district court as a lawyer on civil matters. To allow a judge to preside over cases while practicing in the same court would erode confidence in the impartiality of the judiciary. Colo. J.E.A.B. Op. 07-06.

A judge may not advertise her ability to perform wedding ceremonies by sending fliers to wedding planners and may not otherwise solicit business as a wedding officiant. Colo. J.E.A.B. Op. 07-05.

A judge is not required to automatically disqualify himself when the parent of his estranged godchild or the parent's colleagues appear before the judge. Colo. J.E.A.B. Op. 07-04.

A judge need not automatically disqualify herself where an attorney who represented the judge's adult child, the costs of which were paid by the judge but reimbursed by the adult child, appears before the judge. Colo. J.E.A.B. Op. 07-01.

An active judge planning to retire in the near future should refrain from setting or hearing private mediations until the judge actually retires. Colo. J.E.A.B. Op. 06-09.

A judge may serve on the board of an organization devoted to seeking funds to assist defendants in obtaining court-ordered substance abuse treatment, and the judge may make recommendations to a private foundation that it should fund programs to the same end, but it would be inappropriate for the judge to assist in determining which particular defendants receive the scholarship funds. Colo. J.E.A.B. Op. 06-06.

A judge should disqualify himself sua sponte if an attorney or firm currently representing the judge, or the judge's adversary in a current matter, appears before the judge. A judge should also disqualify himself sua sponte for a reasonable period, typically for one year, after the representation has ended, when the judge's attorney, other members of that firm, the judge's adversary's attorneys, or members of that attorney's firm appear before the judge in order to avoid an appearance of impropriety. After the expiration of a reasonable period of time, disqualification is not required but may be appropriate under the circumstances. Disclosure should continue until the passage of time or circumstances make the prior representation irrelevant. Colo. J.E.A.B. Op. 06-05.

To avoid an appearance of impropriety, when a judge's spouse contributes to a political candidate, the contribution should be made in the spouse's name alone and from the spouse's separate bank account, with no reference to the judge or the judge's position. Colo. J.E.A.B. Op. 06-04.

A judge may recommend a lawyer only in circumstances where the judge has a sufficiently close relationship with the requesting party that he would automatically recuse himself from the case due to the closeness of the relationship regardless of whether the judge had been asked to make the recommendation. Colo. J.E.A.B. Op. 06-01.

Service on the judge's homeowners' association board of directors would be inappropriate where the association is large and substantial, maintains sizable cash reserves and operates under a large budget, and engages in outside transactions likely to result in litigation. Colo. J.E.A.B. Op. 05-3.

A judge should disqualify himself from cases in which a partner or associate in his brother-in-law's firm acts as counsel. Colo. J.E.A.B. Op. 05-02.

A judge need not recuse in every case involving a law enforcement agency for which the judge's spouse occasionally performs arson investigations. Colo. J.E.A.B. Op. 05-01.

A mentee judge may discuss pending or impending matters with his or her mentor judge but the mentee judge alone is responsible for making decisions in the matter. Colo. J.E.A.B. Op. 04-02.

A judge's report of an attorney's misconduct in a case pending before the judge requires the judge to disqualify himself or herself. Colo. J.E.A.B. Op. 04-01.

A judge who, immediately following a hearing, had lunch with one of the attorneys in the proceeding, violated Canon 2A by creating an appearance of impropriety. The closeness in time between the hearing and the social lunch could suggest to a reasonable observer that the attorney had influence over the judge based upon their social relationship. Alaska Formal Op. 021.

A judge engages in improper political activity by moderating a partisan political debate. Despite all candidates being represented and no

sponsorship by any political party, political debates by their nature engage the moderator in political discourse inappropriate to judicial office. Such a debate improperly lends the prestige of judicial office to the event in a state with a non-elected judiciary. Alaska Formal Op. 023.

While a judge may "speak, write, lecture, and teach on both legal and non-legal subjects" and may accept compensation so long as the compensation does not exceed a reasonable amount nor exceed that which would be received by a person who is not a judge, it is not permissible for a judge to write a regular column in a for-profit publication in which the placement of the article, not within the judge's control, could be construed as endorsing other articles or advertisements that might demean the office. Md. Ethics Op. 2001-01.

A judge should not participate on the advisory board of an arbitration association where it is likely that the judge's opinions on matters before the board could be construed as the giving of legal advice. Md. Ethics Op. 1995-06.

A judge's introduction of keynote speaker at event that is primarily commemorative but which also is used to raise funds would create appearance of impropriety. Neb. Ad. Op. 07-01.

No appearance of impropriety for judge who serves on board of directors of charitable organization to allow his name to appear on the organization's stationery provided judge's position is not identified and his name not selectively emphasized. U.S. Conf. Ad. Op. No. 35.

No appearance of impropriety for judge to participate in a seminar in another country designed to improve relations with that country where judge's expenses are paid by organization unlikely to come before Utah courts. Utah Ad. Op. 88-10.

No appearance of impropriety for judge to teach a course involving only one component of the bar. Utah Ad. Op. 99-6.

Rule 1.3: Avoiding Abuse of the Prestige of Judicial Office

A judge shall not abuse the prestige of judicial office to advance the personal or economic interests* of the judge or others, or allow others to do so.

COMMENT

[1] It is improper for a judge to use or attempt to use his or her position to gain personal advantage or deferential treatment of any kind. For example, it would be improper for a judge to allude to his or her judicial status to gain favorable treatment in encounters with traffic officials. Similarly, a judge must not use judicial letterhead to gain an advantage in conducting his or her personal business.

[2] A judge may provide a reference or recommendation for an individual based upon the judge's personal knowledge. The judge may use official letterhead if the judge indicates that the reference is personal and if there is no likelihood that the use of the letterhead would reasonably be perceived as an attempt to exert pressure by reason of the judicial office.

[3] Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees, and by providing information to such entities concerning the professional qualifications of a person being considered for judicial office.

[4] Special considerations arise when judges write or contribute to publications of for-profit entities, whether related or unrelated to the law. A judge should not permit anyone associated with the publication of such materials to exploit the judge's office in a manner that violates this Rule or other applicable law. In contracts for publication of a judge's writing, the judge should retain sufficient control over the advertising to avoid such exploitation.

ETHICS OPINIONS

Judicial officer may not advertise his or her availability to perform wedding ceremonies by sending fliers to wedding planners and may not otherwise solicit business as a wedding officiant. Colo. J.E.A.B. Op. 07-05.

Judge may not testify as a character witness on a voluntary basis, but he or she is obligated to comply with a subpoena if one is issued. Judge should consider attempting to discourage, to the extent reasonable, a party or lawyer from subpoenaing the judge as a character witness, unless the interests of justice require the judge's testimony. Colo. J.E.A.B. Op. 06-03.

Judge's spouse is not subject to the Code of Judicial Conduct and thus may freely pursue elected office. However, the judge should refrain from attending all political events in support of the spouse's candidacy and must avoid activities that could be perceived as constituting an endorsement of the candidate or using the prestige of the judicial office to benefit the spouse. Colo. J.E.A.B. Op. 05-05.

A judge should take appropriate steps to ensure that neither the content of the foreword to a book a judge was asked to write nor the advertising exploit the judicial office or advance the

private interests of others. Utah Ad. Op. 90-8.

Advising a judge to retain control over the advertising of his publications, including a veto right, to ensure that the judicial position is not exploited nor the private interests of others advanced by use of the prestige of the judge's office. U.S. Conf. Ad. Op. No. 55.

A judge should not receive compensation for publication on how to practice before judge's court; for-profit publication on scholarly and legal topics permissible. U.S. Conf. Ad. Op. No. 87.

CANON 2

A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY, COMPETENTLY, AND DILIGENTLY.

Rule 2.1: Giving Precedence to the Duties of Judicial Office

The duties of judicial office, as prescribed by law,* shall take precedence over all of a judge's personal and extrajudicial activities.

COMMENT

[1] To ensure that judges are available to fulfill their judicial duties, judges must conduct their personal and extrajudicial activities to minimize the risk of conflicts that would result in frequent disqualification. See Canon 3.

[2] Although it is not a duty of judicial office unless prescribed by law, judges are encouraged to participate in activities that promote public understanding of and confidence in the justice system.

ETHICS OPINIONS

Whether a judge may sit on the board of directors of his or her homeowner's association is to be determined on a case-by-case basis. Where the association is large and substantial, maintains significant cash reserves, operates under a sizeable budget and engages in substantial business-type contacts with the outside enterprises of the kind that might involve the association in litigation, it would be inappropriate for a judge to serve on the association's board. Colo. J.E.A.B. Op. 05-03.

Rule 2.2: Impartiality and Fairness

A judge shall uphold and apply the law,* and shall perform all duties of judicial office fairly and impartially.*

COMMENT

[1] To ensure impartiality and fairness to all parties, a judge must be objective and open-minded.

[2] Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.

[3] When applying and interpreting the law, a judge sometimes may make good-faith errors of fact or law. Errors of this kind do not violate this Rule.

[4] It is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.

Rule 2.3: Bias, Prejudice, and Harassment

(A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.

(B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's

direction and control to do so.

(C) A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.

(D) The restrictions of paragraphs (B) and (C) do not preclude judges or lawyers from making legitimate reference to the listed factors, or similar factors, when they are relevant to an issue in a proceeding.

COMMENT

[1] A judge who manifests bias or prejudice in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute.

[2] Examples of manifestations of bias or prejudice include but are not limited to epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics. Even facial expressions and body language can convey to parties and lawyers in the proceeding, jurors, the media, and others an appearance of bias or prejudice. A judge must avoid conduct that may reasonably be perceived as prejudiced or biased.

[3] Harassment, as referred to in paragraphs (B) and (C), is verbal or physical conduct that denigrates or shows hostility or aversion toward a person on bases such as race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation.

[4] Sexual harassment includes but is not limited to sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that is unwelcome.

Rule 2.4: External Influences on Judicial Conduct

(A) A judge shall not be swayed by public clamor or fear of criticism.

(B) A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment.

(C) A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge.

COMMENT

[1] An independent judiciary requires that judges decide cases according to the law and facts, without regard to whether particular laws or litigants are popular or unpopular with the public, the media, government officials, or the judge's friends or family. Confidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influences.

ETHICS OPINIONS

The judge may, at her discretion, meet with a special interest group, but the judge is not required to do so. In assessing whether to grant a request for a meeting, the judge should require the special interest group to submit a written request specifying the purpose of the meeting. If the purpose is not improper and the judge wishes to grant the request, she should send a written response laying out ground rules for the meeting. At the meeting itself, the judge should ensure that the group is not given any impression that it is in a special position to influence the judge, and the judge should not engage in any ex parte communications with the group regarding any pending or impending matters. Colo. J.E.A.B. Op. 08-01.

While a mentee judge may consult with his or her mentor judge or any other judge on "pending or impending matters," the extent of those consultations should be limited to aiding the mentee judge in reaching a final decision on that matter. The consultation should not in any way actually influence, or appear to influence, the decision the mentee judge is responsible for making in a pending matter. The final adjudicative responsibility for any decision resides solely with the mentee-judge. Colo. J.E.A.B. Op. 04-02.

Rule 2.5: Competence, Diligence, and Cooperation

(A) A judge shall perform judicial and administrative duties, competently and diligently.

(B) A judge shall cooperate with other judges and court officials in the administration of court business.

COMMENT

[1] Competence in the performance of judicial duties requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary to perform a judge's responsibilities of judicial office.

[2] A judge should seek the necessary docket time, court staff, expertise, and resources to discharge all adjudicative and administrative responsibilities.

[3] Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to take reasonable measures to ensure that court officials, litigants, and their lawyers cooperate with the judge to that end.

[4] In disposing of matters promptly and efficiently, a judge must demonstrate due regard for the rights of parties to be heard and to have issues resolved without unnecessary cost or delay. A judge should monitor and supervise cases in ways that reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs.

Rule 2.6: Ensuring the Right to Be Heard

(A) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.*

(B) A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement.

COMMENT

[1] The right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed.

[2] The steps that are permissible in ensuring a self-represented litigant's right to be heard according to law include but are not limited to liberally construing pleadings; providing brief information about the proceeding and evidentiary and foundational requirements; modifying the traditional order of taking evidence; attempting to make legal concepts understandable; explaining the basis for a ruling; and making referrals to any resources available to assist the litigant in preparation of the case. Self-represented litigants are still required to comply with the same substantive law and procedural requirements as represented litigants.

[3] The judge plays an important role in overseeing the settlement of disputes, but should be careful that efforts to further settlement do not undermine any party's right to be heard according to law. The judge should keep in mind the effect that the judge's participation in settlement discussions may have, not only on the judge's own views of the case, but also on the perceptions of the lawyers and the parties if the case remains with the judge after settlement efforts are unsuccessful. Among the factors that a judge should consider when deciding upon an appropriate settlement practice for a case are (1) whether the parties have requested or voluntarily consented to a certain level of participation by the judge in settlement discussions, (2) whether the parties and their counsel are relatively sophisticated in legal matters, (3) whether the case will be tried by the judge or a jury, (4) whether the parties participate with their counsel in settlement discussions, (5) whether any parties are unrepresented by counsel, and (6) whether the matter is civil or criminal.

[4] Judges must be mindful of the effect settlement discussions can have, not only on their objectivity and impartiality, but also on the appearance of their objectivity and impartiality. Despite a judge's best efforts, there may be instances when information obtained during settlement discussions could influence a judge's decision making during trial, and, in such instances, the judge should consider whether disqualification may be appropriate. See Rule 2.11(A)(1).

Rule 2.7: Responsibility to Decide

A judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law.*

COMMENT

[1] Judges must be available to decide the matters that come before the courts. Although there are times when disqualification is necessary to protect the rights of litigants and preserve public confidence in the independence, integrity, and impartiality of the judiciary, judges must be available to decide matters that come before the courts. Unwarranted disqualification may bring public disfavor to the court and to the judge personally. The dignity of the court, the judge's respect for fulfillment of judicial duties, and a proper concern for the burdens that may be imposed upon the judge's colleagues require that a judge not use disqualification to avoid cases that present difficult, controversial, or unpopular issues.

ANNOTATION

Unnecessary and unwarranted delay by district court judge in issuing a decision violates this Rule. In Re Jones, 728 P.2d 311 (Colo. 1986).

Rule 2.8: Decorum, Demeanor, and Communication with Jurors

(A) A judge shall require order and decorum in proceedings before the court.

(B) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, court staff, court officials, and others subject to the judge's direction and control.

(C) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding.

COMMENT

[1] The duty to hear all proceedings with patience and courtesy is not inconsistent with the duty imposed in Rule 2.5 to dispose promptly of the business of the court. Judges can be efficient and businesslike while being patient and deliberate.

[2] Commending or criticizing jurors for their verdict may imply a judicial expectation in future cases and may impair a juror's ability to be fair and impartial in a subsequent case.

[3] A judge who is not otherwise prohibited by law from doing so may meet with jurors who choose to remain after trial but should be careful not to discuss the merits of the case.

ANNOTATION

Judge who met with jurors after the trial to thank them for their service erred in using jurors' post-verdict statements to impeach the verdict. In re Hall v. Levine, 104 P. 3d 222 (Colo. 2005).

Rule 2.9: Ex Parte Communications

(A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending* or impending matter,* except as follows:

(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:

(a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and

(b) the judge makes provision promptly to notify all other parties of the substance of

the ex parte communication, and gives the parties an opportunity to respond.

(2) A judge may obtain the written advice of a disinterested expert on the law applicable to a proceeding before the judge, if the judge gives advance notice to the parties of the person to be consulted and the subject matter of the advice to be solicited, and affords the parties a reasonable opportunity to object and respond to the notice and to the advice received.

(3) A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.

(4) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge.

(5) A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law* or by consent of the parties to do so.

(B) If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.

(C) A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.

(D) A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this Rule is not violated by court staff, court officials, and others subject to the judge's direction and control.

COMMENT

[1] To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.

[2] Whenever the presence of a party or notice to a party is required by this Rule, it is the party's lawyer, or if the party is unrepresented, the party, who is to be present or to whom notice is to be given.

[3] The proscription against communications concerning a proceeding includes communications with lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted by this Rule.

[4] A judge may initiate, permit, or consider ex parte communications expressly authorized by law or by consent of the parties, including when serving on therapeutic or problem-solving courts such as many mental health courts, drug courts, and truancy courts. In this capacity, judges may assume a more interactive role with the parties, treatment providers, probation officers, social workers, and others.

[5] A judge may consult with other judges on pending matters, but must avoid ex parte discussions of a case with judges who have previously been disqualified from hearing the matter, and with judges who have appellate jurisdiction over the matter.

[6] A judge may consult ethics advisory committees, outside counsel, or legal experts concerning the judge's compliance with this Code. Such consultations are not subject to the restrictions of paragraph (A)(2).

[7] As it applies to paragraph 5(C), the definition of judicially noticed facts is set forth in Rule 201 of the Colorado Rules of Evidence.

ANNOTATION

Law reviews. For article, "Ex Parte Communications with a Tribunal: From Both Sides", see 29 Colo. Law. 55 (April 2000).

The initiation of an ex parte communication by a judge with a party in a dependency hearing regarding the adequacy of her attorney's representation was improper, but judge would not be disqualified where disqualification motion and affidavits failed to allege facts from which it might be inferred that the ex parte communication demonstrated a bias against the party or her attorney. S.S. v. Wakefield, 764 P.2d 70 (Colo. 1988).

Trial court's ex-parte communication with defendant's counsel directing counsel to prepare the form of order was not improper and did not require the attorney fee order to be vacated, where the communication was made after the court had reached its decision based on full briefing of the issues and a telephone hearing, where plaintiff's counsel was given an opportunity to object and did in fact object, and

where there was no evidence of bias on the part of the judge or prejudice to plaintiff as a result of the court's action. Aztec Minerals Corp. v. State, 987 P.2d 895 (Colo. App. 1999).

Applied in People v. Wieghard, 727 P.2d 383 (Colo. App. 1986).

ETHICS OPINIONS

A judge may, at her discretion, meet with a special interest group, but the judge is not required to do so. In assessing whether to grant a request for a meeting, the judge should require the special interest group to submit a written request specifying the purpose of the meeting. If the purpose is not improper and the judge wishes to grant the request, she should send a written response laying out ground rules for the meeting. At the meeting itself, the judge should ensure that the group is not given any impression that it is in a special position to influence the judge, and the judge should not engage in any ex parte communications with the group regarding any pending or impending matters. Colo. J.E.A.B. Op. 08-01.

While a mentee judge may consult with his or her mentor judge or any other judge on "pending or impending matters," the extent of those consultations should be limited to aiding the mentee judge in reaching a final decision on that matter. The consultation should not in any way actually influence, or appear to influence, the decision the mentee judge is responsible for making in a pending matter. The final adjudicative responsibility for any decision resides solely with the mentee-judge. Colo. J.E.A.B. Op. 04-02.

Rule 2.10: Judicial Statements on Pending and Impending Cases

(A) A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending* or impending* in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.

(B) A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial* performance of the adjudicative duties of judicial office.

(C) A judge shall require court staff, court officials, and others subject to the judge's direction and control to refrain from making statements that the judge would be prohibited from making by paragraphs (A) and (B).

(D) Notwithstanding the restrictions in paragraph (A), a judge may make public statements in the course of official duties, may explain court procedures, and may comment on any proceeding in which the judge is a litigant in a personal capacity, subject to Canon 1.

COMMENT

[1] This Rule's restrictions on judicial speech are essential to the maintenance of the independence, integrity, and impartiality of the judiciary.

[2] This Rule does not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity. In cases in which the judge is a litigant in an official capacity, such as a writ of mandamus, the judge must not comment publicly.

ETHICS OPINIONS

While a mentee judge may consult with his or her mentor judge or any other judge on "pending or impending matters," the extent of those consultations should be limited to aiding the mentee judge in reaching a final decision on that matter. The consultation should not in any way actually influence, or appear to influence, the decision the mentee judge is responsible for making in a pending matter. The final adjudicative responsibility for any decision resides solely with the mentee-judge. Colo. J.E.AB. Ad. Op. 2008-01.

Rule 2.11: Disqualification

(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality* might reasonably be questioned, including but not limited to the following

circumstances:

(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge* of facts that are in dispute in the proceeding.

(2) The judge knows* that the judge, the judge's spouse or domestic partner,* or a person within the third degree of relationship* to either of them, or the spouse or domestic partner of such a person is:

(a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;

(b) acting as a lawyer in the proceeding;

(c) a person who has more than a de minimis* interest that could be substantially affected by the proceeding; or

(d) likely to be a material witness in the proceeding.

(3) The judge knows that he or she, individually or as a fiduciary,* or the judge's spouse, domestic partner, parent, child, or other member of the judge's family residing in the judge's household,* has an economic interest* in the subject matter in controversy or in a party to the proceeding.

(4) The judge, while a judge or a judicial candidate,* has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

(5) The judge:

(a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;

(b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy;

(c) was a material witness concerning the matter; or

(d) previously presided as a judge over the matter in another court.

(B) A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse or domestic partner and minor children residing in the judge's household.

(C) A judge subject to disqualification under this Rule, other than for bias or prejudice under paragraph (A)(1), may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

(D) In limited circumstances, the rule of necessity applies and allows judges to hear a case in which all other judges also would have a disqualifying interest or the case could not otherwise be heard.

COMMENT

[1] Under this Rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (5) apply. The term "recusal" is sometimes used interchangeably with the term "disqualification."

[2] A judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed.

[3] The rule of necessity may override the rule of disqualification. The rule of necessity is an exception to the principle that every litigant is entitled to be heard by a judge who is not subject to disqualifications which might reasonably cause the judge's impartiality to be questioned. The rule of necessity has been invoked for trial court and court of appeals judges where disqualifications exist as to all members of the court and there is no other judge available. It has been invoked as to the supreme court when all or a majority of its members have a conflict of interest; the importance of having the court

render a decision overrides the existence of the conflict, which might otherwise leave litigating parties in limbo. Under the rule of necessity, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In matters that require immediate action, the judge must disclose on the record the basis for possible disqualification and make reasonable efforts to transfer the matter to another judge as soon as practicable. Rather than deny a party access to court, judicial disqualification yields to the demands of necessity.

[4] The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not itself disqualify the judge. If, however, the judge's impartiality might reasonably be questioned under paragraph (A), or the relative is known by the judge to have an interest in the law firm that could be substantially affected by the proceeding under paragraph (A)(2)(c), the judge's disqualification is required.

[5] A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.

[6] "Economic interest," as set forth in the Terminology section, means ownership of more than a one percent legal or equitable interest in a party, or a legal or equitable interest in a party of a fair market value exceeding $5,000, or a relationship as a director, advisor, or other active participant in the affairs of a party, except that:

(1) Ownership in a mutual or common investment fund that holds securities, or of securities held in a managed fund, is not an "economic interest" in such securities unless the judge participates in the management of the fund;

(2) securities held by an educational, religious, charitable, fraternal, or civic organization in which the judge or the judge's spouse, domestic partner, parent, or child serves as a director, officer, advisor, or other participant is not an "economic interest" in securities held by the organization;

(3) the proprietary interest of a policy holder in a mutual insurance company, of a depositer in a financial institution or deposits or proprietary interests the judge may maintain as a member of a mutual savings association or credit union, or a similar proprietary interest is an "economic interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest; and

(4) ownership of government securities is an "economic interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

ANNOTATION

Law reviews. For article, "Disqualification of Judges", see 13 Colo. Law. 54 (1984).

Courts must meticulously avoid any appearance of partiality, not merely to secure the confidence of the litigants immediately involved, but to retain public respect and secure willing and ready obedience to their judgments. Wood Bros. Homes v. City of Fort Collins, 670 P.2d 9 (Colo. App. 1983).

Upon reasonable inference of a "bent of mind" that will prevent judge from dealing fairly with party seeking recusal, it is incumbent on trial judge to recuse himself. Wright v. District Court, 731 P.2d 661 (Colo. 1987).

At least an appearance of bias or prejudice existed due to a professional relationship between the trial judge and an expert witness for defendants and the trial court erred in denying a motion for recusal. Hammons v. Birket, 759 P.2d 783 (Colo. App. 1988).

Not all ex parte communications are per se grounds for disqualification under C.R.C.P. 97. The critical test is whether the affidavits in support of the motion to disqualify, along with any other matters of record, establish facts from which it may reasonably be inferred that the judge is prejudiced or biased, or appears to be prejudiced or biased, in favor of or against a party to the litigation. Goebel v. Benton, 830 P.2d 995 (Colo. 1992).

Not every connection between a judge and a participant in a case will require the judge to disqualify himself or herself. It is a judge's duty to sit on a case unless a reasonable person could infer that a judge would be prejudiced against a defendant. People v. Crumb, 203 P.3d 587 (Colo. App., Sept. 18, 2008).

Although judges hearing appeal from trial court's dismissal of antitrust action brought against software manufacturer used the operating system at issue in the lawsuit, raising the potential for a conflict of interest, the rule of necessity required those judges to proceed with the case. Pomerantz v. Microsoft Corp., 50 P.3d 929 (Colo. App. 2002).

Successor judge erred in determining that the same circumstances that led the trial judge to recuse himself or herself from defendant's other cases also existed before the commencement of trial in this case. People v. Schupper, 124 P.3d 856 (Colo. App. 2005), aff'd, 157 P.3d 516 (Colo. 2007).

Appearance of impropriety, not actual prejudice, is sufficient to warrant recusal. Where recusal is sought based upon the rela-

tionship of the judge to another person, it is the closeness of the relationship and its bearing on the underlying case that determines whether disqualification is necessary. People ex rel. A.G., 264 P.3d 615 (Colo. App. 2010) (decided under former canon 3(C)), rev'd on other grounds, 262 P.3d 646 (Colo. 2011).

Trial court judge erred by determining the relationship between his court clerk and the witness did not warrant judge's recusal. Where court clerk's daughter, as caseworker, was material witness in the case, absent waiver, judge abused his discretion by not recusing from the case. People ex rel. A.G., 264 P.3d 615 (Colo. App. 2010) (decided under former canon 3(C)), rev'd on other grounds, 262 P.3d 646 (Colo. 2011).

Applied in People v. Mills, 163 P.3d 1129 (Colo. 2007); Spring Creek Ranchers Ass'n, Inc. v. McNichols, 165 P.2d 244 (Colo. 2007); Schupper v. People, 157 P.3d 516 (Colo. 2007); People v. Julien, 47 P.3d 1194 (Colo. 2002); People v. Harlan, 8 P.3d 448 (Colo. 2000); In re Estate of Elliott, 993 P.2d 474 (Colo. 2000); Office of State Court Adm'r v. Background Info. Services, Inc., 994 P.2d 420 (Colo. 1999); Comiskey v. District Court In and For County of Pueblo, 926 P.2d 539 (Colo. 1996); Wilkerson v. District Court In and For County of El Paso, 925 P.2d 1373 (Colo. 1996); People v. District Court, In and For Eagle County, State of Colo., 898 P.2d 1058 (Colo. 1995); Klinck v. District Court of Eighteenth Judicial District, 876 P.2d 1270 (Colo. 1994); Moody v. Corsentino, 843 P.2d 1355 (Colo. 1993); Goebel v. Benton, 830 P.2d 995 (Colo. 1992); Brewster v. District Court of the Seventh Judicial Dist., 811 P.2d 812 (Colo. 1991); Zoline v. Telluride Lodge Ass'n, 732 P.2d 635 (Colo. 1987); People ex rel. A.E.L., 181 P.3d 186 (Colo. App. 2008); Kane v. County Court Jefferson County, 192 P.3d 443 (Colo. App. 2008); Parsons ex rel. Parsons v. Allstate Ins. Co., 165 P.3d 809 (Colo. App. 2006); In re McSoud, 131 P.3d 685 (Colo. App. 2006); Keith v. Kinney, 140 P.3d 141 (Colo. App. 2005); People v. Cambell, 94 P.3d 1186 (Colo. App. 2004); People ex rel S.G., 91 P.3d 443 (Colo. App. 2004); Tripp v. Borchard, 29 P.3d 345 (Colo. App. 2001); Prefer v. PharmNetRx, LLC, 18 P.3d 844 (Colo. App. 2000); People v. Anderson,991 P.2d 319 (Colo. App. 1999); People v. Lanari, 926 P.2d 116 (Colo. App. 1996); People v. Bowring, 902 P.2d (Colo. App. 1995); People v. McCarty, 851 P.2d 181 (Colo. App. 1992); Giralt v. Vail Vill. Inn Assocs., 759 P.2d 801 (Colo. App. 1988).

ETHICS OPINIONS

A judge who sits on the county bench in a small, rural district and whose spouse wishes to run for election to the city council, which oversees the chief of police, is not required to disqualify himself in cases charged by the police department. He should, however, consider whether the facts and circumstances make disqualification appropriate in a particular case, and, if his spouse is elected, he should disclose her role on the city council in cases charged by the police department. Colo. J.E.A.B. Op. 07-09.

A judge is not required to disqualify himself when the judge's estranged godchild's father appears before him, solely because of that relationship, but disqualification may nevertheless be appropriate depending on the judge's subjective and objective analysis of the circumstances. The judge should, however, disclose the godparent relationship to each party when his godchild's father appears in his court. Colo. J.E.A.B. Op. 07-04.

A judge need not disqualify herself sua sponte when the attorney who represented the judge's adult daughter appears before the judge. The judge should consult her own conscience to determine whether disqualification is warranted if the judge maintains a disabling prejudice for or against the attorney. If the judge concludes that disqualification is unnecessary, disclosure of the daughter's representation may still be appropriate until the passage of time, the limited consequences of the prior matter and the nature of the judge's relationship with the attorney have made the prior representation irrelevant. Colo. J.E.A.B. Op. 07-01.

A judge should disqualify himself or herself sua sponte if an attorney or firm currently representing the judge, or representing the judge's adversary in a current matter, appears before the judge. A judge should also continue to disqualify himself or herself sua sponte for a reasonable period of time after the representation has ended, typically one year, when the judge's attorney, other members of that firm, the judge's adversary's attorneys, or members of that attorney's firm appear before the judge. After the expiration of a reasonable period of time, continued disqualification is not required, but may be appropriate under the facts and circumstances of the case in which the judge was represented. Colo. J.E.A.B. Op. 06-05.

A judge who presides over a county court in a small rural jurisdiction should disqualify himself when any member of his brother-in-law's firm appears in the court on which he serves. Colo. J.E.A.B. Op. 05-02.

A judge must disqualify in any case in which the judge's spouse, who is an officer employed by a fire protection district which assists the sheriff's department with arson investigations, or those he or she supervises, participated in the

investigation of the case. The judge is not, however, required to disqualify from all cases involving a law enforcement agency for which the judge's spouse occasionally performs arson investigations. Colo. J.E.A.B. Op. 05-01.

A judge's report of an attorney's misconduct in a case pending before the judge requires the judge to disqualify himself or herself. Colo. J.E.A.B. Op. 04-01.

Rule 2.12: Supervisory Duties

(A) A judge shall require court staff, court officials, and others subject to the judge's direction and control to act in a manner consistent with the judge's obligations under this Code.

(B) A judge with supervisory authority for the performance of other judges shall take reasonable measures to ensure that those judges properly discharge their judicial responsibilities, including the prompt disposition of matters before them.

COMMENT

[1] A judge is responsible for his or her own conduct and for the conduct of others, such as staff, when those persons are acting at the judge's direction or control. A judge may not direct court personnel to engage in conduct on the judge's behalf or as the judge's representative when such conduct would violate the Code if undertaken by the judge.

[2] Public confidence in the judicial system depends upon timely justice. To promote the efficient administration of justice, a judge with supervisory authority must take the steps needed to ensure that judges under his or her supervision administer their workloads promptly.

Rule 2.13: Administrative Appointments

(A) In making administrative appointments, a judge:

(1) shall exercise the power of appointment impartially* and on the basis of merit; and

(2) shall avoid nepotism, favoritism, and unnecessary appointments.

(B) A judge shall not approve compensation of appointees beyond the fair value of services rendered.

COMMENT

[1] Appointees of a judge include assigned counsel, officials such as referees, commissioners, special masters, receivers, and guardians, and personnel such as clerks, secretaries, and bailiffs. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by paragraph (A).

[2] Unless otherwise defined by law, nepotism is the appointment or hiring of any relative within the third degree of relationship of either the judge or the judge's spouse or domestic partner, or the spouse or domestic partner of such relative.

Rule 2.14: Disability and Impairment

A judge having a reasonable belief that the performance of a lawyer or another judge is impaired by drugs or alcohol, or by a mental, emotional, or physical condition, shall take appropriate action, which may include a confidential referral to a lawyer or judicial assistance program.

COMMENT

[1] "Appropriate action" means action intended and reasonably likely to help the judge or lawyer in question address the problem and prevent harm to the justice system. Depending upon the circumstances, appropriate action may include but is not limited to speaking directly to the impaired person, notifying an individual with supervisory responsibility over the impaired person, or making a referral to an assistance program.

[2] Taking or initiating corrective action by way of referral to an assistance program may

satisfy a judge's responsibility under this Rule. Assistance programs have many approaches for offering help to impaired judges and lawyers, such as intervention, counseling, or referral to appropriate health care professionals. Depending upon the gravity of the conduct that has come to the judge's attention, however, the judge may be required to take other action, such as reporting the impaired judge or lawyer to the appropriate authority, agency, or body. See Rule 2.15.

Rule 2.15: Responding to Judicial and Lawyer Misconduct

(A) A judge having knowledge* that another judge has committed a violation of this Code that raises a substantial question regarding the judge's honesty, trustworthiness, or fitness as a judge in other respects shall inform the appropriate authority.*

(B) A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate authority.

(C) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code shall take appropriate action.

(D) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct shall take appropriate action.

COMMENT

[1] Taking action to address known misconduct is a judge's obligation. Paragraphs (A) and (B) impose an obligation on the judge to report to the appropriate disciplinary authority the known misconduct of another judge or a lawyer that raises a substantial question regarding the honesty, trustworthiness, or fitness of that judge or lawyer. Ignoring or denying known misconduct among one's judicial colleagues or members of the legal profession undermines a judge's responsibility to participate in efforts to ensure public respect for the justice system. This Rule limits the reporting obligation to those offenses that an independent judiciary must vigorously endeavor to prevent.

[2] A judge who does not have actual knowledge that another judge or a lawyer may have committed misconduct, but receives information indicating a substantial likelihood of such misconduct, is required to take appropriate action under paragraphs (C) and (D). Appropriate action may include, but is not limited to, communicating directly with the judge who may have violated this Code, communicating with a supervising judge, or reporting the suspected violation to the appropriate authority or other agency or body. Similarly, actions to be taken in response to information indicating that a lawyer has committed a violation of the Rules of Professional Conduct may include but are not limited to communicating directly with the lawyer who may have committed the violation, or reporting the suspected violation to the appropriate authority or other agency or body.

Rule 2.16: Cooperation with Disciplinary Authorities

(A) A judge shall cooperate and be candid and honest with judicial and lawyer disciplinary agencies.

(B) A judge shall not retaliate, directly or indirectly, against a person known* or suspected to have assisted or cooperated with an investigation of a judge or a lawyer.

COMMENT

[1] Cooperation with investigations and proceedings of judicial and lawyer discipline agencies, as required in paragraph (A), instills confidence in judges' commitment to the integrity of the judicial system and the protection of the public.

CANON 3

A JUDGE SHALL CONDUCT THE JUDGE'S PERSONAL AND EXTRAJUDICIAL ACTIVITIES TO MINIMIZE THE RISK OF CONFLICT WITH THE OBLIGATIONS OF JUDICIAL OFFICE.

Rule 3.1: Extrajudicial Activities in General

A judge may engage in extrajudicial activities, except as prohibited by law* or this Code. However, when engaging in extrajudicial activities, a judge shall not:

(A) participate in activities that will interfere with the proper performance of the judge's judicial duties;

(B) participate in activities that will lead to frequent disqualification of the judge;

(C) participate in activities that would appear to a reasonable person to undermine the judge's independence,* integrity,* or impartiality;*

(D) engage in conduct that would appear to a reasonable person to be coercive; or

(E) make use of court premises, staff, stationery, equipment, or other resources, except for incidental use for activities that concern the law, the legal system, or the administration of justice, or unless such additional use is permitted by law.

COMMENT

[1] To the extent that time permits, and judicial independence and impartiality are not compromised, judges are encouraged to engage in appropriate extrajudicial activities. Judges are uniquely qualified to engage in extrajudicial activities that concern the law, the legal system, and the administration of justice, such as by speaking, writing, teaching, or participating in scholarly research projects. In addition, judges are permitted and encouraged to engage in educational, religious, charitable, fraternal or civic extrajudicial activities not conducted for profit, even when the activities do not involve the law. See Rule 3.7.

[2] Participation in both law-related and other extrajudicial activities helps integrate judges into their communities, and furthers public understanding of and respect for courts and the judicial system.

[3] Discriminatory actions and expressions of bias or prejudice by a judge, even outside the judge's official or judicial actions, are likely to appear to a reasonable person to call into question the judge's integrity and impartiality. Examples include jokes or other remarks that demean individuals based upon their race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, or socioeconomic status. For the same reason, a judge's extrajudicial activities must not be conducted in connection or affiliation with an organization that practices invidious discrimination. See Rule 3.6.

[4] While engaged in permitted extrajudicial activities, judges must not coerce others or take action that would reasonably be perceived as coercive. For example, depending upon the circumstances, a judge's solicitation of contributions or memberships for an organization, even as permitted by Rule 3.7(A), might create the risk that the person solicited would feel obligated to respond favorably, or would do so to curry favor with the judge.

ANNOTATION

Judge's use of judicial chambers stationery for letters to opposing counsel in personal matter creates appearance of impropriety; objectively reasonable person would not know the difference between judicial chambers stationery and official court stationery. Judge privately reprimanded for this and other misconduct. Inquiry Concerning a Judge, 822 P.2d 1333, 1340 (Alaska 1991).

Public reprimand appropriate where judge was arrested for and plead guilty to drunk driving. In re Weaver, 691 N.W.2d 725 (Iowa 2004).

District court judge's two-month secret intimate relationship with assistant county attorney, who appeared before him on behalf of State on daily basis, was conduct that brought disrepute to judicial office, and warranted 60 day suspension without pay, despite lack of evidence that judge's relationship with county attorney prejudiced any defendant who appeared before him, where affair occurred with subordinate public servant, judge allowed affair to remain hidden from those who appeared before him against assistant county attorney, judge and county attorney engaged in intimate encounters in courthouse, and both parties were married to other people. In re Gerard, 631 N.W.2 271 (Iowa

2001).

Juvenile court judge's retaliation and intemperate statements directed at the attorneys required by law to appear on child welfare cases was at least negligent and ran afoul of duties to give precedence to his or her judicial duties over all other activities of the judge, to be patient and courteous to all persons dealt with in a judicial capacity, and to disqualify himself if impartiality could reasonably be questioned; the judge allowed his non-judicial activities, namely his federal action against the Director of the Office of the Guardian ad Litem, to take priority over his judicial duty to hear child welfare cases, and he did so by treating the Director, the attorneys in her office, and the attorneys of the Attorney General's office with considerable disrespect, creating a continuing situation where his impartiality could reasonably be, and was, repeatedly questioned. In re Anderson, 82 P.3d 1134 (Utah 2004).

ETHICS OPINIONS

The judge may speak at a CLE which is, in effect, limited to only one component of the bar, provided that the judge satisfies certain conditions. In addition, the judge should consider with care the topic on which he presents, and should avoid presenting on a topic such as trial strategy, which could raise questions regarding the judge's impartiality. Colo. J.E.A.B. Op. 08-03.

Judges are not permitted to be members of special bar association, as it would convey the appearance of a special relationship to one side in the adversarial process. Judges should avoid membership in even the most praiseworthy and noncontroversial organizations if they espouse or are dedicated to a particular legal philosophy or position. Alaska Ad. Op. 99-4.

A judge may not participate in an infomercial for a local surgeon, which would demean the judicial office and lend the prestige of the judge's office to advance the physician's private interests. Md. Ad. Op. 2006-11.

Judge may serve as a director of a non-profit corporation formed to solicit funds from the community to provide incentives for participants in a local Drug Court. Md. Ad. Op. 2005-11.

Judge may make presentations before groups representing single components of the judicial system as long as the judge is careful about the contents of the discussions and does not give legal advice, comment on pending cases, or offer opinions that would indicate biases or prejudgment of certain types of cases. The judge must also be willing to accept invitations from other components in the system. Utah Ad. Op. 2006-06.

Judge may maintain membership in a cycling club that is sponsored, in part, by a law firm. Utah Ad. Op. 03-01.

Rule 3.2: Appearances before Governmental Bodies and Consultation with Government Officials

A judge shall not appear voluntarily at a public hearing before, or otherwise consult with, an executive or a legislative body or official, except:

(A) in connection with matters concerning the law, the legal system, or the administration of justice;

(B) in connection with matters about which the judge acquired knowledge or expertise in the course of the judge's judicial duties; or

(C) when the judge is acting pro se in a matter involving the judge's legal or economic interests, or when the judge is acting in a fiduciary* capacity.

COMMENT

[1] Judges possess special expertise in matters of law, the legal system, and the administration of justice, and may properly share that expertise with governmental bodies and executive or legislative branch officials.

[2] In appearing before governmental bodies or consulting with government officials, judges must be mindful that they remain subject to other provisions of this Code, such as Rule 1.3, prohibiting judges from using the prestige of office to advance their own or others' interests, Rule 2.10, governing public comment on pending and impending matters, Rule 2.11, outlining the circumstances under which a judge must disqualify himself or herself, and Rule 3.1(C), prohibiting judges from engaging in extrajudicial activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality.

[3] In general, it would be an unnecessary and unfair burden to prohibit judges from appearing before governmental bodies or consulting with government officials on matters that are likely to affect them as private citizens, such

as zoning proposals affecting their real property. In engaging in such activities, however, judges must not refer to their judicial positions, and must otherwise exercise caution to avoid using the prestige of judicial office.

ETHICS OPINIONS

A district court judge may not accept a voting or non-voting board position on a local community board that combines integrated services and legislative advocacy because such membership would involve legislative advocacy beyond matters to improve the law. Colo. J.E.A.B. Op. 2007-07.

The judge should not accept appointment to a blue ribbon panel of public and private leaders charged with "reducing the state's contribution and vulnerability to a changed climate" by developing a set of recommendations and policy proposals addressing how Colorado can mitigate and adapt to climate change. The judge's work on the panel would involve consulting with or providing recommendations to the legislative and executive branches on climate control issues, which are unconnected with the law, the legal system, the administration of justice, or the role of the judiciary. Colo. J.E.A.B. Op. 06-08.

Rule 3.3: Testifying as a Character Witness

A judge shall not testify as a character witness in a judicial, administrative, or other adjudicatory proceeding or otherwise vouch for the character of a person in a legal proceeding, except when duly summoned.

COMMENT

[1] A judge who, without being subpoenaed, testifies as a character witness abuses the prestige of judicial office to advance the interests of another. See Rule 1.3. Except in unusual circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify as a character witness.

ETHICS OPINIONS

A judge may not testify as a character witness on a voluntary basis, but he is obligated to comply with a subpoena if one is issued. Where a judge has been asked to provide such testimony, the judge should consider whether the interests of justice require his or her testimony, and if not should then consider attempting to discourage the subpoenaing party or lawyer from requiring the testimony, because of the possibility that the testimony is being sought to trade on the judge's position. Colo. J.E.A.B. Op. 06-03.

A judge may not write a letter to the pardon board at the request of convicted felon sentenced by the judge, nor should the judge write such a letter of the judge's own initiative. Alaska Ad. Op. 2003-01.

A judge should not testify as a character witness for a criminal defendant in a trial unless the judge has been subpoenaed. The giving of such character testimony by judges should be discouraged, and is appropriate only where a subpoena makes it unavoidable. Utah Ad. Op. 88-09.

Rule 3.4: Appointments to Governmental Positions

A judge shall not accept appointment to a governmental committee, board, commission, or other governmental position, unless it is one that concerns the law, the legal system, or the administration of justice.

COMMENT

[1] Rule 3.4 implicitly acknowledges the value of judges accepting appointments to entities that concern the law, the legal system, or the administration of justice. Even in such instances, however, a judge should assess the appropriateness of accepting an appointment, paying particular attention to the subject matter of the appointment and the availability and allocation of judicial resources, including the judge's time commitments, and giving due regard to the

requirements of the independence and impartiality of the judiciary.

[2] A judge may represent his or her country, state, or locality on ceremonial occasions or in connection with historical, educational, or cultural activities. Such representation does not constitute acceptance of a government position.

[3] Complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives. Every governmental board, committee and commission is different and must be evaluated independently to determine whether judicial participation is appropriate. In considering the appropriateness of accepting extrajudicial assignments, a judge should ensure that the mission and work of the board or commission relates to the law, the legal system, or the administration of justice. To effectuate the Code's goal of encouraging judges to participate in their communities, the relationship between the board's mission and the law, legal system, or the administration of justice should be construed broadly. Any judicial ethics advisory opinions issued before adoption of this Code requiring a narrow link or stringent nexus are no longer valid. A judge should avoid participating in governmental boards or commissions that might lead to the judge's frequent disqualification or that might call into question the judge's impartiality. The changing nature of some organizations and of their relationship to the law makes it necessary for a judge to regularly reexamine the activities of each organization with which the judge is affiliated to determine if it is proper to continue the affiliation.

ETHICS OPINIONS

Judge's service on a state Children's Justice Act task force created by federal statute and requiring state judge membership should be limited to roles permitted by ethical limitations. "Fundamentally, whether a judge may sit on any board or committee, turns on whether that board or committee is devoted to the improvement of the law or the administration of justice, and, regardless of whether it is or not, whether participation by a judge would lead to an appearance of partiality in cases coming before that judge." Ak. Ad. Op. 2001-01.

Rule 3.5: Use of Nonpublic Information

A judge shall not intentionally disclose or use nonpublic information* acquired in a judicial capacity for any purpose unrelated to the judge's judicial duties.

COMMENT

[1] In the course of performing judicial duties, a judge may acquire information of commercial or other value that is unavailable to the public. The judge must not reveal or use such information for personal gain or for any purpose unrelated to his or her judicial duties.

[2] This rule is not intended, however, to affect a judge's ability to act on information as necessary to protect the health or safety of the judge or a member of a judge's family, court personnel, or other judicial officers if consistent with other provisions of this Code.

Rule 3.6: Affiliation with Discriminatory Organizations

(A) A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation.

(B) A judge shall not use the benefits or facilities of an organization if the judge knows* or should know that the organization practices invidious discrimination on one or more of the bases identified in paragraph (A). A judge's attendance at an event in a facility of an organization that the judge is not permitted to join is not a violation of this Rule when the judge's attendance is an isolated event that could not reasonably be perceived as an endorsement of the organization's practices.

COMMENT

[1] A judge's public manifestation of approval of invidious discrimination on any basis gives rise to the appearance of impropriety and diminishes public confidence in the integrity and impartiality of the judiciary. A judge's membership in an organization that practices

invidious discrimination creates the perception that the judge's impartiality is impaired.

[2] An organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation, persons who would otherwise be eligible for admission. Whether an organization practices invidious discrimination is a complex question to which judges should be attentive. The answer cannot be determined from a mere examination of an organization's current membership rolls, but rather, depends upon how the organization selects members, as well as other relevant factors, such as whether the organization is dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest to its members, or whether it is an intimate, purely private organization whose membership limitations could not constitutionally be prohibited.

[3] When a judge learns that an organization to which the judge belongs engages in invidious discrimination, the judge must resign immediately from the organization.

[4] A judge's membership in a religious organization as a lawful exercise of the freedom of religion is not a violation of this Rule.

[5] This Rule does not apply to national or state military service.

Rule 3.7: Participation in Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities

(A) Subject to the requirements of Rule 3.1, a judge may participate in activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of justice, and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit, including but not limited to the following activities:

(1) assisting such an organization or entity in planning related to fund-raising, and participating in the management and investment of the organization's or entity's funds;

(2) soliciting* contributions* for such an organization or entity, but only from members of the judge's family,* or from judges over whom the judge does not exercise supervisory or appellate authority;

(3) soliciting membership for such an organization or entity, even though the membership dues or fees generated may be used to support the objectives of the organization or entity, but only if the organization or entity is concerned with the law, the legal system, or the administration of justice;

(4) appearing or speaking at, receiving an award or other recognition at, being featured on the program of, and permitting his or her title to be used in connection with an event of such an organization or entity, but if the event serves a fund-raising purpose, the judge may participate only if the event concerns the law, the legal system, or the administration of justice;

(5) making recommendations to such a public or private fund-granting organization or entity in connection with its programs and activities, but only if the organization or entity is concerned with the law, the legal system, or the administration of justice; and

(6) serving as an officer, director, trustee, or nonlegal advisor of such an organization or entity, unless it is likely that the organization or entity:

(a) will be engaged in proceedings that would ordinarily come before the judge; or

(b) will frequently be engaged in adversary proceedings in the court of which the judge is a member, or in any court subject to the appellate jurisdiction of the court of which the judge is a member.

(B) A judge may encourage lawyers to provide pro bono publico legal services.

COMMENT

[1] The activities permitted by paragraph (A) generally include those sponsored by or undertaken on behalf of public or private not-for-profit educational institutions, and other not-for-profit organizations, including law-related, charitable, and other organizations.

[2] Even for law-related organizations, a judge should consider whether the membership and purposes of the organization, or the nature of the judge's participation in or association with the organization, would conflict with the judge's obligation to refrain from activities that reflect adversely upon a judge's independence, integrity, and impartiality.

[3] Mere attendance at an event, whether or not the event serves a fund-raising purpose,

does not constitute a violation of paragraph 4(A). It is also generally permissible for a judge to serve as an usher or a food server or preparer, or to perform similar functions, at fund-raising events sponsored by educational, religious, charitable, fraternal, or civic organizations. Such activities are not solicitation and do not present an element of coercion or abuse the prestige of judicial office.

[4] Identification of a judge's position in educational, religious, charitable, fraternal, or civic organizations on letterhead used for fund-raising or membership solicitation does not violate this Rule. The letterhead may list the judge's title or judicial office if comparable designations are used for other persons.

[5] In addition to appointing lawyers to serve as counsel for indigent parties in individual cases, a judge may promote broader access to justice by encouraging lawyers to participate in pro bono publico legal services, if in doing so the judge does not employ coercion, or abuse the prestige of judicial office. Such encouragement may take many forms, including providing lists of available programs, training lawyers to do pro bono publico legal work, and participating in events recognizing lawyers who have done pro bono publico work.

ETHICS OPINIONS

A district court judge may not accept a voting or non-voting board position on a local community board that combines integrated services and legislative advocacy because such membership would involve legislative advocacy beyond matters to improve the law. Colo. J.E.A.B. Op. 07-07.

A judge may serve on a grant-making committee of a community foundation. Colo. J.E.A.B. Op. 07-03.

A judge may serve on the board of directors of a public charter school in a neighboring judicial district. Colo. J.E.A.B. Op. 07-02.

The judge should not accept appointment to a blue-ribbon panel of public and private leaders charged with "reducing the state's contribution and vulnerability to a changed climate" by developing a set of recommendations and policy proposals addressing how Colorado can mitigate and adapt to climate change. Colo. J.E.A.B. Op. 06-08.

A judge may serve on the board of an organization devoted to seeking funds to assist defendants in obtaining court-ordered substance abuse treatment, and he may make recommendations to a private foundation that it should fund programs to the same end, but it would be inappropriate for the judge to assist in determining which particular defendants receive the scholarship funds. Colo. J.E.A.B. Op. 06-06.

A judge may make monetary contributions to further pro bono activities, but it is inappropriate for judges to solicit attorneys to participate in particular pro bono programs. Acknowledging the *pro bono* activity of particular attorneys would be permissible if it were done in a manner that is public, but letters of congratulation sent directly to the attorney could be interpreted as evidence that the attorneys are in a special position of influence or that the judge's ability to act impartially has been compromised. Alaska Ad. Op. 2004-01.

Judge may as college trustee co-host outreach event for alumni who are lawyers. Md. Ad. Op. 2008-06.

Judge may serve as a director of a non-profit corporation formed to solicit funds from the community to provide incentives for participants in a local Drug Court. Md. Ad. Op. 2005-11.

A judge shall not be a director or officer of an organization if it is likely that the organization will be engaged regularly in adversary proceedings in any court. Md. Ad. Op. 2008-05.

A judge may not serve on the board of a mental health organization whose representatives frequently appear in the judge's court. Utah Ad. Op. 07-04.

Judge may participate in a nationally renowned non-profit musical education and performance organization. Utah. Ad. Op. 97-3.

Part-time traffic referee may not practice criminal law. The referee also may not practice law at the court or courts which the referee serves. The judges of the district must enter disqualification in all cases in which the referee appears as counsel. Utah Ad. Op. 07-02.

Rule 3.8: Appointments to Fiduciary Positions

(A) A judge shall not accept appointment to serve in a fiduciary* position, such as executor, administrator, trustee, guardian, attorney in fact, or other personal representative, except for the estate, trust, or person of a member of the judge's family,* and then only if such service will not interfere with the proper performance of judicial duties.

(B) A judge shall not serve in a fiduciary position if the judge as fiduciary will likely be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which the judge serves, or one under its appellate jurisdiction.

(C) A judge acting in a fiduciary capacity shall be subject to the same restrictions on engaging in financial activities that apply to a judge personally.

(D) If a person who is serving in a fiduciary position becomes a judge, he or she must comply with this Rule as soon as reasonably practicable, but in no event later than one year after becoming a judge.

COMMENT

[1] A judge should recognize that other restrictions imposed by this Code may conflict with a judge's obligations as a fiduciary; in such circumstances, a judge should resign as fiduciary. For example, serving as a fiduciary might require frequent disqualification of a judge under Rule 2.11 because a judge is deemed to have an economic interest in shares of stock held by a trust if the amount of stock held is more than de minimis.

Rule 3.9: Service as Arbitrator or Mediator

A judge shall not act as an arbitrator or a mediator or perform other judicial functions apart from the judge's official duties unless expressly authorized by law.*

COMMENT

[1] This Rule does not prohibit a judge from participating in arbitration, mediation, or settlement conferences performed as part of assigned judicial duties. Rendering dispute resolution services apart from those duties, whether or not for economic gain, is prohibited unless it is expressly authorized by law.

ETHICS OPINIONS

Active judge soon to retire and participate in the Senior Judge Program should refrain from setting or hearing private mediations until after he retires. Colo. J.E.A.B. Op. 06-09.

A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge. Trial judges conducting settlement conferences in their own cases must, however, have a heightened awareness of the appearance that the parties might feel improper pressure to settle or that the judge will no longer be impartial if the case fails to settle. Alaska Ad. Op. 2006-01.

Rule 3.10: Practice of Law

A judge shall not practice law except as permitted by law or this Code. A judge may act pro se but should not defend himself or herself when sued in an official capacity. The judge may, without compensation, give legal advice to and draft or review documents for a member of the judge's family,* but is prohibited from serving as the family member's lawyer in any forum.

COMMENT

[1] A judge may act pro se in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with governmental bodies. A judge must not use the prestige of office to advance the judge's personal or family interests. See Rule 1.3.

[2] A judge who drafts or reviews documents as permitted by this rule must comply with C.R.C.P. 11(b).

ETHICS OPINIONS

Judge may not participate in a local legal service's call-a-lawyer program by providing advice to callers, anonymous or otherwise, because doing so would constitute the practice of law. The judge may, however, engage in activities intended to encourage attorneys to perform pro bono services or act in an advisory capacity to the legal services pro bono program. Colo.

J.E.A.B. Op. 06-02.

A judge may serve as a National Guard judge advocate if the judge's role is limited to performing only those duties that do not resemble services provided by civilian attorneys for members of the military. Judges may not take any actions while serving as a National Guard judge advocate that would give the impression that the judge is an advocate on matters that concern the civilian justice system. Ak. Ad. Op. 2007-01.

Rule 3.11: Financial, Business, or Remunerative Activities

(A) A judge may hold and manage investments of the judge and members of the judge's family.*

(B) A judge shall not serve as an officer, director, manager, general partner, advisor, or employee of any business entity except that a judge may manage or participate in:

(1) a business closely held by the judge or members of the judge's family; or

(2) a business entity primarily engaged in investment of the financial resources of the judge or members of the judge's family.

(C) A judge shall not engage in financial activities permitted under paragraphs (A) and (B) if they will:

(1) interfere with the proper performance of judicial duties;

(2) lead to frequent disqualification of the judge;

(3) involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves; or

(4) result in violation of other provisions of this Code.

COMMENT

[1] Judges are generally permitted to engage in financial activities, including managing real estate and other investments for themselves or for members of their families. Participation in these activities, like participation in other extrajudicial activities, is subject to the requirements of this Code. For example, it would be improper for a judge to spend so much time on business activities that it interferes with the performance of judicial duties. See Rule 2.1. Similarly, it would be improper for a judge to use his or her official title or appear in judicial robes in business advertising, or to conduct his or her business or financial affairs in such a way that disqualification is frequently required. See Rules 1.3 and 2.11.

[2] As soon as practicable without serious financial detriment, the judge must divest himself or herself of investments and other financial interests that might require frequent disqualification or otherwise violate this Rule.

ANNOTATION

Judge's conduct in assuming command responsibility in furtherance of speculative real estate development project which depends for success upon official action of city and which results in substantial profit to judge violates canon requiring judge to avoid giving grounds for any reasonable suspicion that he is using power or prestige or his office to persuade others to contribute to the success of private business ventures and rule that judge shall not directly or indirectly lend the influence of his name or prestige of his office to aid or advance the welfare of a private business and such conduct warrants censure. In re Foster, 318 A.2d 523 (Md. 1974).

ETHICS OPINIONS

A judge may not serve as president of a corporation which markets products to correctional facilities. As a company officer, the judge would be engaged in financial dealings. A judge's service to an organization that markets product to correctional facilities may reasonably be perceived to exploit the judge's judicial position, and may cast reasonable doubt on the judge's capacity to act impartially as a judge. Utah Ad. Op. 05-01.

Rule 3.12: Compensation for Extrajudicial Activities

A judge may accept reasonable compensation for extrajudicial activities permitted by this Code or other law* unless such acceptance would appear to a reasonable person to undermine the judge's independence,* integrity,* or impartiality.*

COMMENT

[1] A judge is permitted to accept honoraria, stipends, fees, wages, salaries, royalties, or other compensation for speaking, teaching, writing, and other extrajudicial activities, provided the compensation is reasonable and commensurate with the task performed. The judge should be mindful, however, that judicial duties must take precedence over other activities. See Rule 2.1.

[2] Compensation derived from extrajudicial activities may be subject to public reporting. See Rule 3.15.

Note: Statutory disclosure and reporting requirements are contained in § 24-6-202 and -203, C.R.S.

ETHICS OPINIONS

Judge may not charge a fee for performing ceremonies at the court conducted during normal business hours. Utah Ad. Op. 98-8.

Rule 3.13: Acceptance and Reporting of Gifts, Loans, Bequests, Benefits, or Other Things of Value

(A) A judge shall not accept any gifts, loans, bequests, benefits, or other things of value, if acceptance is prohibited by law* or would appear to a reasonable person to undermine the judge's independence,* integrity,* or impartiality.*

(B) Unless otherwise prohibited by law, or by paragraph (A), a judge may accept the following without publicly reporting such acceptance:

(1) items with little intrinsic value, such as plaques, certificates, trophies, and greeting cards;

(2) gifts, loans, bequests, benefits, or other things of value from friends, relatives, or other persons, including lawyers, whose appearance or interest in a proceeding pending* or impending* before the judge would in any event require disqualification of the judge under Rule 2.11;

(3) ordinary social hospitality;

(4) commercial or financial opportunities and benefits, including special pricing and discounts, and loans from lending institutions in their regular course of business, if the same opportunities and benefits or loans are made available on the same terms to similarly situated persons who are not judges;

(5) rewards and prizes given to competitors or participants in random drawings, contests, or other events that are open to persons who are not judges;

(6) scholarships, fellowships, and similar benefits or awards, if they are available to similarly situated persons who are not judges, based upon the same terms and criteria;

(7) books, magazines, journals, audiovisual materials, and other resource materials supplied by publishers on a complimentary basis for official use; or

(8) gifts, awards, or benefits associated with the business, profession, or other separate activity of a spouse, a domestic partner,* or other family member of a judge residing in the judge's household,* but that incidentally benefit the judge.

(C) Unless otherwise prohibited by law or by paragraph (A), a judge may accept the following items, and must report such acceptance to the extent required by Rule 3.15:

(1) gifts incident to a public testimonial;

(2) invitations to the judge and the judge's spouse, domestic partner, or guest to attend without charge:

(a) an event associated with a bar-related function or other activity relating to the law, the legal system, or the administration of justice; or

(b) an event associated with any of the judge's educational, religious, charitable, fraternal or civic activities permitted by this Code, if the same invitation is offered to nonjudges who are engaged in similar ways in the activity as is the judge; and

(3) gifts, loans, bequests, benefits, or other things of value, if the source is a party or other person, including a lawyer, who has come or is likely to come before the judge, or whose interests have come or are likely to come before the judge.

COMMENT

[1] Whenever a judge accepts a gift or other thing of value without paying fair market value, there is a risk that the benefit might be viewed as intended to influence the judge's decision in a case. Rule 3.13 imposes restrictions upon the acceptance of such benefits, according to the magnitude of the risk. Paragraph (B) identifies circumstances in which the risk that the acceptance would appear to undermine the judge's independence, integrity, or impartiality is low, and explicitly provides that such items need not be publicly reported. As the value of the benefit or the likelihood that the source of the benefit will appear before the judge increases, the judge is either prohibited under paragraph (A) from accepting the gift, or required under paragraph (C) to publicly report it.

[2] Gift-giving between friends and relatives is a common occurrence, and ordinarily does not create an appearance of impropriety or cause reasonable persons to believe that the judge's independence, integrity, or impartiality has been compromised. In addition, when the appearance of friends or relatives in a case would require the judge's disqualification under Rule 2.11, there would be no opportunity for a gift to influence the judge's decision making. Paragraph (B)(2) places no restrictions upon the ability of a judge to accept gifts or other things of value from friends or relatives under these circumstances, and does not require public reporting.

[3] Businesses and financial institutions frequently make available special pricing, discounts, and other benefits, either in connection with a temporary promotion or for preferred customers, based upon longevity of the relationship, volume of business transacted, and other factors. A judge may freely accept such benefits if they are available to the general public, or if the judge qualifies for the special price or discount according to the same criteria as are applied to persons who are not judges. As an example, loans provided at generally prevailing interest rates are not gifts, but a judge could not accept a loan from a financial institution at below-market interest rates unless the same rate was being made available to the general public for a certain period of time or only to borrowers with specified qualifications that the judge also possesses.

[4] Rule 3.13 applies only to acceptance of gifts or other things of value by a judge. Nonetheless, if a gift or other benefit is given to the judge's spouse, domestic partner, or member of the judge's family residing in the judge's household, it may be viewed as an attempt to evade Rule 3.13 and influence the judge indirectly. Where the gift or benefit is being made primarily to such other persons, and the judge is merely an incidental beneficiary, this concern is reduced. A judge should, however, remind family and household members of the restrictions imposed upon judges, and urge them to take these restrictions into account when making decisions about accepting such gifts or benefits.

Note: Statutory disclosure and reporting requirements are contained in § 24-6-202 and -203, C.R.S.

ETHICS OPINIONS

Judge may not receive free travel to conference sponsored by The Roscoe Pound Foundation of Trial Lawyers of America because it could convey a special relationship to one side in the adversarial process. Alaska. Ad. Op. 99-5.

Judge may not allow law firm to pay for function following investiture. Md. Ad. Op. 2005-16.

Rule 3.14: Reimbursement of Expenses and Waivers of Fees or Charges

(A) Unless otherwise prohibited by Rules 3.1 and 3.13(A) or other law,* a judge may accept reimbursement of necessary and reasonable expenses for travel, food, lodging, or other incidental expenses, or a waiver or partial waiver of fees or charges for registration,

tuition, and similar items, from sources other than the judge's employing entity, if the expenses or charges are associated with the judge's participation in extrajudicial activities permitted by this Code.

(B) Reimbursement of expenses for necessary travel, food, lodging, or other incidental expenses shall be limited to the actual costs reasonably incurred by the judge and, when appropriate to the occasion, by the judge's spouse, domestic partner,* or guest.

(C) A judge who accepts reimbursement of expenses or waivers or partial waivers of fees or charges on behalf of the judge or the judge's spouse, domestic partner, or guest shall publicly report such acceptance as required by Rule 3.15.

COMMENT

[1] Educational, civic, religious, fraternal, and charitable organizations often sponsor meetings, seminars, symposia, dinners, awards ceremonies, and similar events. Judges are encouraged to attend educational programs, as both teachers and participants, in law-related and academic disciplines, in furtherance of their duty to remain competent in the law. Participation in a variety of other extrajudicial activity is also permitted and encouraged by this Code.

[2] Not infrequently, sponsoring organizations invite certain judges to attend seminars or other events on a fee-waived or partial-fee-waived basis, and sometimes include reimbursement for necessary travel, food, lodging, or other incidental expenses. A judge's decision whether to accept reimbursement of expenses or a waiver or partial waiver of fees or charges in connection with these or other extrajudicial activities must be based upon an assessment of all the circumstances. The judge must undertake a reasonable inquiry to obtain the information necessary to make an informed judgment about whether acceptance would be consistent with the requirements of this Code.

[3] A judge must assure himself or herself that acceptance of reimbursement or fee waivers would not appear to a reasonable person to undermine the judge's independence, integrity, or impartiality. The factors that a judge should consider when deciding whether to accept reimbursement or a fee waiver for attendance at a particular activity include:

(a) whether the sponsor is an accredited educational institution or bar association rather than a trade association or a for-profit entity;

(b) whether the funding comes largely from numerous contributors rather than from a single entity and is earmarked for programs with specific content;

(c) whether the content is related or unrelated to the subject matter of litigation pending or impending before the judge, or to matters that are likely to come before the judge;

(d) whether the activity is primarily educational rather than recreational, and whether the costs of the event are reasonable and comparable to those associated with similar events sponsored by the judiciary, bar associations, or similar groups;

(e) whether information concerning the activity and its funding sources is available upon inquiry;

(f) whether the sponsor or source of funding is generally associated with particular parties or interests currently appearing or likely to appear in the judge's court, thus possibly requiring disqualification of the judge under Rule 2.11;

(g) whether differing viewpoints are presented; and

(h) whether a broad range of judicial and nonjudicial participants are invited, whether a large number of participants are invited, and whether the program is designed specifically for judges.

Note: Statutory disclosure and reporting requirements are contained in § 24-6-202 and -203, C.R.S.

Rule 3.15: Reporting Requirements

(A) A judge shall publicly report the source and amount or value of:

(1) compensation received for extrajudicial activities as permitted by Rule 3.12;

(2) gifts and other things of value as permitted by Rule 3.13(C), unless the value of such items does not exceed the statutory amount specified in Title 24, Article VI of the Colorado Revised Statutes; and

(3) reimbursement of expenses and waiver of fees or charges permitted by Rule 3.14(A).

(B) When public reporting is required by paragraph (A), a judge shall report the date, place, and nature of the activity for which the judge received any compensation; the

description of any gift, loan, bequest, benefit, or other thing of value accepted; and the source of reimbursement of expenses or waiver or partial waiver of fees or charges.

(C) The public report required by paragraph (A)(1) shall be made at least annually. Public reports required by paragraph (A)(2) and (3) shall be made quarterly.

(D) Reports made in compliance with this Rule shall be filed as public documents in the office of the clerk of the court on which the judge serves or other office designated by law*.

(E) Full time magistrates shall file reports required by paragraph A in the office of the clerk of the court on which the magistrate serves annually on or before January 15.

COMMENT

[1] In Colorado, judges' public reporting requirements are governed both by this Code and by statute. See § 24-6-202 and -203, C.R.S.

[2] Pursuant to section 24-6-202, all judges are required to file an annual disclosure with the secretary of state.

[3] Pursuant to section 24-6-203, judges are required to file quarterly disclosures reporting gifts, loans, tickets to events, and reimbursement for travel and lodging expenses.

[a] Money, including a loan, pledge, or advance of money or a guarantee of a loan of money with a value of $25 or more must be reported. § 24-6-203(3)(a), C.R.S.

[b] Any gift of any item of real or personal property, other than money, with a value of $50 or more must be reported. § 24-6-203(3)(b).

[c] Any loan of any item of real or personal property, other than money, if the value of the loan is $50 or more. § 24-6-203(3)(c).

[d] Waiver or partial waiver of the cost of attending CLEs or other educational conferences or seminars is included within the statutory requirement that judges report tickets to sporting, recreational, educational or cultural events with a value of $50 or more, or a series of tickets with a value of $100 or more. § 24-6-203(3)(e), C.R.S.

[e] Payment of or reimbursement for actual and necessary expenditures for travel and lodging at a convention or meeting at which the judge is scheduled to participate must be reported unless the payment or reimbursement is made from public funds, a joint governmental agency, an association of judges, or the judicial branch. § 24-6-203(3)(f), C.R.S.

[4] The disclosure reports filed with the secretary of state's office may be posted electronically on its website when technically feasible.

CANON 4

A JUDGE OR CANDIDATE FOR JUDICIAL OFFICE SHALL NOT ENGAGE IN POLITICAL OR CAMPAIGN ACTIVITY THAT IS INCONSISTENT WITH THE INDEPENDENCE, INTEGRITY, OR IMPARTIALITY OF THE JUDICIARY.

Rule 4.1: Political and Campaign Activities of Judges and Judicial Candidates in General

(A) Except as permitted by law,* or by this Canon, a judge or a judicial candidate* shall not:

(1) act as a leader in, or hold an office in, a political organization;*

(2) make speeches on behalf of a political organization;

(3) publicly endorse or oppose a candidate for any public office;

(4) solicit funds for, pay an assessment to, or make a contribution* to a political organization or a candidate for public office;

(5) attend or purchase tickets for dinners or other events sponsored by a political organization or a candidate for public office;

(6) publicly identify himself or herself as a candidate of a political organization;

(7) seek, accept, or use endorsements from a political organization;

(8) personally solicit* or accept campaign contributions;

(9) use or permit the use of campaign contributions for the private benefit of the judge or others;

(10) use court staff, facilities, or other court resources as a judicial candidate;

(11) knowingly,* or with reckless disregard for the truth, make any false or misleading statement;

(12) make any statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending* or impending* in any court; or

(13) in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial* performance of the adjudicative duties of judicial office.

(B) A judge or judicial candidate shall take reasonable measures to ensure that other persons do not undertake, on behalf of the judge or judicial candidate, any activities prohibited under paragraph (A), except as permitted by Rule 4.3.

COMMENT

General Considerations

[1] A judge plays a role different from that of a legislator or executive branch official. Rather than making decisions based upon the expressed views or preferences of the electorate, a judge makes decisions based upon the law and the facts of every case. Therefore, in furtherance of this interest, judges and judicial candidates must, to the greatest extent possible, be free and appear to be free from political influence and political pressure. This Canon imposes narrowly tailored restrictions upon the political and campaign activities of all judges and judicial candidates, taking into account the various methods of selecting judges.

[2] When a person becomes a judicial candidate, this Canon becomes applicable to his or her conduct.

Participation in Political Activities

[3] Public confidence in the independence and impartiality of the judiciary is eroded if judges or judicial candidates are perceived to be subject to political influence. Although judges and judicial candidates may register to vote as members of a political party, they are prohibited by paragraph (A)(1) from assuming leadership roles in political organizations.

[4] Paragraphs (A)(2) and (A)(3) prohibit judges and judicial candidates from making speeches on behalf of political organizations or publicly endorsing or opposing candidates for public office, respectively, to prevent them from abusing the prestige of judicial office to advance the interests of others. See Rule 1.3.

[5] Although members of the families of judges and judicial candidates are free to engage in their own political activity, including running for public office, there is no "family exception" to the prohibition in paragraph (A)(3) against a judge or candidate publicly endorsing candidates for public office. A judge or judicial candidate must not become involved in, or publicly associated with, a family member's political activity or campaign for public office. To avoid public misunderstanding, judges and judicial candidates should take, and should urge members of their families to take, reasonable steps to avoid any implication that they endorse any family member's candidacy or other political activity.

[6] Judges and judicial candidates retain the right to participate in the political process as voters in both primary and general elections. For purposes of this Canon, participation in a caucus-type election procedure does not constitute public support for or endorsement of a political organization or candidate, and is not prohibited by paragraphs (A)(2) or (A)(3).

Statements and Comments Made during a Campaign for Judicial Office

[7] Judicial candidates must be scrupulously fair and accurate in all statements made by them and by their retention committees. Paragraph (A)(11) obligates candidates and their committees to refrain from making statements that are false or misleading, or that omit facts necessary to make the communication considered as a whole not materially misleading.

[8] Judicial candidates are sometimes the subject of false, misleading, or unfair allegations. For example, false or misleading statements might be made regarding the identity, present position, experience, qualifications, or judicial rulings of a candidate. In other situations, false or misleading allegations may be made that bear upon a candidate's integrity or fitness for judicial office. As long as the candidate does not violate paragraphs (A)(11), (A)(12), or (A)(13), the candidate may make a factually accurate public response. In making any such response, the judge should maintain the dignity appropriate to judicial office.

[9] Paragraph (A)(12) prohibits judicial candidates from making comments that might impair the fairness of pending or impending judicial proceedings. This provision does not restrict arguments or statements to the court or jury by a lawyer who is a judicial candidate, or rulings, statements, or instructions by a judge that may appropriately affect the outcome of a matter.

Pledges, Promises, or Commitments Inconsistent with Impartial Performance of the Adjudicative Duties of Judicial Office

[10] The role of a judge is different from that of a legislator or executive branch official Campaigns for retention to judicial office must be conducted differently from campaigns for other offices. The narrowly drafted restrictions upon political and campaign activities of judicial candidates provided in Canon 4 are in-

tended to help preserve the integrity and independence of the judiciary, and to honor Colorado's merit-based system of selecting and retaining judges.

[11] Paragraph (A)(13) makes applicable to both judges and judicial candidates the prohibition that applies to judges in Rule 2.10(B), relating to pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

[12] The making of a pledge, promise, or commitment is not dependent upon, or limited to, the use of any specific words or phrases; instead, the totality of the statement must be examined to determine if a reasonable person would believe that the candidate for judicial office has specifically undertaken to reach a particular result. Pledges, promises, or commitments must be contrasted with statements or announcements of personal views on legal, political, or other issues, which are not prohibited. When making such statements, a judge should acknowledge the overarching judicial obligation to apply and uphold the law, without regard to his or her personal views.

ANNOTATION

Judge who allowed candidate for public office to place a sign in support of candidate outside judge's home publicly endorsed candidate for public office, thereby engaging in a prohibited political activity and improperly lending the prestige of his office to advance the private interests of another. In re Inquiry Concerning McCormick, 639 N.W.2d 12 (Iowa 2002).

ETHICS OPINIONS

To make clear that any contribution by the judge's spouse to a political candidate is not from the judge, that contribution should be made in the spouse's name alone from the spouse's separate bank account with no reference to the judge or judicial position. Colo. J.E.A.B. Op. 06-04.

A judge may not contribute to another judge's retention campaign fund. Although a judge standing for retention is not necessarily a candidate for "public" office, judicial contributions to retention elections necessarily politicizes them, in contravention to the Code. Alaska Op. 98-3.

A judge may not attend a political party caucus. A judge may vote in a primary election, even when participation is conditioned on party affiliation. Utah. Ad. Op. 2002-1.

A judge may not act as a master of ceremonies at a "Meet the Candidates Night" sponsored by a local PTA, because the meeting is a political gathering. Utah Ad. Op. 98-15.

Rule 4.2: Political and Campaign Activities of a Judge Who is a Candidate for Retention

(A) A judicial candidate* in a retention public election* shall:

(1) act at all times in a manner consistent with the independence,* integrity,* and impartiality* of the judiciary;

(2) comply with all applicable federal and state election, election campaign, and election campaign fund-raising laws and regulations;

(3) review and approve the content of all campaign statements and materials produced by the candidate or his or her campaign committee, as authorized by Rule 4.3, before their dissemination; and

(4) take reasonable measures to ensure that other persons do not undertake on behalf of the candidate activities, other than those described in Rule 4.3, that the candidate is prohibited from doing by Rule 4.1.

ETHICS OPINIONS

Judges standing for retention may not appear on a television program in which a representative of the League of Women Voters would ask them questions to help provide viewers with more information about whether or not the judges should be retained. Viewers might reasonably expect that the judge was seeking an approval vote and might therefore understand that the judge is engaging in campaign activity. Colo. J.E.A.B. Op. 08-04.

Rule 4.3: Retention Campaign Committees

(A) A judge who is a candidate for retention in office should abstain from any campaign activity in connection with the judge's own candidacy unless there is active opposition to his or her retention in office. If there is active opposition to the retention of a candidate judge:

(1) The judge may speak at public meetings;

(2) the judge may use advertising media, provided that the advertising is within the bounds of proper judicial decorum;

(3) a nonpartisan citizens' committee or committees advocating a judge's retention in office may be organized by others, either on their own initiative or at the request of the judge;

(4) any committee organized pursuant to subsection (A)(3) may raise funds for the judge's campaign, but the judge should not solicit funds personally or accept any funds except those paid to the judge by a committee for reimbursement of the judge's campaign expenses;

(5) the judge should not be advised of the source of funds raised by the committee or committees;

(6) the judge should review and approve the content of all statements and materials produced by the committee or committees before their dissemination.

COMMENT

[1] Judicial candidates are prohibited from personally soliciting funds in support of their retention or personally accepting retention campaign contributions. See Rule 4.1(A)(8).

[2] Retention campaign committees may solicit and accept campaign contributions, manage the expenditure of campaign funds, and generally conduct campaigns. Judicial candidates are responsible for compliance with the requirements of election law and other applicable law, and for the activities of their retention campaign committees.

[3] At the start of a retention campaign, the candidate must instruct the retention campaign committee to solicit or accept only such contributions as are reasonable in amount, appropriate under the circumstances, and in conformity with applicable law. Although lawyers and others who might appear before a judge who is retained are permitted to make campaign contributions, the judge should not be informed of the source of any funds.

Note: The Fair Campaign Practice Act, §§1-45-101 et. seq., C.R.S. applies to campaigns for and against retention in office.

ETHICS OPINIONS

A great deal of media attention to a judge's ruling, even if it is critical of the ruling, does not, in itself, constitute active opposition to the judge's retention. However, if there is an organized campaign in opposition to the judge's retention or if there are individual comments opposed to the judge's retention that have been broadcast to a public audience, the judge may safely conclude that there is active opposition to the judge's retention. Here, the Board concludes that the numerous comments posted on the local newspaper's website recommending non-retention of the judge amount to active opposition. Nevertheless, the Board cautions the judge that even though he may, ethically, campaign for retention, he should begin a campaign with great care, bearing in mind that our system strongly disfavors judicial campaigns. Colo. J.E.A.B. Op. 08-05.

Judges standing for retention may not appear on a television program in which a representative of the League of Women Voters would ask them questions to help provide viewers with more information about whether or not the judges should be retained. Viewers might reasonably expect that the judge was seeking an approval vote and might therefore understand that the judge is engaging in campaign activity. Colo. J.E.A.B. 08-04.

A judge may operate a retention campaign if there is active opposition to the judge's retention. Active opposition does not include a below-average performance rating by the Judicial Conduct Commission or casual, water-cooler type discussions in opposition to the judge's retention, but can include scenarios where an anti-retention message is broadcast to a large audience of potential voters, such as through a letter to the editor, lawn signs, or paid advertisements in a publication. Active opposition

may also be found in news stories, timed to a judge's retention election, that raise negative facts and qualification issues not immediately relevant to a news-making case. Utah Ad. Op. 2000-05.

Rule 4.4: Activities of Judges Who Become Candidates for Nonjudicial Office

(A) Upon becoming a candidate for a nonjudicial elective office, a judge shall resign from judicial office, unless permitted by law* to continue to hold judicial office.

(B) Upon becoming a candidate for a nonjudicial appointive office, a judge is not required to resign from judicial office, provided that the judge complies with the other provisions of this Code.

COMMENT

[1] In campaigns for nonjudicial elective public office, candidates may make pledges, promises, or commitments related to positions they would take and ways they would act if elected to office. Although appropriate in nonjudicial campaigns, this manner of campaigning is inconsistent with the role of a judge, who must remain fair and impartial to all who come before him or her. The potential for misuse of the judicial office, and the political promises that the judge would be compelled to make in the course of campaigning for nonjudicial elective office, together dictate that a judge who wishes to run for such an office must resign upon becoming a candidate.

[2] The "resign to run" rule set forth in paragraph (A) ensures that a judge cannot use the judicial office to promote his or her candidacy, and prevents post-campaign retaliation from the judge in the event the judge is defeated in the election. When a judge is seeking appointive nonjudicial office, however, the dangers are not sufficient to warrant imposing the "resign to run" rule.

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CHAPTER 25

The Colorado Rules of County Court Civil Procedure

ANALYSIS BY RULE

CHAPTER 25

COLORADO RULES OF COUNTY COURT CIVIL PROCEDURE

Rule 301. Scope of Rules

(a) Procedure Governed. These rules govern the procedure in all county courts created and governed by Chapter 45 of the Colorado Session Laws of 1964. They shall be liberally construed to secure the just, speedy and inexpensive determination of every action.

(b) How Known and Cited. These rules shall be known and cited as the Colorado Rules of Civil Procedure, or C.R.C.P.

Source: (b) amended and adopted December 5, 1996, effective January 1, 1997.

Editor's note: Chapter 45 of the session laws of 1964 is now numbered as article 6 of title 13, C.R.S.

ANNOTATION

Orders need not be signed to be valid. There is no provision in these rules requiring orders to be signed in order to be valid. Spar Consol. Mining & Dev. Co. v. Aasgaard, 33 Colo. App. 35, 516 P.2d 127, aff'd, 185 Colo. 157, 522 P.2d 726 (1974).

Rule 302. Form of Action

There shall be one form of action to be known as a "Simplified Civil Action".

Rule 303. Commencement of Action

(a) How Commenced. A simplified civil action is commenced: (1) by filing with the court a complaint consisting of a statement of claim setting forth briefly the facts and circumstances giving rise to the action in the manner and form provided in Rule 308; or (2) by service of a summons and complaint. The complaint must be filed within 14 days of the service of the summons and not less than 7 days in advance of the return date. If the complaint is not timely filed, the service of the summons shall be deemed ineffective and void without notice. In such case the court may, in its discretion, tax a reasonable sum in favor of the defendant to compensate the defendant for expense and inconvenience, including attorney's fees, to be paid by plaintiff or the plaintiff's attorney. The 14 day filing requirement may be expressly waived by a defendant and shall be deemed waived upon the filing of an answer or motion to the complaint without reserving the issue.

(b) Issuance of Summons. Upon the filing of a complaint as provided in section (a) of this rule and the payment of the docket fee, the clerk shall docket the case and assign it a number. Unless summons has prior thereto been issued and signed by an attorney, the clerk shall then sign and issue a summons under the seal of the court. Separate, additional, and amended summons may be issued by the clerk or an attorney of record against any defendant at any time, and when issued by an attorney, it must be filed with the court no later than 7 days in advance of the return date. All process shall be issued by the clerk except as otherwise provided by these rules.

(c) Time of Jurisdiction. The court shall have jurisdiction from (1) the filing of the complaint, or (2) the service of the summons and complaint; provided, however, if more than 14 days elapses after service upon any defendant before the filing of the complaint, jurisdiction as to that defendant shall not attach by virtue of the service.

Source: (a) amended July 22, 1993, effective January 1, 1994; (b) amended November 18, 1993, effective January 1, 1994; (a) and (b) amended and effective June 28, 2007; (c) amended and effective April 10, 2008; entire rule amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Rule 304. Service of Process

(a) To What Applicable. This rule applies to all process except as otherwise provided by these rules.

(b) Initial Process. Except in cases of service by publication under Rule 304(f), the complaint and a blank copy of the answer form shall be served with the summons.

(c) By Whom Served. Process may be served within the United States or its Territories by any person whose age is eighteen years or older, not a party to the action. Process served in a foreign country shall be according to any internationally agreed means reasonably calculated to give notice, the law of the foreign country, or as directed by the foreign authority or the court if not otherwise prohibited by international agreement.

(d) Personal Service. Personal service shall be as follows:

(1) Upon a natural person whose age is eighteen years or older by delivering a copy thereof to the person, or by leaving a copy thereof at the person's usual place of abode, with any person whose age is eighteen years or older and who is a member of the person's family, or at the person's usual workplace, with the person's supervisor, secretary, administrative assistant, bookkeeper, human resources representative or managing agent; or by delivering a copy to a person authorized by appointment or by law to receive service of process.

(2) Upon a natural person whose age is at least thirteen years and less than eighteen years, by delivering a copy thereof to the person and another copy thereof to the person's father, mother, or guardian, or if there be none in the state, then by delivering a copy thereof to any person in whose care or control the person may be, or with whom the person resides, or in whose service the person is employed, and upon a natural person under the age of thirteen years by delivering a copy to the person's father, mother, or guardian, or if there be none in the state, then by delivering a copy thereof to the person in whose care or control the person may be.

(3) Upon a person for whom a conservator has been appointed, by delivering a copy thereof to such conservator.

(4) Upon any form of corporation, partnership, association, cooperative, limited liability company, limited partnership association, trust, organization, or other form of entity that is recognized under the laws of this state or of any other jurisdiction, (including any such organization, association or entity serving as an agent for service of process for itself or for another entity) by delivering a copy thereof to the registered agent for service as set forth in the most recently filed document in the records of the secretary of state of this state or of any other jurisdiction, or that agent's secretary or assistant, or one of the following:

(A) An officer of any form of entity having officers, or that officer's secretary or assistant;

(B) A general partner of any form of partnership, or that general partner's secretary or assistant;

(C) A manager of a limited liability company or limited partnership association in which management is vested in managers rather than members, or that manager's secretary or assistant;

(D) A member of a limited liability company or limited partnership association in which management is vested in the members or in which management is vested in managers and there are no managers, or that member's secretary or assistant;

(E) A trustee of a trust, or that trustee's secretary or assistant;

(F) The functional equivalent of any person described in paragraphs (A) through (E) of this subsection (4), regardless of such person's title, under:

(I) the articles of incorporation, articles of organization, certificate of limited partnership, articles of association, statement of registration, or other documents of similar import

duly filed or recorded by which the entity or any or all of its owners obtains status as an entity or the attribute of limited liability, or

(II) the law pursuant to which the entity is formed or which governs the operation of the entity;

(G) If no person listed in subsection (4) of this rule can be found in this state, upon any person serving as a shareholder, member, partner, or other person having an ownership or similar interest in, or any director, agent, or principal employee of such entity, who can be found in this state, or service as otherwise provided by law.

(5) Repealed.

(6) Upon a municipal corporation, by delivering a copy thereof to the mayor, the city manager, the clerk, or deputy clerk.

(7) Upon a county, by delivering a copy thereof to the county clerk, chief deputy, or county commissioner.

(8) Upon a school district, by delivering a copy thereof to the superintendent.

(9) Upon the state by delivering a copy thereof to the attorney general.

(10) (A) Upon an officer, agent, or employee of the state, acting in an official capacity, by delivering a copy thereof to the officer, agent, or employee, and by delivering a copy to the attorney general.

(B) Upon a department or agency of the state, subject to suit, by delivering a copy thereof to the principal officer, chief clerk, or other executive employee thereof, and by delivering a copy to the attorney general.

(C) For purposes of service of an initial summons and complaint, the copies shall be delivered to both the party and the attorney general within the times as set forth in rule 312(a). For all other purposes, the effective date of service shall be the latter date of delivery.

(11) Upon other political subdivisions of the State of Colorado, special districts, or quasi-municipal entities, by delivering a copy thereof to any officer or general manager, unless otherwise provided by law.

(12) Upon any of the entities or persons listed in subsections (4) through (11) of this section (d) by delivering a copy to any designee authorized to accept service of process for such entity or person, or by delivery to a person authorized by appointment or law to receive service of process for such entity or person. The delivery shall be made in any manner permitted by such appointment or law.

(e) Substitute Service. In the event that a party attempting service of process by personal service under section (d) is unable to accomplish service, and service by publication or mail is not otherwise permitted under section (f), the party may file a motion, supported by an affidavit of the person attempting service, for an order for substituted service. The motion shall state (1) the efforts made to obtain personal service and the reason that personal service could not be obtained, (2) the identity of the person to whom the party wishes to deliver the process, and (3) the address, or last known address of the workplace and residence, if known, of the party upon whom service is to be effected. If the court is satisfied that due diligence has been used to attempt personal service under section (d), that further attempts to obtain service under section (d) would be to no avail, and that the person to whom delivery of the process is appropriate under the circumstances and reasonably calculated to give actual notice to the party upon whom service is to be effective, it shall:

(1) Authorize delivery to be made to the person deemed appropriate for service, and

(2) Order the process to be mailed to the address(es) of the party to be served by substituted service, as set forth in the motion, on or before the date of delivery.

Service shall be complete on the date of delivery to the person deemed appropriate for service.

(f) Other Service. Except as otherwise provided by law, service by mail or publication shall be allowed only in actions affecting specific property or status or other proceedings in rem. When service is by publication, the complaint need not be published with the summons. The party desiring service of process by mail or publication under this section (f) shall file a motion verified by the oath of such party or of someone in the party's behalf for an order of service by mail or publication. It shall state the facts authorizing such

service, and shall show the efforts, if any, that have been made to obtain personal service and shall give the address, or last known address, of each person to be served or shall state that this address and last known address are unknown. The court, if satisfied that due diligence has been used to obtain personal service or that efforts to obtain the same would have been to no avail, shall:

(1) Order the party to send by registered or certified mail a copy of the summons and a copy of the complaint, addressed to such person at such address, requesting a return receipt signed by addressee only. Such service shall be complete on the date of the filing of proof thereof, together with such return receipt attached thereto signed by such addressee, or

(2) Order publication of the summons in a newspaper published in the county in which the action is pending. Such publication shall be made once each week for five successive weeks. Within fifteen days after the order the party shall mail a copy of the summons and complaint to each person whose address or last known address has been stated in the motion and file proof thereof. Service shall be completed on the day of the last publication. If no newspaper is published in the county, the court shall designate one in some adjoining county.

(g) Manner of Proof. Proof of service shall be made as follows:

(1) If served personally, by a statement, certified by the sheriff, marshal or similar governmental official, or statement duly acknowledged under oath by any other person completing the service as to date, place, and manner of service.

(2) Repealed.

(3) If served by mail, an affidavit showing the date of the mailing, with the return receipt attached, where applicable.

(4) If served by publication, by the affidavit of publication, together with an affidavit as to the mailing of a copy of the summons, complaint and answer form where required.

(5) If served by waiver, by the written admission or waiver of service by the person or persons to be served, duly acknowledged, or by their attorney.

(6) If served by substituted service, by a duly acknowledged statement as to the date, place, and manner of service, accompanied by an affidavit that the process was also mailed to the party to be served by substituted service, setting forth the address(es) where the process was mailed.

(h) Amendment. At any time in its discretion and upon such terms as it deems just, the court may allow any summons or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the summons issued.

(i) Waiver of Service of Summons. A defendant who waives service of a summons does not thereby waive any objection to the venue or to the jurisdiction of the court over the defendant.

(j) Refusal of Copy. If a person to be served refuses to accept a copy of the summons and complaint, service shall be sufficient if the person serving the documents knows or has reason to identify the person who refuses to be served, identifies the documents being served as a summons and complaint, offers to deliver a copy of the documents to the person who refuses to be served, and thereafter leaves a copy in a conspicuous place.

Source: Entire rule amended July 22, 1993, effective January 1, 1994; entire rule amended and effective March 23, 2006; (g)(1) amended and effective February 7, 2008; (d)(1) and (d)(4) amended and effective June 21, 2012.

Rule 305. Service and Filing of Pleadings and other Papers

(a) Service: When Required. Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper related to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, filings on appeal, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that

pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 304.

(b) Making Service. (1) Service under C.R.C.P. 305(a) on a party represented by an attorney is made upon the attorney unless the court orders personal service upon the party. A resident attorney, on whom pleadings and other papers may be served, shall be associated as attorney of record with any out-of-state attorney practicing in any courts of this state.

(2) Service under C.R.C.P. 305(a) is made by:

(A) Delivering a copy to the person served by:

(i) handing it to the person;

(ii) leaving it at the person's office with a clerk or other person in charge, or if no one is in charge, leaving it in a conspicuous place in the office; or

(iii) if the person has no office or the office is closed, leaving it at the person's dwelling house or usual place of abode with someone 18 years of age or older residing there;

(B) Mailing a copy to the last known address of the person served. Service by mail is complete on mailing;

(C) If the person served has no known address, leaving a copy with the clerk of the court; or

(D) Delivering a copy by any other means, including E-Service, other electronic means or a designated overnight courier, consented to in writing by the person served. Designation of a facsimile phone number in the pleadings effects consent in writing for such delivery. Parties who have subscribed to E-Filing, pursuant to Chief Justice Directive 06-02 have agreed to receive E-Service. Service by other electronic means is complete on transmission; service by other consented means is complete when the person making service delivers the copy to the agency designated to make delivery. Service by other electronic means or overnight courier under C.R.C.P. 305(b)(2)(D) is not effective if the party making service learns that the attempted service did not reach the person to be served.

(c) Service: Numerous Defendants. In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) Filing; Certificate of Service. All papers after the initial pleading required to be served upon a party, together with a certificate of service, must be filed with the court within a reasonable time after service, but disclosures under Rule C.R.C.P. 316 and discovery requests and responses shall not be filed until they are used in the proceeding or the court orders otherwise.

(e) Filing with Court Defined. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. A paper filed by E-Filing in compliance with Chief Justice Directive 06-02 constitutes a written paper for the purpose of this Rule. The clerk shall not refuse to accept any paper presented for filing solely because it is not presented in proper form as required by these rules or any local practice.

(f) Inmate Filing and Service. Except where personal service is required, a pleading filed or served by an inmate confined to an institution is timely filed or served if deposited in the institution's internal mailing system on or before the last day for filing or serving. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule.

Source: (a), (b), (d), and (e) amended July 22, 1993, effective January 1, 1994; entire rule repealed and readopted and effective June 28, 2007.

Rule 305.5. Electronic Filing and Serving

(a) **Definitions:**

(1) **Document:** A pleading, motion, writing or other paper filed or served under the E-System.

(2) **E-Filing/Service System:** The E-Filing/service system ("**E-System**") approved by the Colorado Supreme Court for filing and service of documents via the Internet through the Court-authorized E-System provider.

(3) **Electronic Filing:** Electronic filing ("**E-Filing**") is the transmission of documents to the clerk of the court, and from the court, via the E-System.

(4) **Electronic Service:** Electronic service ("**E-Service**") is the transmission of documents to any party in a case via the E-System. Parties who have subscribed to the E-System have agreed to receive service, other than service of a summons, via the E-System.

(5) **E-System Provider:** The E-Service/E-Filing system provider authorized by the Colorado Supreme Court.

(6) **Signatures:**

I. Electronic Signature: an electronic sound, symbol, or process attached to or logically associated with an electronic record and executed or adopted by the person with the intent to sign the E-filed or E-served document.

II. Scanned Signature: A graphic image of a handwritten signature.

(b) **Types of Cases Applicable:** E-Filing and E-Service may be used for all cases filed in county court as the service becomes available. The availability of the E-System will be determined by the Colorado Supreme Court and announced through its website: http:www.courts.state.co.us and through published directives. E-Filing and E-Service may be mandated pursuant to Section (o) of this Rule 305.5.

(c) **To Whom Applicable:**

(1) Attorneys licensed to practice law in Colorado may register to use the E-System. Any attorney so registered may enter an appearance pursuant to C.R.C.P. 121, Section 1-1, through E-Filing. Where E-Filing is mandated pursuant to Section (o) of this Rule 305.5, attorneys must register and use the E-System.

(2) Where the system and necessary equipment are in place to permit it, pro se parties and government entities and agencies may register to use the E-System.

(d) **Commencement of Action-Service of Summons:** Cases may be commenced under C.R.C.P. 303 through an E-Filing. Cases commenced under C.R.C.P. 303 through an E-Filing must be E-Filed to the court no later than seven (7) days before the set return date, if any. Service of a summons shall be made in accordance with C.R.C.P. 304

(e) **E-Filing, Date and Time of Filing:** Documents filed in cases on the E-System may be filed under C.R.C.P. 305 through an E-Filing. A document transmitted to the E-System provider by 11:59 p.m. Colorado time shall be deemed to have been filed with the clerk of the court on that date.

(f) **E-Service - When Required - Date and Time of Service:** Documents submitted to the court through E-Filing shall be served under C.R.C.P. 5 by E-Service. Parties shall keep their address and contact information updated in the e-system. A filing party shall enter or confirm the served party's last known address in the e-system. A document transmitted to the E-System Provider for service by 11:59 p.m. Colorado time shall be deemed to have been served on that date.

(g) **Filing Party To Maintain the Signed Copy, Paper Document Not To Be Filed, Duration of Maintaining of Document:** A printed or printable copy of an E-Filed or E-Served document with original, electronic, or scanned signatures shall be maintained by the filing party and made available for inspection by other parties or the court upon request, but shall not be filed with the court. When these rules require a party to maintain a document, the filer is required to maintain the document for a period of two years after the final resolution of the action, including the final resolution of all appeals.

(h) Default Judgments and Original Documents:

(1) If the action is on a promissory note or where an original document is by law required to be filed, that original document shall be scanned and submitted electronically with the e-filed motion for default. The original document shall be presented to the court in order that the court may make a notation of the judgment on the face of the document.

(2) Following compliance with sub-paragraph (1) of this paragraph (h) the document may then be returned to the filing party; retained by the court for a specified period of time to be determined by the court; or destroyed by the court.

(3) When the return of service is required for entry of default, the return of service may be scanned and E-Filed. In accordance with paragraph (i) of this Rule, signatures of attorneys, parties, witnesses, notaries and notary stamps may be electronically affixed or documents with signatures obtained on a paper form may be scanned into the system to satisfy signature requirements.

(i) Documents Requiring E-Filed Signatures: E-Filed and E-Served documents, signatures of attorneys, parties, witnesses, notaries and notary stamps may be electronically affixed or documents with signatures obtained on a paper form may be scanned into the system to satisfy signature requirements.

(j) C.R.C.P. 311 Compliance: Use of the E-System by an attorney constitutes compliance with the signature requirement of C.R.C.P. 311. An attorney using the E-System shall be subject to all other requirements of Rule 311.

(k) Documents Under Seal: A motion for leave to file documents under seal may be E-Filed. Documents to be filed under seal pursuant to an order of the court may be E-Filed at the discretion of the court; however, the filing party may object to this procedure.

(l) Transmitting of Orders, Notices, and Other Court Entries: Courts shall distribute orders, notices, and other court entries using the E-System in cases where E-Filings were received from any party.

(m) Form of E-Filed Documents: C.R.C.P. 310 shall apply to E-Filed documents. A document shall not be transmitted to the clerk of the court by any other means unless the court at any later time requests a printed copy.

(n) Repealed.

(o) E-Filing May Be Mandated: With the permission of the Chief Justice, a chief judge may mandate E-filing within a county or judicial district for specific case classes or types of cases. Where E-Filing is mandatory, the court may thereafter accept a document in paper form and the court shall scan the document and upload it to the E-Service provider. After notice to an attorney that all future documents are to be E-Filed, the court may charge a fee of $50 per document for the service of scanning and uploading a document filed in paper form. Where E-Filing and E-Service are mandatory, the Chief Judge or appropriate judicial officer may exclude pro se parties from mandatory E-Filing requirements.

(p) Relief in the Event of Technical Difficulties:

(1) Upon satisfactory proof that E-Filing or E-Service of a document was not completed because of: (1) an error in the transmission of the document to the E-System provider which was unknown to the sending party, (2) a failure of the E-System provider to process the E-Filing when received, or (3) other technical problems experienced by the filer or E-System provider, the court may enter an order permitting the document to be filed nunc pro tunc to the date it was first attempted to be sent electronically.

(2) Upon satisfactory proof that an E-Served document was not received by or unavailable to a party served, the court may enter an order extending the time for responding to that document.

(q) Form of Electronic Documents

(1) Electronic Document Format, Size, and Density: Electronic document format, size, and density shall be as specified by Chief Justice Directive # 11-01.

(2) **Multiple Documents:** Multiple documents (including proposed orders) may be filed in a single electronic filing transaction. Each document (including proposed orders) in that filing must bear a separate document title.

(3) **Proposed Orders:** Proposed orders shall be E-Filed in an editable format. Proposed orders that are E-Filed in a non-editable format shall be rejected by the Court Clerk's office and must be resubmitted.

Source: Entire rule and committee comment added and effective September 10, 2009; (a)(6), (b), (d), (f), (g), (h)(3), (i), and (q)(1) amended and (n) repealed and effective June 21, 2012.

COMMITTEE COMMENT

The Court authorized service provider for the program is LexisNexis File & Serve (www.lexisnexis.com/fileandserve).

"Editable Format" is one which is subject to modification by the court using standard means such as Word or WordPerfect format.

C.R.C.P. 377 provides that courts are always open for business. This Rule 305.5 is intended to comport with that rule.

Rule 306. Time

(a) **Computation.** (1) In computing any period of time prescribed or allowed by these rules, by order of court, or by an applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. Thereafter, every day shall be counted including holidays, Saturdays or Sundays. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(2) As used in this Rule, "Legal holiday" includes the first day of January, observed as New Year's Day; the third Monday in January, observed as Martin Luther King Day; the third Monday in February, observed as Washington-Lincoln Day; the last Monday in May, observed as Memorial Day; the fourth day of July, observed as Independence Day; the first Monday in September, observed as Labor Day; the second Monday in October, observed as Columbus Day; the eleventh day of November, observed as Veteran's Day; the fourth Thursday in November, observed as Thanksgiving Day; the twenty-fifth day of December, observed as Christmas Day, and any other day except Saturday or Sunday when the court is closed.

(b) **Enlargement.** When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 325 and 360(b), except to the extent and under the conditions stated in them.

(c) **Unaffected by Expiration of Term.** Repealed.

(d) **Notice, Motion, Affidavits.** Repealed.

(e) **Additional Time on Service Under C.R.C.P. 305(b)(2)(B), (C), or (D).**Repealed. to Rule 306(e)

Source: (e) amended July 22, 1993, effective January 1, 1994; (a) amended and effective August 4, 1994; (a) and (e) amended and effective and (e) committee comment added and effective June 28, 2007; (a) amended and (c), (d), and (e) and (e) committee comment repealed and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); comment added and adopted June 21, 2012, effective July 1, 2012.

Cross references: For statutes concerning holidays, see article 11 of title 24, C.R.S.

COMMENT

After the particular effective date, time computation in most situations is intended to incorporate the Rule of Seven. Under the Rule of Seven, a day is a day, and because calendars are divided into 7-day week intervals, groupings of days are in 7-day or multiples of 7-day intervals. Groupings of less than 7 days have been left as they were because such small numbers do not interfere with the underlying concept. Details of the Rule of Seven reform are set forth in an article by Richard P. Holme, 41 Colo. Lawyer, Vol. 1, P 33 (January 2012).

Time computation is sometimes "forward," meaning starting the count at a particular stated event [such as date of filing] and counting forward to the deadline date. Counting "backward" means counting backward from the event to reach the deadline date [such as a stated number of days being allowed before the commencement of trial]. In determining the effective date of the Rule of Seven time computation/time interval amendments having a statutory basis, said amendments take effect on July 1, 2012 and regardless of whether time intervals are counted forward or backward, both the time computation start date and deadline date must be after June 30, 2012. Further, the time computation/time interval amendments do not apply to modify the settings of any dates or time intervals set by an order of a court entered before July 1, 2012.

Rule 307. Pleadings and Motions

(a) Pleadings. There shall be a complaint and an answer which may or may not include a counterclaim. No other pleadings shall be allowed except by order of court.

(b) Motions. Repealed.

(c) Demurrers, Pleas, etc., Abolished. Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.

(d) Agreed Case, Procedure. Parties to a dispute which might be the subject of a civil action may, without pleadings, file, in the court which would have had jurisdiction if an action had been brought, an agreed statement of facts. The same shall be supported by an affidavit that the controversy is real and that it is filed in good faith to determine the rights of the parties. The matters shall then be deemed an action at issue and all proceedings thereafter shall be as provided by these rules.

Source: (b) repealed, effective April 5, 2010.

Rule 308. General Rules of Pleading

(a) Claims for Relief. Complaints shall be in the form and content of Appendix to Chapter 25, Form 2, C.R.C.P., and shall be signed by the plaintiff or the plaintiff's attorney.

(b) Defenses; Form of Denials. The answer shall be in the form and content of Appendix to Chapter 25, Form 3, C.R.C.P., and shall be signed by the defendant or the defendant's attorney.

Source: Entire rule amended July 22, 1993, effective January 1, 1994.

Rule 309. Pleading Special Matters

(a) Capacity. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is a party. The issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity shall be raised by a short, concise, negative statement with supporting particulars in the answer.

(b) Fraud, Mistake, Condition of the Mind. All claims of fraud or mistake and the facts constituting such shall be concisely stated.

(c) Official Document or Act. In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.

(d) Judgment. In pleading a judgment or decision of a court, judicial or quasi-judicial tribunal, or of a board or officer within the United States or within a territory or insular possession subject to the dominion of the United States, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it. A denial of jurisdiction shall be made specifically and with particularity and when so made the party pleading the judgment or decision shall establish on the trial all controverted jurisdictional facts.

(e) Time and Place. For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(f) Special Damages. When items of special damage are claimed, they shall be specifically stated.

(g) Pleading Statute. In pleading a statute of Colorado or of the United States, the same need not be set forth at length, but it shall be sufficient to refer to such statute by the appropriate designation in the official or recognized compilation thereof, or otherwise identify the same, and the court shall thereupon take judicial notice thereof.

Rule 310. Form of Summons, Pleadings and Other Documents

(a) Caption; Names of Parties. The complaint and answer shall be in the form shown in Appendix to Chapter 25, C.R.C.P. with a caption that conforms with C.R.C.P. 10. The complaint in an action brought pursuant to section 13-40-110, C.R.S., shall also include a demand for possession setting forth all jurisdictional prerequisites necessary for the entry of judgment for possession. The complaint in an action brought pursuant to section 13-6-104 (5) or (6), C.R.S., shall also be verified and include a demand for injunctive relief. The complaint in an action brought pursuant to section 13-6-105(1)(f), C.R.S., shall also be verified and include a demand for injunctive relief, and a copy of the covenant shall be attached as an exhibit. Affidavits, written orders and all other documents authorized to be filed shall contain the form of caption as specified in C.R.C.P. 10. In all cases the case or docket number shall appear on the document if known.

(b) Exhibits. An exhibit is a part of the document to which it is attached for all purposes.

(c) Form of Summons. The summons shall be in the form and content prescribed by the Appendix to Chapter 25, Forms 1, 1A (for actions brought pursuant to section 13-40-110, C.R.S.), 1B (for actions brought pursuant to section 13-6-105(1)(f), C.R.S.), or 1C (for actions where service is permitted to be by publication), with a caption that conforms with C.R.C.P. 10. The summons shall contain the name, address, telephone number, and registration number of the plaintiff's attorney, if any, and if not, the full name, address and daytime telephone number of the plaintiff.

(d) General Rule Regarding Paper Size and Quality. Only documents which are clear and legible and are on permanent plain 8 1/2 by 11 inch paper shall be filed.

Source: Entire rule amended July 22, 1993, effective January 1, 1994; (a) corrected and effective January 9, 1995; (a) and (c) amended June 1, 2000, effective July 1, 2000; (c) amended and effective July 10, 2000.

Rule 311. Signing of Pleadings

(a) Obligations of parties and attorneys. When a party is not represented by an attorney, the party shall sign the pleadings. The pleadings shall contain the party's address,

and if the party is not represented by an attorney, shall include the party's telephone number. If a party is represented by an attorney, the attorney shall sign the pleading and state on the initial pleading the attorney's registration number, and in addition thereto shall note the attorney's address and telephone number thereon. The signature of the attorney on a pleading shall have the same effect and subject the attorney to the same penalties as provided in C.R.C.P. 11. If the pleading is not signed, it may be stricken and the action may proceed as though the pleading had not been filed. If the current registration number of the attorney is not included with the signature, the clerk of the court shall request from the attorney the registration number. If the attorney is unable to furnish the clerk with a registration number, that fact shall be reported to the clerk of the Supreme Court, but the clerk shall, nevertheless, accept the filing.

(b) Limited representation. An attorney may undertake to provide limited representation in accordance with Colo.RPC 1.2 to a pro se party involved in a court proceeding. Pleadings or papers filed by the pro se party that were prepared with the drafting assistance of the attorney shall include the attorney's name, address, telephone number and registration number. The attorney shall advise the pro se party that such pleading or other paper must contain this statement. In helping to draft the pleading or paper filed by the pro se party, the attorney certifies that to the best of the attorney's knowledge, information and belief, this pleading or paper is (1) well-grounded in fact based upon a reasonable inquiry of the pro se party by the attorney, (2) is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and (3) is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. The attorney in providing such drafting assistance may rely on the pro se party's representation of facts, unless the attorney has reason to believe that such representations are false or materially insufficient, in which instance the attorney shall make an independent reasonable inquiry into the facts. Assistance by an attorney to a pro se party in filling out pre-printed and electronically published forms that are issued through the judicial branch for use in court are not subject to the certification and attorney name disclosure requirements of this Rule 311(b).

Limited representation of a pro se party under this Rule 311(b) shall not constitute an entry of appearance by the attorney for purposes of C.R.C.P. 121, section 1-1 or C.R.C.P. 305, and does not authorize or require the service of papers upon the attorney. Representation of the pro se party by the attorney at any proceeding before a judge, magistrate, or other judicial officer on behalf of the pro se party constitutes an entry of an appearance pursuant to C.R.C.P. 121, section 1-1. The attorney's violation of this Rule 311(b) may subject the attorney to the sanctions provided in C.R.C.P. 311(a).

Source: Entire rule amended July 22, 1993, effective January 1, 1994; entire rule amended and adopted June 17, 1999, effective July 1, 1999.

ANNOTATION

Law reviews. For article, "Discrete Task Representation a/k/a Unbundled Legal Services", see 29 Colo. Law. 5 (January 2000).

Rule 312. Defenses and Objections — When and How Presented — by Pleading or Motion — Motion for Judgment on Pleadings

(a) Responsive Pleadings; When Presented. The defendant shall file an answer including any counterclaim or cross-claim on or before the appearance date as fixed in the summons. Except as otherwise provided in this rule, the appearance date shall not be more than 63 days from the date of the issuance of the summons and the summons must have been served at least 14 days before the appearance date. When circumstances require that the plaintiff proceed under Rule 304(e), the above limitation shall not apply and the appearance date shall not be less than 14 days after the completion of service by publication or mail.

(b) Motions. Motions raising defenses shall be made in accordance with Rule 307. If made by the defendant on or before the appearance date the motions shall be ruled upon before an answer is required to be filed. If the court rules upon such motions on the appearance date, the defendant may be required to file the answer immediately. The answer shall otherwise be filed within 14 days of the order. The court may permit the plaintiff to amend the complaint or supply additional facts and may permit additional time within which the answer shall be filed.

(c) Waiver of Defenses. A party waives all defenses and objections which are not raised either by motion or in his answer except that the defense of lack of jurisdiction of the subject matter may be made at any time.

(d) Motion for Judgment on the Pleadings. At any time after the last pleading is filed, but within such time as not to delay the trial, any party may move for judgment on the pleadings. A party shall not submit matters outside the pleadings in support of the motion.

Source: Entire section amended July 22, 1993, effective January 1, 1994; (a) amended and adopted effective April 23, 1998; (a) amended and effective June 28, 2007; (a) and (b) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

ANNOTATION

Applied in Abts v. Bd. of Educ., 622 P.2d 518 (Colo. 1980).

Rule 313. Counterclaim and Cross Claim

(a) Compulsory Counterclaims. If at the time the action is commenced the defendant possesses a counterclaim against the plaintiff that is within the jurisdiction of the county court, exclusive of interest and costs, arises out of the transaction or occurrence that is the subject matter of the plaintiff's claim, does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction, and is not the subject of another pending action, the defendant shall file such counterclaim in the answer or thereafter be barred from suit on the counterclaim. The defendant may also elect to file a counterclaim not arising out of the transaction or occurrence.

(b) Alternate. If at the time the action is commenced the defendant possesses a counterclaim against the plaintiff that is not within the jurisdiction of the county court, exclusive of interest and costs, the defendant may:

(1) File the counterclaim in the pending county court action, but, unless the defendant follows the procedure set forth in section (2) below, any judgment in the defendant's favor shall be limited to the jurisdictional limit of the county court, exclusive of interest and costs, and suit for the excess due the defendant over that sum will be barred thereafter; or

(2) File the counterclaim together with the answer in the pending county court action and request in the answer that the action be transferred to the district court. Upon filing the answer and counterclaim, the defendant shall tender the district court filing fee for a complaint. Upon compliance by the defendant with the requirements of this section, all county court proceedings shall be discontinued and the clerk of the county court shall certify all records in the case and forward the docket fee to the district court.

(c) Counterclaim Maturing or Acquired after Pleading. A claim which either matured or was acquired by the defendant after the answer was filed may, with the permission of the court, be presented as a counterclaim by supplemental pleading. If the counterclaim exceeds the jurisdiction of the county court, upon request of the defendant to transfer the case to district court and the tendering of the district court filing fee for a complaint, all county court proceedings shall be discontinued and the clerk of the county court shall certify all records in the case and forward the docket fee to the district court. If it is determined that the defendant's request for transfer was made for the purpose of delaying the trial of the plaintiff's claim, the district court shall award the plaintiff any costs, including reasonable attorney fees, occasioned by the delay.

(d) Omitted or Amended Counterclaim. When a defendant fails to file a counterclaim or request that the case be transferred to the district court through oversight, inadvertence, or excusable neglect, or when justice requires, the counterclaim may be pled by amendment, subject to Rule 315. If this omitted or amended counterclaim exceeds the jurisdiction of the county court, upon request of the defendant to transfer the case to district court and the tendering of the district court filing fee for a complaint, all county court proceedings shall be discontinued and the clerk of the county court shall certify all records in the case and forward the docket fee to the district court. If it is determined that the defendant's request for transfer was made for the purpose of delaying the trial of the plaintiff's claim, the district court shall award the plaintiff any costs, including reasonable attorney's fees, occasioned by the delay.

(e) Cross Claim against Co-party. An answer may state a cross claim against a codefendant arising out of the same transaction or occurrence that is the subject matter of the original action or relating to any property that is the subject matter of the original action. Such cross claim may include a claim that a party against whom it is asserted is or may be liable to the cross claimant for all or part of a claim asserted in the action against the cross claimant. A claim which either matured or was acquired by the defendant after filing the answer may, with the permission of the court, be presented as a cross claim by supplemental pleading. Any cross claim shall be limited to the jurisdictional limit of the county court, but the cross claimant shall have the right to dismiss the cross claim without prejudice at any time prior to trial, except that a dismissal operates as an adjudication upon the merits when requested by the cross claimant who has once dismissed in any court an action based on or including the same claim.

(f) Joinder of Additional Parties. Persons other than those made parties to the original action may be made parties to a counterclaim or cross claim in accordance with the provisions of Rules 319 and 320.

(g) Claims against Assignor or Assignee. Except as otherwise provided by law as to negotiable instruments, any claim, counterclaim, or cross claim which could be asserted against an assignor at the time of or before notice of an assignment, may be asserted against an assignee of the assignor, to the extent that such claim, counterclaim, or cross claim does not exceed recovery upon the claim of the assignee.

Source: (a), the introductory portion to (b), and (b)(2) amended and effective July 1, 1993; entire rule amended July 22, 1993, effective January 1, 1994.

ANNOTATION

Court not to predetermine damages for jurisdictional question. Since damages are a matter of proof at the trial, a trial court may not determine in advance of filing whether the jurisdictional amount can be established. Medina v. District Court, 177 Colo. 185, 493 P.2d 367 (1972).

The three provisions of paragraph (b) are mutually exclusive alternatives for pursuing counterclaims in county court. As a result, when defendant filed its counterclaim in county court its potential recovery was limited to $5,000. Intern. Satellite Com. v. Kelly Servs., 749 P.2d 468 (Colo. App. 1987).

Even though defendant's counterclaim did not mature until after the action was begun, it is still subject to the other provisions of this rule. Intern. Satellite Com. v. Kelly Servs., 749 P.2d 468 (Colo. App. 1987).

Tenant's unlawful eviction action in district court was properly dismissed where tenant failed to mention landlord's unlawful detainer action in county court, failed to comply with the procedural requirements for asserting an unlawful eviction claim, and was unable to refile the same answer and counterclaim in district court that he had filed in county court. Platte River Drive J. Venture v. Vasquez, 560 P.2d 599 (Colo. App. 1993).

Applied in Blackwell v. Del Bosco, 35 Colo. App. 399, 536 P.2d 838 (1975); Hurricane v. Kanover, Ltd., 651 P.2d 1218 (Colo. 1982).

Rule 314. No Colorado Rule

Rule 315. Amended Pleadings

Amendments. Amendment to pleadings shall not be permitted except by order of court.

Rule 316. Pretrial Procedure — Disclosure and Conference

(a) Disclosure Statement.

(1) At any time after the answer is filed but no later than 21 days before trial, a party may request from an opposing party a list of witnesses who may be called at trial, and copies of documents and pictures, and a description of physical evidence which may be used at trial. Such request shall be made by serving pursuant to C.R.C.P. 305 a blank disclosure statement, which shall be in the form and content of Appendix to Chapter 25, Form 9, on the opposing party and shall be accompanied by the requesting party's properly completed Form 9 and its attachments. The opposing party shall serve pursuant to C.R.C.P. 305 a completed Form 9 with attachments on the requesting party within 21 days after service but not less than 7 days before trial. The court may shorten or extend that time. A party may not supplement the disclosure statement except for good cause.

(2) The court may order the parties to exchange and file Form 9 disclosure statements at any time before trial.

(3) Any party failing to respond in good faith to a Form 9 request or court order under this subsection (a) shall be subject to imposition of appropriate sanctions at the time of trial.

(b) Pretrial Conferences. Prior to trial, the court may in its discretion and upon reasonable notice order a pretrial conference. Conferences by telephone are encouraged. Following a pretrial conference, the court may issue an order which may include limitations on the issues to be raised and the witnesses and exhibits to be allowed at trial, entry of judgment, or dismissal, if appropriate. Failure to appear at a pretrial conference may result in appropriate sanctions, including an award of attorney's fees and expenses incurred by the appearing party.

(c) Pretrial Discovery. If a pretrial conference is held, any party may request that discovery be permitted to assist in the preparation for trial. The request shall be made only during the conference. The discovery may include depositions, requests for admission, interrogatories, physical or mental examinations, or requests for production or inspection. If the court enters a discovery order, it shall set forth the extent and terms of the discovery as well as the time for compliance. If the court fails to specify any term, then the provisions of C.R.C.P. 30, 32, 33, 34, 35, and 36 shall be followed as to the missing term.

(d) Resolution of Disputes. All issues regarding discovery shall be resolved during the conference. No party shall be entitled to seek protective orders following the conference. Unless otherwise ordered by the court, a dispute over compliance with the discovery order shall be resolved at the time of trial, and the court may impose appropriate sanctions, including attorney's fees and costs, against the non-complying party.

(e) Juror Notebooks. The court may order the use of juror notebooks. If notebooks are to be used, counsel for each party shall confer about items to be included in juror notebooks and at the pretrial conference or other date set by the court make a joint submission to the court of items to be included in the juror notebook.

COMMITTEE COMMENT

Subsection (a) provides for the disclosure of a list of witnesses and copies of exhibits through the use of a form Disclosure Statement in simple cases. This rule also sets forth the procedure for pretrial conferences. A simplified form of discovery has been developed for the exceptional case warranting the expense of discovery due to the increased jurisdictional limit of the county court and is available only when there is a pretrial conference. The procedure is designed to provide discovery which is tailored to the particular needs of the parties. In order to

avoid disputes arising from discovery, all matters should be resolved by the court at the time of the conference.

Source: Entire rule added May 30, 1991, effective September 1, 1991. (e) added and adopted June 25, 1998, effective January 1, 1999; (a)(1) and (a)(3) amended and effective June 28, 2007; (a)(1) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Rule 317. Parties Plaintiff and Defendant

(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest; but a fiduciary as defined in section 15-1-301, C.R.S., a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in such party's own name without joining the party for whose benefit the action is brought, and when a statute so provides, an action for the use or benefit of another shall be brought in the name of the people of the state of Colorado.

(b) Capacity to Sue or Be Sued. A partnership or other unincorporated association may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right. A father and mother or the sole surviving parent may maintain an action for the injury or death of a child; where both maintain the action, each shall have an equal interest in the judgment; where one has deserted or refuses to sue, the other may maintain the action. A guardian may maintain an action for the injury or death of the guardian's ward.

(c) Minors or Incapacitated Persons. Whenever a minor or incapacitated person has a representative, such as a fiduciary as defined in section 15-1-301, C.R.S., the fiduciary may sue or defend on behalf of the minor or incapacitated person. If a minor or incapacitated person does not have a duly appointed fiduciary, or such fiduciary fails to act, the minor or incapacitated person may sue by a next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for a minor or incapacitated person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the minor or incapacitated person, provided, that in an action in rem it shall not be necessary to appoint a guardian ad litem for any unknown person who might be a minor or incapacitated person.

Source: Entire rule amended July 22, 1993, effective January 1, 1994.

Rule 318. Joinder of Claims and Remedies

(a) Joinder of Claims. The plaintiff in his complaint or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party.

(b) Joinder of Remedies: Fraudulent Conveyances. Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. For example, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money.

Rule 319. Necessary Joinder of Parties

Persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, or the person's consent cannot be obtained, that person may be made a defendant, or in proper cases, an involuntary plaintiff.

Source: Entire rule amended July 22, 1993, effective January 1, 1994.

Rule 320. Permissive Joinder of Parties

(a) Permissive Joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

(b) Separate Trials. The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom the party asserts no claim and who asserts no claim against that party, and may order separate trials or make other orders to prevent delay or prejudice.

(c) Parties Jointly or Severally Liable. Persons jointly or severally liable upon the same obligation or instrument, including the parties to negotiable instruments and sureties on the same or separate instruments, may all or any of them be sued in the same action, at the option of the plaintiff.

Source: (b) amended July 22, 1993, effective January 1, 1994.

Rule 321. Misjoinder and Nonjoinder of Parties

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

Rules 322 and 323.

(There are no present Colorado Rules 322 and 323.)

Rule 324. Intervention

Upon good cause shown, the court may permit intervention on such terms as it deems just.

Rule 325. Substitution of Parties

(a) Death.

(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 305 and upon persons not parties in the manner provided in Rule 304 for the service of process, and may be served in any county. Suggestion of death upon the record is made by service of a statement of the fact of death as provided herein for the service of the motion and by filing of proof thereof. If the motion for substitution is not made within 91 days (13 weeks) after such service, the action shall be dismissed as to the deceased party.

(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

(b) Incapacity. If a party becomes incapacitated, the court upon motion served as

provided in section (a) of this Rule may allow the action to be continued by or against the party's representative.

(c) Transfer of Interest. In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subsection (a)(1) of this Rule.

(d) Public Officers; Death or Separation from Office.

(1) When a public officer is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and the successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

(2) When a public officer sues or is sued in the officer's official capacity, the officer may be described as a party by the official title rather than by name; but the court may require the official's name to be added.

Source: (b) and (d) amended July 22, 1993, effective January 1, 1994; (a)(1) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Rule 326. Depositions to Preserve Testimony

(a) After jurisdiction has been obtained over the defendant or over the property which is the subject of the action, a deposition by written interrogatories of a witness, including a party, may be ordered taken by the court upon motion pursuant to Rule 307 but only upon a showing (1) that the witness is or will be absent from the state at the time of trial or is or will be more than one hundred miles from the place of trial at the time of trial; or (2) that the witness will be unable to attend or testify because of age, sickness, infirmity, or imprisonment.

(b) If the court shall order such a deposition to be taken it shall be done in accordance with, and thereafter subject to, the provisions of Rule 331. Upon entry of such order, the deposition may be taken by oral examination upon agreement of the parties.

(c) The court, in lieu of a deposition to preserve testimony, may, where circumstances warrant, allow the witness to testify at the trial by telephone.

Source: Entire rule amended July 22, 1993, effective January 1, 1994.

ANNOTATION

Law reviews. For article, "Limited Discovery in Colorado's County Courts", see 18 Colo. Law. 1959 (1989).

Rules 327 to 330.

(There are no present Colorado Rules 327 to 330.)

Rule 331. Conducting Depositions to Preserve Testimony

(a) Serving Interrogatories; Notice. If the court shall order the taking of a deposition of any person, the party desiring to take the deposition shall serve upon every other party not in default at least 7 days prior to the scheduled deposition copies of the written interrogatories, including the name and address of the person who is to answer them and the name, descriptive title, and address of the officer who will administer the interrogatories and transcribe the responses. Within 7 days thereafter a party so served may serve cross-interrogatories upon the party proposing to take the deposition. No redirect or recross interrogatories shall be permitted.

(b) A copy of all interrogatories served shall be delivered by the party taking the deposition to the officer designated in the order who shall put the witness on oath and who shall personally, or by someone acting under the officer's direction and in the officer's presence, record the answers of the witness verbatim. When the answers are fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by the witness, unless such examination and reading are waived by the witness and the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless on a motion to suppress under Rule 332(d) hereof the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(c) Certification and Filing by Officer, Copies; Notice of Filing.

(1) The officer shall certify on the interrogatories and answers thereto that the witness was duly sworn and that the deposition is a true record of the answers given by the witness. The deposition shall then be securely sealed in an envelope endorsed with the title of the action and marked "deposition of (here insert name of witness)", and it shall be promptly delivered or sent by registered or certified mail to the attorney for the party taking the deposition and give written notice of the delivery or mailing to all other parties.

(2) Upon the payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) [Deleted]

(d) Orders for the Protection of Parties and Deponents. After the service of interrogatories and prior to the taking of the testimony of the deponent, the court in which the action is pending, on motion promptly made by a party or a deponent, upon notice and good cause shown, may make any order which is appropriate and just or an order that the deposition shall not be taken before the officer designated in the order.

Source: (a), (b), and (c) amended July 22, 1993, effective January 1, 1994; (a) amended and effective June 28, 2007; (a) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Rule 332. Effect of Errors and Irregularities in Depositions to Preserve Testimony

(a) As to Notice. All errors and irregularities in the notice for taking a deposition under Rule 331 are waived unless written objection is promptly served upon the party after notice.

(b) As to Disqualification of Officer. Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(c) As to Taking of Deposition. Objections to the form of written interrogatories submitted under Rule 331 are waived unless served in writing upon the party propounding them within **three days** of receipt of said interrogatories.

(d) Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under these rules are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or, with due diligence might have been, ascertained.

Source: (d) amended July 22, 1993, effective January 1, 1994; (c) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Rules 333 to 337.

(There are no present Colorado Rules 333 to 337.)

Rule 338. Right to Trial by Jury

(a) Exercise of Right. Upon the filing of a demand and the simultaneous payment of the requisite jury fee by any party in actions wherein a trial by jury is provided by constitution or by statute, including actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due on contract, or as damages for breach of contract, or for injuries to person or property, all issues of fact shall be tried by a jury. The jury fee is not refundable; however, a demanding party may waive that party's demand for trial by jury pursuant to section (e) of this rule.

(b) Demand. A demand for trial by jury must be made on or before the appearance date. The demand may be made orally at the time of appearance or endorsed on the face of the complaint or answer. The demanding party shall pay the requisite jury fee at the time the demand is made and shall serve the demand on all other parties.

(c) Jury Fees. When a party to an action has exercised the right to demand a trial by jury, every other party to such action shall also pay the requisite jury fee unless such other party files and serves a notice of waiver of the right to trial by jury within 14 days after service of the demand.

(d) Specification of Issues. A demand may specify the issues to be tried to the jury; in the absence of such specification, the party filing the demand shall be deemed to have demanded trial by jury of all issues so triable. If a party demands trial by jury on fewer than all of the issues so triable, any other party, within 14 days after the demand is made, may file and serve a demand for trial by jury of any other issues so triable.

(e) Waiver; Withdrawal. The failure of a party to make a demand as required by this rule and simultaneously pay the requisite jury fee constitutes a waiver of that party's right to trial by jury. A demand for trial by jury made pursuant to this rule may not subsequently be withdrawn in the absence of the written consent of every party who has demanded a trial by jury and paid the requisite jury fee and of every party who has failed to waive the right to trial by jury and paid the requisite jury fee.

Source: Entire rule repealed and reenacted July 12, 1990, effective September 1, 1990; (c) and (d) amended and effective June 28, 2007; (c) and (d) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Rule 339. Trial by Jury or by the Court

(a) By Jury. When trial by jury has been demanded and the requisite jury fee has been paid pursuant to Rule 338, the action shall be designated upon the register of actions as a jury action. The trial shall be by jury of all issues so demanded, unless (1) all parties who have demanded a trial by jury and paid the requisite jury fee and all parties who have failed to waive the right to trial by jury and paid the requisite jury fee have, in writing, waived their rights to trial by jury, or (2) the court upon motion or on its own initiative finds that a right to trial by jury of some or all of those issues does not exist, or (3) all parties demanding trial by jury fail to appear at trial.

(b) By the Court. Issues not demanded for trial by jury as provided in Rule 338 shall be tried by the court.

(c) No Advisory Jury or Jury Without a Jury Demand. An issue not designated in a demand as an issue triable by jury shall not be tried by an advisory jury or by any jury.

Source: Entire rule repealed and reenacted July 12, 1990, effective September 1, 1990.

ANNOTATION

Litigant is denied right to jury trial by repeated continuances. By structuring the court system to require a civil litigant to undergo repeated continuances if a jury trial is requested, a civil litigant is denied the right to a jury trial. Halliburton v. County Court ex rel. City & County of Denver, 672 P.2d 1006 (Colo. 1983).

Applied in Husar v. Larimer County Court, 629 P.2d 1104 (Colo. App. 1981).

Rule 340. Assignment of Cases for Trial

Trial courts shall provide by rule for the placing of actions upon the trial calendar in such manner as they deem expedient.

Rule 341. Dismissal of Actions

(a) (1) Subject to the provisions of these rules, an action may be dismissed by the plaintiff upon payment of costs without order of court (i) by filing notice of dismissal at any time before filing or service by the adverse party of an answer, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court an action based on or including the same claim.

(2) **By Order of Court.** Except as provided in subsection (a)(1) of this Rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) Involuntary Dismissal.

(1) **By Defendant.** For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or any claim. After the completion of the plaintiff's evidence, the defendant, without waiving the right to offer evidence in the event that the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render a judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this Rule, other than a dismissal for lack of jurisdiction or failure to file a complaint under Rule 303, operates as an adjudication upon the merits.

(2) **By the Court.** Actions not prosecuted or brought to trial with due diligence may, upon notice, be dismissed without prejudice unless otherwise specified by the court upon 28 days' notice in writing to all appearing parties or their counsel of record, unless a party shows cause in writing within said 28 days why the case should not be dismissed.

(c) Dismissal of Counterclaim or Cross Claim. The provisions of this Rule apply to the dismissal of a counterclaim or cross claim, except as provided in Rule 313(e).

Source: (b) and (c) amended July 22, 1993, effective January 1, 1994; (b)(2) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

ANNOTATION

This rule provides for a plaintiff's voluntary dismissal of his action without prejudice if the notice of dismissal is filed before the adverse party files or serves his answer. The provisions of the rule also apply to the dismissal of a counterclaim. Where a reply to a counter-

claim was filed after the notice of dismissal was sought, there is no reason why the counterclaim should not be dismissed as a matter of course. Empiregas, Inc., of Pueblo v. County Court, 715 P2d 937 (Colo. App. 1985).

Rule 342. Consolidation; Separate Trials

(a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) Separate Trials. The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim or issue.

(c) Court Sessions Public; When Closed. All sessions of court shall be public, except that when it appears to the court that the action will be of such character as to injure public morals, or when orderly procedure requires it, it shall be its duty to exclude all persons not officers of the court or connected with such case.

Rule 343. Evidence

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

(b) to **(d)** Repealed.

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

(f) and **(g)** Repealed.

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

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

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

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

(2) **Response.** If any party objects to absentee testimony, said party shall file a written response within 7 days following service of the motion unless the opening of the proceeding occurs first, in which case the objection shall be made orally in open court at the commencement of the proceeding or as soon as practicable thereafter. If no response is filed or objection is made, the motion may be deemed confessed.

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

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

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

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

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

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

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

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

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

examine the witness.

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

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

Source: (a) amended, (b) to (d), (f), and (g) repealed, and (h) added March 17, 1994, effective July 1, 1994; (a) corrected and effective January 9, 1995; (h) repealed and readopted and effective June 28, 2007; (h)(2) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Rule 344. Proof of Official Record

(a) Authentication of Copy. An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof, or by a copy attested by the officer having the legal custody of the record, or by the deputy, and accompanied with a certificate that such officer has the custody. If the office in which the record is kept is within the United States or within a territory or possession subject to the dominion of the United States, the certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of the office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of embassy or legation consul general, consul, vice-consul, or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of the office.

(b) Proof of Lack of Record. A written statement signed by an officer having the custody of an official record or by the deputy that after diligent search no record or entry of a specified tenor is found to exist in the records of the office, accompanied by a certificate as above provided, is admissible as evidence that the records of the office contain no such record or entry.

(c) Other Proof. This Rule does not prevent the proof of official records or of entry or lack of entry therein by any method authorized by any applicable statute or by the rules of evidence.

(d) Certified Copies of Records Read in Evidence. All copies of any record, or document, or paper, in the custody of a public officer of this state, or of the United States, certified by the officer having custody thereof, or verified by the oath of such officer to be a full, true and correct copy of the original in the officer's custody, may be read in evidence in an action or proceeding in the courts of this state, in like manner and with like effects as the original could be if produced.

(e) Seal Dispensed With. In the event any office or officer, authenticating any documents under the provisions of this Rule, has no official seal, then authentication by seal is dispensed with.

(f) Statutes and Laws of Other States and Countries. A printed copy of a statute, or other written law, of another state, or of a territory, or of a foreign country, or a printed copy of a proclamation, edict, decree or ordinance by the executive power thereof, contained in a book or publication purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law in the judicial tribunals thereof, is presumptive evidence of the statute, law, proclamation, edict, decree or ordinance. The unwritten or common law of another state, or of a territory, or of a foreign country, may be proved as a fact by oral evidence. The books of reports of cases adjudged in the courts thereof must also be admitted as presumptive evidence of the unwritten or common law thereof. The law of such state or territory or foreign country is to be determined by the court or master and included in the findings of the court or master or instructions to the jury, as the case may be. Such finding or instruction is subject to review. In determining such law, neither the trial court nor the supreme court shall be limited to the evidence produced on the trial by the parties, but may consult any of the

written authorities above named in this subdivision, with the same force and effect as if the same had been admitted in evidence.

Source: (a) to (d) amended July 22, 1993, effective January 1, 1994; (a) corrected and effective January 9, 1995.

Rule 345. Subpoena

(a) For Attendance of Witnesses; Form; Issuance. Subpoenas may be issued under Rule 345 only to compel attendance of witnesses, with or without documentary evidence, at a deposition, hearing or trial. Every subpoena shall state the name of the court, and the title of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified.

(b) For Production of Documentary Evidence. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon oral motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

(c) Service. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering the fees for one day's attendance and mileage allowed by law. Service is also valid if the person named in the subpoena has signed a written admission or waiver of personal service. When the subpoena is issued on behalf of the state of Colorado, or an officer or agency thereof, fees and mileage need not be tendered. Proof of service shall be made as in Rule 304(g). Unless otherwise ordered by the court for good cause shown, such subpoena shall be served no later than 48 hours before the time for appearance set out in said subpoena.

(d) Subpoena for Taking Depositions on Written Interrogatories; Place of Examination. (1) Presentation of a notice to take a deposition by written interrogatories as provided in Rule 331, constitutes a sufficient authorization for the issuance by the judge or clerk of any court of record in the county where the deposition is to be taken, or by the notary public or other officer authorized to take the deposition, of subpoenas for the persons named or described therein.

(2) A resident of this state may be required by subpoena to attend an examination upon deposition by written interrogatories only in the county wherein the person resides or is employed or transacts business in person, or at such other convenient place as is fixed by an order of the court. A nonresident of this state may be required by subpoena to attend only in the county wherein the person is served with the subpoena, or within forty miles from the place of service, or at such other convenient place as is fixed by the order of the court.

(e) Subpoena for Deposition to Perserve Testimony, Hearing or Trial. Subpoenas shall be issued either by the clerk of the court in which the case is docketed or by one of counsel whose appearance has been entered in the particular case in which the subpoena is sought. A subpoena requiring the attendance of a witness at a deposition to preserve testimony, hearing or trial may be served any place within the state.

Source: (a), (c), (d)(2), and (e) amended July 22, 1993, effective January 1, 1994; (c) amended and effective April 10, 2008.

Rule 346. Exceptions Unnecessary

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action

which the party desires the court to take or states the objection to the action of the court and the grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice that party.

Source: Entire rule amended July 22, 1993, effective January 1, 1994.

Rule 347. Jurors

(a) Orientation and Examination of Jurors. An orientation and examination shall be conducted to inform prospective jurors about their duties and service and to obtain information about prospective jurors to facilitate an intelligent exercise of challenges for cause and peremptory challenges.

(1) The jury commissioner is authorized to examine and, when appropriate, excuse prospective jurors who do not satisfy the statutory qualifications for jury service, or who are entitled to a postponement, or as otherwise authorized by appropriate court order.

(2) When prospective jurors have reported to the courtroom, the judge shall explain to them in plain and clear language:

(I) The grounds for challenge for cause;

(II) Each juror's duty to volunteer information that would constitute a disqualification or give rise to a challenge for cause;

(III) The identities of the parties and their counsel;

(IV) The nature of the case, utilizing the parties' CJI(3d) Instruction 2:1 or, alternatively, a joint statement of factual information intended to provide a relevant context for the prospective jurors to respond to questions asked of them. Alternatively, at the request of counsel and in the discretion of the judge, counsel may present such information through brief, non-argumentative statements.

(V) General legal principles applicable to the case, including burdens of proof, definitions of preponderance and other pertinent evidentiary standards and other matters that jurors will be required to consider and apply in deciding the issues.

(3) The judge shall ask prospective jurors questions concerning their qualifications to serve as jurors. The parties or their counsel shall be permitted to ask the prospective jurors additional questions. In the discretion of the judge, juror questionnaires, posterboards and other methods may be used. In order to minimize delay, the judge may reasonably limit the time available to the parties or their counsel for juror examination. The court may limit or terminate repetitious, irrelevant, unreasonably lengthy, abusive, or otherwise improper examination.

(4) Jurors shall not be required to disclose personal locating information, such as address or place of business in open court and such information shall not be maintained in files open to the public. The trial judge shall assure that parties and counsel have access to appropriate and necessary locating information.

(5) Once the jury is impaneled, the judge shall explain the general principles of law applicable to civil cases, the procedural guidelines regarding conduct by jurors during the trial, case specific legal principles and definitions of technical or special terms expected to be used during the presentation of the case.

(b) Alternate Jurors. No alternate jurors shall be called or impaneled to sit on juries in the county court.

(c) Challenge to Array. A challenge to the array of jurors may not be made by either party.

(d) Challenge to Individual Jurors. A challenge to an individual juror may be for cause or peremptory.

(e) Challenges for Cause. Challenges for cause may be taken on one or more of the following grounds:

(1) A want of any of the qualifications prescribed by the statute to render a person competent as a juror.

(2) Consanguinity or affinity within the third degree to any party.

(3) Standing in the relation of guardian, ward, employer, employee, principal, or agent to any party, or being a member of the family of any party, or a partner in business with any party or being security on any bond or obligation for any party.

(4) Having served as a juror or been a witness on a previous trial between the same parties for the same cause of action.

(5) Interest on the part of the juror in the event of the action, or in the main question involved in the action, except the interest of the juror as a member, or citizen of a municipal corporation.

(6) Having formed or expressed an unqualified opinion or belief as to the merits of the action.

(7) The existence of a state of mind in the juror evincing enmity against or bias to either party.

(f) Order and Determination of Challenges for Cause. The plaintiff first, and afterwards the defendant, shall complete challenges for cause. Such challenges shall be tried by the court, and the juror challenged, and any other person, may be examined as a witness.

(g) Order of Selecting Jury. The clerk shall draw by lot and call the number of jurors that are to try the cause plus such an additional number as will allow for all peremptory challenges permitted. After each challenge for cause sustained, another juror shall be called to fill the vacancy and may be challenged for cause. When the challenges for cause are completed, the clerk shall make a list of the jurors remaining in the order called and each side beginning with plaintiff shall indicate thereon its peremptory challenge. The clerk shall then swear the remaining jurors to the number required to try the cause and these shall constitute the jury.

(h) Peremptory Challenges. Each side shall be entitled to one peremptory challenge, and if there be more than one party to a side they must join in such challenge. One additional peremptory challenge shall be allowed to each party appearing under Rule 324 if the trial court in its discretion determines that the ends of justice so require.

(i) Oath of Jurors. As soon as the jury is completed, an oath or affirmation shall be administered to the jurors in substance:

That you and each of you will well and truly try the matter at issue between _____, the plaintiff, and _____, the defendant, and a true verdict render, according to the evidence.

(j) When Juror Disqualified. If before verdict a juror becomes unable or disqualified to perform the juror's duty the parties may agree to proceed with the other jurors or agree that a new juror be sworn and the trial begun anew. If the parties do not so agree the court shall discharge the jury and the case shall be tried anew.

(k) Examination of Premises by Jury. The court may not order or permit the jury to see or examine any property or place.

(l) Deliberation of Jury. After hearing the charge the jury may either decide in court or retire for deliberation. If it retires, except as hereinafter provided in this section, it shall be kept together in a separate room or other convenient place under the charge of one or more officers until it agrees upon a verdict or is discharged. While the jury is deliberating the officer shall, to the utmost of the officer's ability, keep the jury together, separate from other persons. The officer shall not communicate or allow any communication to be made to any juror unless by order of the court except to ask it if it has agreed upon a verdict, and shall not, before the verdict is rendered, communicate with any person the state of its deliberations or the verdict agreed upon. The court in its discretion in any individual case may modify the procedure under this Rule by permitting a jury which is deliberating to separate during the luncheon or dinner hour or separate for the night under appropriate cautionary instructions, with directions that they meet again at a time certain to resume deliberations again under the charge of the appropriate officer.

(m) Items Taken to Deliberation. Upon retiring, the jurors shall take the jury instructions, their juror notebooks and notes they personally made, if any, and to the extent feasible, those exhibits that have been admitted as evidence.

(n) Additional Instructions. After the jury has retired for deliberation, if it desires additional instructions, it may request the same from the court; any additional instructions shall be given it in court in the presence of or after notice to the parties.

(o) New Trial if No Verdict. When a jury is discharged or prevented from giving a verdict for any reason, the action shall be tried anew.

(p) When Sealed Verdict. While the jury is absent the court may adjourn from time to

time, in respect to other business, but it shall be nevertheless deemed open for every purpose connected with the cause submitted to the jury, until a verdict is rendered or the jury discharged. The court may direct the jury to bring in a sealed verdict at the opening of court, in case of an agreement during a recess or adjournment for the day. A final adjournment of the court for the term shall discharge the jury.

(q) Declaration of Verdict. When the jury has agreed upon its verdict it shall be conducted into court by the officer in charge. The names of the jurors shall be called, and the jurors shall be asked by the court or clerk if they have agreed upon a verdict, and if the answer be in the affirmative, they shall hand the same to the clerk. The clerk shall enter in the record the names of the jurors. Upon a request of any party the jury may be polled.

(r) Correction of Verdict. If the verdict be informal or insufficient in any particular, the jury, under the advice of the court, may correct it or may be again sent out.

(s) Verdict Recorded, Disagreement. The verdict, if agreed upon by all jurors, shall be received and recorded and the jury discharged. If all the jurors do not concur in the verdict, the jury may be again sent out, or may be discharged.

(t) Juror Notebooks. Juror notebooks may be available during trial and deliberation to aid jurors in the performance of their duties.

(u) Juror Questions. Jurors shall be allowed to submit written questions to the court for the court to ask of witnesses during trial, in compliance with procedures established by the trial court. The trial court shall have the discretion to prohibit or limit questioning in a particular trial for good cause.

Source: (e)(3), (j), (l), (m), and (q) amended July 22, 1993, effective January 1, 1994. (a) repealed and readopted, (m) amended, and (t) added June 25, 1998, effective January 1, 1999; (u) added and adopted March 13, 2003, effective July 1, 2003.

Cross references: For jury selection and service, see the "Colorado Uniform Jury Selection and Service Act", article 71 of title 13, C.R.S.

Rule 348. Number of Jurors

The jury shall consist of the number provided by statute.

Cross references: For the number of jurors, see § 13-71-103, C.R.S.

Rule 349. No Colorado Rule

Rule 350. Motion for a Directed Verdict

A party may move for a directed verdict at the close of the evidence offered by an opponent or at the close of all the evidence. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without the assent of the jury.

Source: Entire rule amended July 22, 1993, effective January 1, 1994.

Rule 351. Instructions to Jury

(a) Any party may submit proposed jury instructions by filing with the court two sets of proposed jury instructions and verdict forms. Both sets may be photocopies, but one copy of each instruction shall contain a brief statement of the legal authority on which the proposed instruction is based. The party submitting such instructions and forms shall, simultaneously with the filing of the jury instructions and forms, serve copies on all other appearing parties or their counsel of record.

(b) The parties shall make all objections to the instructions before they are given to the jury. Only the objections specified shall be considered on motion for post-trial relief or on appeal or certiorari. Before closing argument, the court shall read its instructions to the jury but shall not comment upon the evidence. The court's instructions may be taken by the jury when it retires. All instructions offered or given shall be filed with the clerk and, with the indorsement thereon indicating the action of the court, shall be taken as a part of the record of the cause.

Source: Entire rule amended July 22, 1993, effective January 1, 1994.

Rule 351.1. Colorado Jury Instructions

(1) In instructing the jury in a civil case, the court shall use such instructions as are contained in Colorado Jury Instructions (CJI) as are applicable to the evidence and the prevailing law.

(2) In cases in which there are no CJI instructions on the subject, or in which the factual situation or changes in the law warrant a departure from the CJI instructions, the court shall instruct the jury as to the prevailing law applicable to the evidence in a manner which is clear, unambiguous, impartial and free from argument, using CJI instructions as models as to the form so far as possible.

Rule 352. Judgment by the Court

Entry of Judgment. In all actions tried upon the facts without a jury the court shall, at the conclusion of the case, forthwith orally announce its decision, including findings of fact and conclusions of law, and direct the entry of the appropriate judgment. No written findings shall be required. The court may, under exceptional circumstances, take a case under advisement.

Source: Entire rule amended July 22, 1993, effective January 1, 1994.

Rule 353. No Colorado Rule

Rule 354. Judgments; Costs

(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order to or from which an appeal lies.

(b) Judgment Upon Multiple Claims. Whether as a claim, counterclaim or cross claim, the court may not direct the entry of a final judgment upon less than all of the claims presented.

(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

(d) Costs. Except when express provision therefor is made either in a statute of this state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the state of Colorado, its officers or agencies, shall be imposed only to the extent permitted by law.

(e) Against Partnership. Any judgment obtained against a partnership or unincorporated association shall bind only the joint property of the partners or associates, and the separate property of the parties personally served.

(f) After Death, How Payable. If a party dies after a verdict or decision upon any issue of fact, and before judgment, the court may, nevertheless, render judgment thereon. Such judgment shall not be a lien on the real property of the deceased party, but shall be paid as a claim against his estate.

(g) Against Unknown Defendants. The judgment in an action in rem shall apply to and conclude the unknown defendants whose interests are described in the complaint.

(h) Revival of Judgments. A judgment may be revived against any one or more

judgment debtors whether they are jointly or severally liable under the judgment. To revive a judgment a motion shall be filed alleging the date of the judgment and the amount thereof which remains unsatisfied. Thereupon the clerk shall issue a notice requiring the judgment debtor to show cause within 14 days after service thereof why the judgment should not be revived. The notice shall be served on the judgment debtor in conformity with Rule 304. If the judgment debtor answers, any issue so presented may be tried and determined by the court. A revived judgment must be entered within twenty years after the entry of the judgment which it revives, and may be enforced and made a lien in the same manner and for like period as an original judgment. A judgment entered on or after July 1, 1981 must be revived within six years after the entry of the judgment which it revives, and may be enforced and made a lien in the same manner and for like period as an original judgment. If a judgment is revived before the expiration of any lien created by the original judgment, the filing of the transcript of the entry of revivor in the register of actions with the clerk and recorder of the appropriate county before the expiration of such lien shall continue that lien for the same period from the entry of the revived judgment as is provided for original judgments. Revived judgments may themselves be revived in the manner herein provided.

Source: (h) amended and effective April 5, 2010; (d) and (h) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Rule 355. Default

(a) Entry at Time of Appearance. Upon the date and at the time set for appearance, if the defendant has filed no answer or fails to appear and if the plaintiff proves by appropriate return that the summons was served at least 14 days before the appearance date, the judge may enter judgment for the plaintiff for the amount due, including interest, costs and other items provided by statute or the agreement. However, before judgment is entered, the court shall be satisfied that the venue of the action is proper Under Rule 398(c).

(b) At Time of Trial. Failure to appear on any date set for trial shall be grounds for entering a default and judgment thereon against the non-appearing party. For good cause shown, the court may set aside an entry of default and the judgment entered thereon in accordance with Rule 360.

Source: (a) amended and effective June 28, 2007; (a) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

ANNOTATION

Applied in Bachman v. County Court, 43 Colo. App. 175, 602 P.2d 899 (1979).

Rules 356 and 357.

(There are no present Colorado Rules 356 and 357.)

Rule 358. Entry and Satisfaction of Judgment

(a) Entry. Judgment upon the verdict of a jury or upon trial by the court in all actions shall be entered forthwith by the judge or the clerk at the discretion of the judge. A notation of the judgment shall be made in the register of actions as provided in Rule 379(a) and such notation of the judgment shall constitute the entry of judgment. The judgment shall not be effective for the purpose of placing a lien upon property unless so recorded in the register of actions. Money judgments shall also be entered in the judgment record as provided for in Rule 379(c). Whenever the court signs a judgment and a party is not present when it is signed, a copy of the signed judgment shall be immediately mailed by the court, pursuant to Rule 305, to each absent party who has previously appeared.

(b) Satisfaction. Satisfaction in whole or in part of a money judgment may be entered

in the judgment record (Rule 379(c)) upon an execution returned satisfied in whole or in part, or upon the filing of a satisfaction with the clerk, signed by the judgment creditor's attorney of record unless a revocation of that authority be previously filed, or by the signing of such satisfaction, by the judgment creditor, attested by the clerk or notary public, or by the signing of the judgment record (Rule 379(c)) by one herein authorized to execute satisfaction. Whenever a judgment shall be so satisfied in fact otherwise than upon execution, it shall be the duty of the judgment creditor or the judgment creditor's attorney to give such satisfaction, and upon motion the court may compel it or may order the entry of such satisfaction to be made without it. With respect to judgments entered on or after July 1, 1981 the clerk shall, after six years from the entry of final judgment, satisfy the judgment and shall enter a full satisfaction in the judgment record (Rule 379(c)) unless the judgment is revived pursuant to Rule 354(h).

Source: (b) amended July 2, 1986, effective January 1, 1987; entire rule amended July 22, 1993, effective January 1, 1994; (b) amended and adopted February 27, 1997, effective July 1, 1997.

Rule 359. New Trials; Amendment of Judgments

(a) No Motion for New Trial Necessary. Motion for new trial shall not be a condition of appeal from the county to district court.

(b) Time for Motion. A motion for new trial (which must be in writing) may be made within 14 days of entry of judgment and if so made the time for appeal shall be extended until 21 days after disposition of the motion. Only matters raised in said motion shall be considered on appeal.

(c) Grounds. A new trial may be granted to all or any of the parties, and on all or a part of the issues, after trial by jury or by the court. On a motion for a new trial in an action tried without a jury, the court may upon the judgment, if one has been entered, take additional testimony and direct the entry of a new judgment. Subject to the provisions of Rule 361, a new trial may be granted for any of the following causes:

(1) Any irregularity in the proceedings by which any party was prevented from having a fair trial.

(2) Misconduct of the jury.

(3) Accident or surprise, which ordinary prudence could not have guarded against.

(4) Newly discovered evidence, material for the party making the application which he could not, with reasonable diligence, have discovered and produced at the trial.

(5) Excessive or inadequate damages.

(6) Insufficiency of the evidence.

(7) Error in law.

When application is made under subsection 1, 2, 3, or 4 of section (c) of this Rule it shall be supported by affidavit filed with the motion. When application is made under any of the subsections (1) to (7) of section (c) of this Rule there shall be filed with the motion a short memorandum brief including authorities, if any, upon which the applicant relies in support of the motion.

(d) Time for Filing and Serving Affidavits. When a motion for a new trial is based upon affidavits they shall be filed with the motion. The opposing party has ten calendar days after service thereof within which to file opposing affidavits, which period maybe extended for an additional period not exceeding twenty days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(e) On Initiative of Court. Not later than fifteen days after entry of judgment, the court on its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(f) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be filed not later than 21 days after entry of the judgment.

(g) Effect of Granting Motion. The granting of a motion for a new trial shall not be an appealable order, but a party by participating in the new trial shall not be deemed to have waived any objections to the granting of the motion, and the validity of the order

granting the motion may be raised on appeal to the district court and in the petition in the Supreme Court for writ of certiorari.

Source: (d) amended and effective June 28, 2007; (b) and (f) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

ANNOTATION

Applied in Bachman v. County Court, 43 Colo. App. 175, 602 P.2d 899 (1979).

Rule 360. Relief from Judgment or Order

(a) Clerical Mistakes. Clerical mistakes in judgments, orders, or other parts of the records and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal such mistakes may be so corrected before the case is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistake; Inadvertence; Surprise; Excusable Neglect; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (3) the judgment is void; (4) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1) and (2), not more than six months after the judgment, order, or proceeding complained of was entered or taken. A motion under this section (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court: (1) To entertain an independent action to relieve a party from a judgment, order, or proceeding; or (2) to set aside a judgment for fraud upon the court; or (3) when, for any cause, the summons in an action has not been personally served within or without the state on the defendant, to allow, on such terms as may be just, such defendant, or the defendant's legal representatives, at any time within six months after the rendition of any judgment in such action, to answer to the merits of the original action.

Source: Entire rule amended July 22, 1993, effective January 1, 1994; (b) corrected and effective January 2, 1996.

ANNOTATION

This rule applies to default judgments. Bachman v. County Court, 43 Colo. App. 175, 602 P.2d 899 (1979).

Applied in Pollard v. Walsh, 194 Colo. 566, 575 P.2d 411 (1978).

Rule 361. Harmless Error

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Rule 362. Stay of Proceedings to Enforce a Judgment

(a) No Automatic Stay. If, upon the rendition of a judgment, payment is not made forthwith, an execution may issue immediately and proceedings may be taken for its enforcement unless the defendant requests a stay of execution and the court grants such request. Proceedings to enforce execution and other process after judgment and the fees therefor shall be as provided by law or these rules.

(b) Stay on Motion for New Trial or for Judgment. In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 359, or of a motion for relief from a judgment or order made pursuant to Rule 360, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 350, or pending the filing and determination of an appeal to the district court.

Rule 363. Disability of a Judge

If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or finding of fact and conclusions of law are filed, then any other judge lawfully sitting in or assigned to the court in which the action was tried may perform those duties; but if such other judge is satisfied that the judge cannot perform those duties having not presided at the trial or for any other reason, a new trial may be ordered.

Source: Entire rule amended July 22, 1993, effective January 1, 1994.

Rule 364. No Colorado Rule

Rule 365. Injunctions, Restraining Orders and Orders for Emergency Protection

(a) No injunction, restraining order or order to prevent domestic abuse or for emergency protection under sections 14-4-101 et seq., C.R.S., shall be issued by the court except as provided in section (b) hereof or in accordance with sections 14-4-101 et seq., C.R.S.

(b) Assault and Threats Against the Person — Restraining Order.

(1) Upon the filing of a complaint, duly verified, alleging that the defendant has attacked, beaten, molested, or threatened the life of the plaintiff, or threatened to do serious bodily harm to the plaintiff, the court, after hearing the evidence and being fully satisfied therein that sufficient cause exists, may issue a temporary restraining order and a citation directed to the defendants, commanding the defendant to appear before the court at a specific time and date, to show cause, if any, why the temporary restraining order should not be made permanent.

(2) A copy of the complaint together with a copy of the temporary restraining order and a copy of the citation shall be served upon the defendant in accordance with the rules for service of process as provided in Rule 304, and the citation shall inform the defendant that should the defendant fail to appear in court in accordance with the terms of the citation, the temporary restraining order shall be made permanent, and a bench warrant may issue for the arrest of the defendant.

(3) On the return date of the citation, or on the day to which the hearing has been continued by the court, the court shall examine the record and the evidence, and if upon such record and evidence the court shall be of the opinion that the defendant has attacked, beaten, molested, or threatened the life of the plaintiff or threatened to do serious bodily harm to the plaintiff, and that unless restrained and enjoined will continue to attack, beat, molest, or threaten the life of the plaintiff, or threaten to do serious bodily harm to the plaintiff, the court shall order the restraining order to be made permanent and the order shall inform the defendant that a violation of the restraining order will constitute contempt of court and subject the defendant to such punishment as may be provided by law. Upon

the consent of all parties, the court may direct that the order be a mutual, permanent restraining order.

(c) Restrictive Covenants on Residential Real Property.

(1) Upon the filing of a complaint, duly verified, alleging that the defendant has violated a restrictive covenant on residential real property, the court shall issue a summons, which shall include notice to the defendant that it will hear the plaintiff's request for a preliminary injunction on the appearance date. A temporary restraining order may be granted without written or oral notice to the adverse party or the party's attorney only if: (a) It clearly appears from specific facts shown by affidavit or by the verified complaint or by testimony that immediate and irreparable injury, loss, or damage will result to the plaintiff before the adverse party or the party's attorney can be heard in opposition, and (b) the plaintiff or the plaintiff's attorney certifies to the court in writing or on the record the efforts, if any, which have been made to give notice and the reasons supporting a claim that notice should not be required. The restraining order shall be served upon the defendant, together with the summons and complaint, and shall be effective until the appearance date.

(2) On the appearance date, the court shall examine the record and the evidence and, if upon such record and evidence the court shall be of the opinion that the defendant has violated the restrictive covenant, the court shall issue a preliminary injunction which shall remain in effect until the trial of the action. If merely restraining the doing of an act or acts will not effectuate the relief to which the plaintiff is entitled, the injunction may be made mandatory. The court may, upon agreement of the parties, order that the trial of the action be advanced and consolidated with the preliminary injunction hearing.

(3) Any restraining order or injunction issued under this section (c) shall inform the defendant that a violation thereof will constitute contempt of court and subject the defendant to such punishment as may be provided by law.

Source: Entire rule amended July 22, 1993, effective January 1, 1994.

ANNOTATION

County court has no jurisdiction to enter restraining order limiting visitation with a child when a custody proceeding is pending in another state. G.B. v. Arapahoe County Ct., 890 P.2d 1153 (Colo. 1995).

Rule 366. No Colorado Rule

Rule 367. Deposit in Court

(a) By Party. In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing, to be held by the clerk of the court subject to withdrawal in whole or in part at any time thereafter upon order of the court.

(b) By Trustee. When it is admitted by the pleadings or examination of a party that the party has possession or control of any money or other things capable of delivery which, being the subject of litigation, is held by that party as trustee for another party, or which belongs or is due to another party, upon motion, the court may order the same to be deposited in court or delivered to such party, upon such conditions as may be just, subject to the further direction of the court.

Source: (b) amended July 22, 1993, effective January 1, 1994.

Rule 368. Offer of Judgment

Repealed July 12, 1990, effective, nunc pro tunc, July 1, 1990.

Rule 369. Execution and Proceedings Subsequent to Judgment

(a) In General. Except as provided in Rule 403 herein, process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise.

(b) Execution for Costs. Whenever costs are finally awarded to a party by an order of any court, such party may have an execution therefor in like manner as upon a judgment. Whenever costs are awarded to a party by an appellate court, such party may have an execution for the same upon filing a remittance with the clerk of the court below, and it shall be the duty of such clerk, whenever the remittitur is filed, to issue the execution on application therefor.

(c) Debtor of Judgment; Debtor May Pay Sheriff. After issuance of an execution against property, any person indebted to the judgment debtor may pay to the sheriff the amount of the debt, or so much as may be necessary to satisfy the execution, and the sheriff's receipt shall be sufficient discharge for the amount so paid.

(d) Order for Debtor to Answer. At any time when execution may issue on a judgment, the judgment creditor shall be entitled to an order requiring the judgment debtor to answer such interrogatories concerning his property as shall be approved by the court. The interrogatories when so approved shall be mailed by the clerk to the judgment debtor, who shall answer the said interrogatories and mail or file them with the court within 14 days after receipt thereof by the judgment debtor. The interrogatories, upon approval, may also be served upon the judgment debtor in accordance with Rule 304.

(e) Order for Interrogatories to Debtor of Judgment Debtor. At any time when execution may issue on a judgment, upon proof to the satisfaction of the court, by affidavit or otherwise, that any person or corporation has property of the judgment debtor or is indebted to the judgment creditor in an amount exceeding fifty dollars not exempt from execution, the court may order such person to answer such interrogatories as the court may approve touching upon the matters set forth in the affidavit of the judgment creditor.

(f) Order for Property to be Applied on Judgment; Contempt. The court may order any property of the judgment debtor not exempt from execution in the hands of such debtor or any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment. If any person, party or witness disobeys an order of the court properly made in proceedings under this Rule, he shall be punished by the court for contempt. Nothing in this Rule shall be construed to prevent an action in the nature of a creditor's bill.

(g) Pattern Interrogatories - Use Automatically Approved. The pattern interrogatories set forth in Appendix to Chapter 25, Form Numbers 7 and 7A are approved, and as part of the judgment order, may be mailed by the clerk or served by the judgment creditor in accordance with rule 304 without any further order of court. Any proposed non-pattern interrogatory must be specifically approved by the court.

Source: (c) and (e) amended and effective and (g) added and effective June 28, 2007; (d) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Rule 370. Judgment for Specific Acts; Personal Property

If a judgment directs a party to execute a transfer of documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party on application of the party entitled to performance, the clerk shall issue a writ of attachment against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt.

If personal property is within the state, the court in lieu of directing a transfer thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a transfer executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution upon application to the clerk.

ANNOTATION

This rule properly may be read with the understanding that county courts have jurisdiction to issue decrees of specific performance. Snyder v. Sullivan, 705 P.2d 510 (Colo. 1985).

Rule 371. Procedure in Behalf of and Against Persons Not Parties

An order made in favor of a person who is not a party to the action may be enforced by the same procedure as if the person were a party; and, when obedience to an order may be lawfully enforced against a person who is not a party, the person is liable to the same procedure for enforcing obedience to the order as any party.

Source: Entire rule amended July 22, 1993, effective January 1, 1994.

Rules 372 to 376.

(There are no present Colorado Rules 372 to 376.)

Rule 377. Courts and Clerks

(a) Courts Always Open. Courts shall be deemed always open for the purpose of filing any pleading or other proper paper, of issuing and returning process, and the conducting of court business.

(b) Clerk's Office and Orders by Clerk. The clerk's office with the clerk or deputy in attendance shall be open at such hours and on such days as may be provided by law, and by local rule not in conflict with law. All motions and all applications in the clerk's office for issuing process, for entering defaults and judgments by default, and for other proceedings which do not require allowance or order of the court are grantable as a matter of course by the clerk; but the clerk's action may be suspended or altered or rescinded by the court or judge upon cause shown.

(c) Orders in Any County. Any ex parte order in any pending action may be entered by the court, or by any judge thereof.

Source: (a) and (b) amended July 22, 1993, effective January 1, 1994.

Rule 378. No Colorado Rule

Rule 379. Records

(a) Register of Actions (Civil Docket). The clerk shall keep a record known as the register of actions and shall enter therein those items set forth below. The register of actions may be in any of the following forms or styles:

(1) A page, sheet, or printed form in a book, case jacket, or separate file, or the cover of the case jacket.

(2) A microfilm roll, film jacket, or microfiche card.

(3) Computer magnetic tape or magnetic disc storage, where the register of actions items appear on the terminal screen, or on a paper print-out of the screen display.

(4) Any other form or style prescribed by supreme court directive.

A register of actions shall be prepared for each case or matter filed. The file number of each case or matter shall be noted on every page, jacket cover, film or computer record whereon the first and all subsequent entries of actions are made. All papers filed with the clerk, all process issued and returns made thereon, all costs, appearances, orders, verdicts, and judgments shall be noted chronologically in the register of actions. These notations shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The notation of an order or judgment shall show the date the notation is made. The notation of the judgment in the register of actions shall constitute the entry of judgment. When trial by

jury has been demanded or ordered, the clerk shall enter the word jury on the page, jacket cover, film or computer record assigned to that case.

(b) Indices; Calendars. The clerk shall keep suitable indices of all records as directed by the court. The clerk shall also keep, as directed by the court, calendars of all hearings and all cases ready for trial, which shall distinguish trials to a jury from trials to the court. Indices and calendars may be in any of the following forms or styles:

(1) A page or sheet in a book or separate file.

(2) A mechanical or hand operated index machine or card file.

(3) Computer magnetic tape or magnetic disc storage, where the information appears on the terminal screen, or on a print-out of the screen display.

(4) Microfilm copies of 1, 2, and 3 above.

(5) Any other form or style prescribed by supreme court directive.

(c) Judgment Record. The clerk shall keep a judgment record in which a notation shall be made of every money judgment. The judgment record may be in any of the following forms or styles:

(1) A page, sheet, or printed form in a book, case jacket or separate file, or the cover of the case jacket.

(2) Computer magnetic tape or magnetic disc storage, where the judgment and subsequent transactions appear on the terminal screen, or on a paper print-out of the screen display.

(3) A microfilm copy or variation of 1 and 2 above.

(4) Any other form or style prescribed by supreme court directive.

(d) Retention and Disposition of Records. The clerk shall retain and dispose of all court records in accordance with instructions provided in the manual entitled, Colorado Judicial Department, Records Management.

Rule 380. Reporter; Stenographic Report or Transcript as Evidence

(a) A record of the proceedings and evidence at trials in the county court shall be maintained by electronic devices except as such record may be unnecessary in certain proceedings pursuant to specific provisions of law.

(b) Whenever the testimony of a witness at a trial or hearing which was recorded by electronic devices or by stenographic means is admissible in evidence at a later trial, it may be proved by the transcript thereof duly certified by the person who reported or transcribed the testimony, or by the judge.

(c) Reporter's Notes, Electronic or Mechanical Recording; Custody, Use, Ownership, Retention. All reporter's notes and electronic or mechanical recordings shall be the property of the state. The notes and recordings shall be retained by the court for no less than six months after the creation of the notes or recordings, or such other period as may be prescribed by supreme court directive or by instructions in the manual entitled, Colorado Judicial Department, Records Management. During the period of retention, notes and recordings shall be made available to the reporter of record, or to any other reporter or person the court may designate. During the trial or the taking of other matters on the record, the notes and recordings shall be considered the property of the state, even though in the custody of the reporter, judge, or clerk. After the trial and appeal period, the reporter shall list, date and index all notes and recordings and shall properly pack them for storage. Where no reporter is used, the clerk of court shall perform this function. The state shall provide the storage containers and space.

Source: Entire rule amended June 9, 1988, effective January 1, 1989.

Editor's note: The June 9, 1988, amendment to this rule resulted in the renumbering of the paragraphs contained therein.

Rule 381. Applicability in General

Special Statutory Proceedings. These rules do not govern procedure and practice in any special statutory proceeding insofar as they are inconsistent or in conflict with the

procedure and practice provided by the applicable statute. Where the applicable statute provides for procedure under a former Code of Civil Procedure, such procedure shall be in accordance with these rules.

Rule 382. Jurisdiction Unaffected

These rules shall not be construed to extend or limit the jurisdiction of any court.

Rule 383. Rules by Trial Courts

All county court local rules, including local county court procedures and standing orders having the effect of county court local rules, enacted before February 1, 1992, are hereby repealed. Each county court, by a majority of its judges, may from time to time propose county court local rules and amendments of the county court local rules. A proposed local rule or amendment shall not be inconsistent with the Colorado Rules of County Court Civil Procedure or with any directive of the Supreme Court regarding the conduct of formal judicial proceedings in county courts. A proposed local rule or amendment shall not be effective until it is approved by the Supreme Court. To obtain approval, three copies of any proposed local rule or amendment shall be submitted to the Supreme Court through the office of the State Court Administrator. Reasonable uniformity of county court local rules is required. Numbering and format of any county court local rule shall be as prescribed by the Supreme Court. Numbering and format requirements are on file at the office of the State Court Administrator. The Supreme Court's approval of a county court local rule or local procedure shall not preclude review of that rule or procedure under the law or circumstances of a particular case. Nothing in this rule is intended to affect the authority of a county court to adopt internal administrative procedures not relating to the conduct of formal judicial proceedings as prescribed by the Colorado Rules of County Court Civil Procedure.

Source: Entire rule amended January 9, 1992, effective February 1, 1992.

ANNOTATION

Law reviews. For article, "Limited Discovery in Colorado's County Courts", see 18 Colo. Law. 1959 (1989).

Rule 384. Forms

Repealed July 22, 1993, effective January 1, 1994.

Rule 385. Title

Repealed December 5, 1996, effective January 1, 1997.

Rules 386 to 396.

(There are no present Colorado Rules 386 to 396.)

Rule 397. Change of Judge

A judge shall be disqualified in an action in which the judge is interested or prejudiced, or has been of counsel for any party, or is or has been a material witness, or is so related or connected with any party or attorney as to render it improper to sit on the trial or other proceeding therein. The disqualification may be made on the judge's own initiative, or any party may move for such disqualification and any motion by a party for disqualification shall be supported by affidavit. Upon the filing by a party of such a motion, all other proceedings in the case shall be suspended until a ruling is made thereon. Upon disqualification, the judge shall notify forthwith the presiding judge of the court, who shall assign

another judge of the court to hear the action. If no other judge of the court is available, the judge shall notify forthwith the chief judge of the district, who shall assign another judge in the district to hear the action. If no other judge in the district is available or qualified, the chief judge shall notify forthwith the state court administrator, who shall obtain from the Chief Justice the assignment of a replacement judge.

Source: Entire rule amended July 22, 1993, effective January 1, 1994.

ANNOTATION

Law reviews. For article, "Disqualification of Judges", see 13 Colo. Law. 54 (1984).

Rule 398. Place of Trial

(a) Venue of Real Property. All actions affecting real property shall be tried in the county in which the subject of the action, or a substantial part thereof, is situated.

(b) Venue for Recovery of Penalty, etc. Actions upon the following claims shall be tried in the county where the claim, or some part thereof, arose:

(1) For the recovery of a penalty or forfeiture imposed by statute, except that when it is imposed for an offense committed on a lake, river, or other stream of water, situated in two or more counties, the action may be brought in any county bordering on such lake, river or stream and opposite the place where the offense was committed.

(2) Against a public officer or person specially appointed to execute his duties, for an act done by him in virtue of his office, or against a person who by his command, or in his aid, does anything touching the duties of such officer, or for a failure to perform any act or duty which he is by law required to perform.

(c) Venue for Tort and Contract and Other Actions. (1) Except as provided in sections (a) and (b) and subsections (c)(2) through (5) of this Rule, an action shall be tried in the county in which the defendants, or any of them, may reside at the commencement of the action, or in the county where the plaintiff resides when service is made on the defendant in such county; or if the defendant is a nonresident of this state, the same may be tried in any county in which the defendant may be found in this state, or in the county designated in the complaint, and if any defendant is about to depart from the state, such action may be tried in any county where plaintiff resides, or where defendant may be found and service had.

(2) Except as provided in subsection (3) of this section an action on book account or for goods sold and delivered may also be tried in the county where the plaintiff resides or where the goods were sold; an action upon contract may also be tried in the county where the same was to be performed.

(3) (A) For the purposes of this Rule, a consumer contract is any sale, lease or loan in which (i) the buyer, lessee or debtor is a person other than an organization; (ii) the goods are purchased or leased, the services are obtained, or the debt is incurred, primarily for a personal, family, or household purpose; and (iii) the initial amount due under the contract, the total amount initially payable under the lease, or the initial principal does not exceed twenty-five thousand dollars.

(B) An action on a consumer contract shall be tried (i) in the county in which the contract was signed or entered into by any defendant; or (ii) in the county in which any defendant resided at the time the contract was entered into; or (iii) in the county in which any defendant resides at the time the action is commenced. If the defendant is a nonresident of this state, the same may be tried in any county in which the defendant may be found in this state, or in the county designated in the complaint, and if any defendant is about to depart from the state, such action may be tried in any county where plaintiff resides, or where defendant may be found and service had.

(C) In any action on a consumer contract, if the plaintiff fails to state facts in the complaint or by affidavit showing that the action has been commenced in the proper county as described in this Rule, or if it appears from the stated facts the venue is improper, the

court may, upon its own motion or upon motion of any party, dismiss any such action without prejudice; however, if appropriate facts appear in the record, the court shall transfer the action to an appropriate county. Any provision or authorization in any consumer contract purporting to waive any rights under subsection (3) of section (c) of this Rule is void.

(D) Any debt collector covered by the provisions of the Federal "Fair Debt Collection Practices Act" shall comply with the provisions of said Act set forth in 15 U.S.C. 1692(i) concerning legal actions by debt collectors, notwithstanding any provision of this Rule.

(4) An action upon a contract for services may also be tried in the county in which the services were to be performed.

(5) An action for tort may also be tried in the county where the tort was committed.

(d) Motion to Change Venue. (1) Except for actions under subsection (c) (3) of this Rule, a motion for change of venue under the provisions of (a) through (c) hereof or on the grounds that the county designated in the complaint is not the proper county shall be made on the date fixed in the summons for appearance or answer. The motion shall be heard at that time and if overruled or granted the answer shall be filed immediately unless the court shall fix a different time. Unless filed as prescribed herein the right to have venue changed on said grounds is waived.

(2) A motion for change of venue on the grounds (A) that the convenience of witnesses and the ends of justice would be promoted by the change or (B) that a party fears that he will not receive a fair trial in the county in which the action is pending because the adverse party has an undue influence over the minds of the inhabitants thereof or that they are prejudiced against him so that he cannot expect a fair trial, or (C) that the venue of the action is improper under subsection (c) (3) of this Rule, may be made either on the date fixed in the summons for appearance or at any time before ten days prior to the date fixed for trial. The court may by order permit the filing of affidavits and a written counter motion and affidavits. Unless such motions are filed as prescribed herein the right to have venue changed on said grounds is waived.

(3) Except as otherwise provided in an order allowing a motion to change venue, earlier ex parte and other orders affecting an action, or the parties thereto, shall remain in effect, subject to change or modification by order of the court to which the action is removed.

(e) Transfer Where Concurrent Jurisdiction. All actions or proceedings in which district and county courts have concurrent jurisdiction, may, by stipulation of the parties and order of court, be transferred by either court to such other court of the same county. Upon transfer, the court to which such cause is removed shall have and exercise the same jurisdiction as if originally commenced therein.

(f) Place Changed if Parties Agree. When all parties assent, or when all parties who have entered their appearance assent and the remaining nonappearing parties are in default, the place of trial of an action in a county court may be changed to any other county court in the county.

(g) Parties Must Agree on Change. Where there are two or more plaintiffs or defendants, the place of trial shall not be changed unless the motion is made by or with the consent of all of the plaintiffs or defendants, as the case may be.

(h) Only One Change. No Waiver. In case the place of trail is changed the party securing the same shall not be permitted to apply for another change upon the same ground. A party does not waive his right to change of judge or place of trial if his objection thereto is made in apt time.

ANNOTATION

When improper venue does not impair court's jurisdiction. In a civil case where the defendant does not interpose a timely motion to change the place of trial, improper venue does not impair a court's jurisdiction. Under such circumstances, a county court does not act properly in changing venue at its own instance, contrary to the agreement of the parties and over the express objection of one of them. Halliburton v. County Court ex rel. City & County of Denver, 672 P.2d 1006 (Colo. 1983).

Rules 399 and 400.

(There are no present Colorado Rules 399 and 400.)

Rule 401. Arrest and Exemplary Damages

Repealed May 29, 1986, effective January 1, 1987.

Rule 402. Attachments

(a) Before Judgment. Any party, at the time of filing a claim, in an action on contract, express or implied, or in an action to recover damages for any tort committed against the person or property of a resident of this state, or at any time afterward before judgment, may have nonexempt property of the party against whom the claim is asserted (hereinafter defendant), attached by an ex parte order of court in the manner and on the grounds prescribed in this Rule, unless the defendant shall give good and sufficient security as required by section (f) of this Rule. No ex parte attachments before judgment shall be permitted other than those specified in this Rule.

(b) Affidavit. No writ of attachment shall issue unless the party asserting the claim (hereinafter plaintiff), the plaintiff's agent or attorney, or some credible person for the plaintiff, shall file in the court in which the action is brought an affidavit setting forth that the defendant is indebted to the plaintiff, or that the defendant is liable in damages to the plaintiff for a tort committed against the person or property of a resident of this state, stating the nature and amount of such indebtedness or claim for damages and setting forth facts showing one or more of the causes of attachment of section (c) of this Rule.

(c) Causes. No writ of attachment shall issue unless it be shown by affidavit or testimony in specific factual detail, within the personal knowledge of an affiant or witness, that there is a reasonable probability that any of the following causes exist:

(1) The defendant is a foreign corporation without a certificate of authority to do business in this state.

(2) The defendant has for more than four months been absent from the state, or the whereabouts of the defendant are unknown, or the defendant is a nonresident of this state, and all reasonable efforts to obtain in personam jurisdiction over the defendant have failed. Plaintiff must show what efforts have been made to obtain jurisdiction over the defendant.

(3) The defendant hides, or defies an officer, so that process of law cannot be served upon the defendant.

(4) The defendant is presently about to remove any property or effects, or a material part thereof, from this state with intent to defraud, delay, or hinder one or more of the defendant's creditors, or to render execution unavailing if judgment is obtained.

(5) The defendant has fraudulently conveyed, transferred, or assigned any property or effects, or a material part thereof, so as to hinder or delay one or more of the defendant's creditors, or to render execution unavailing if judgment is obtained.

(6) The defendant has fraudulently concealed, removed, or disposed of any property or effects, or a material part thereof, so as to hinder or delay one or more of the defendant's creditors, or to render execution unavailing if judgment is obtained.

(7) The defendant is presently about to fraudulently convey, transfer, or assign any property or effects, or a material part thereof, so as to hinder or delay one or more of the defendant's creditors, or to render execution unavailing if judgment is obtained.

(8) The defendant is presently about to fraudulently conceal, remove, or dispose of any property or effects, or a material part thereof, so as to hinder or delay one or more of the defendant's creditors, or to render execution unavailing if judgment is obtained.

(9) The defendant has departed or is presently about to depart from this state, with the intention of having any property or effects, or a material part thereof, removed from the state.

(d) Plaintiff to Give Bond. Before the issuance of a writ of attachment the plaintiff shall furnish a bond or written undertaking, sufficient to the court, in an amount set by the court in its discretion, not exceeding double the amount claimed, to the effect that if the

defendant recover judgment, or if the court shall finally decide that the plaintiff was not entitled to an attachment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages defendant may sustain by reason of the wrongful suing out of the attachment. The defendant may require the sureties to satisfy the court that each is worth the amount for which the person has become surety over and above the person's just debts and liabilities, in property located in this state and not by law exempt from execution.

(e) Court Issues Writ of Attachment. After the affidavit and bond are filed as aforesaid and testimony had as the court may require, the court may issue a writ of attachment, directed to the sheriff of a specified county, commanding the sheriff to attach the lands, tenements, goods, chattels, rights, credits, moneys, and effects of said defendant, of every kind, or so much thereof as will be sufficient to satisfy the claim sworn to, regardless of whose hands or possession in which the same may be found.

(f) Contents of Writ and Notice. The writ shall direct the sheriff to serve a copy of the writ on the defendant if found in the county, and to attach and keep safely all the property of the defendant within the county, not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's claim, the amount of which shall be stated in conformity with the affidavit. The writ shall also inform the defendant of the right to traverse and to have a hearing to contest the attachment. If the defendant's property is or may be located in more than one county, additional or alias writs may be issued contemporaneously. If the defendant deposits the amount of money claimed by the plaintiff or gives and furnishes security by an undertaking, approved by the sheriff, of a corporate surety company or of at least two sureties in an amount sufficient to satisfy such claim, the sheriff shall take such money or undertaking in lieu of the property. Alias writs may issue at any time to the sheriffs of different counties.

(g) Service; How Made. The writ of attachment shall be served in like manner and under the same conditions as are provided in these rules for the service of process. Service shall be deemed completed upon the expiration of the same period as is provided for service of process.

(h) Execution of Writ. The sheriff to whom the writ is directed and delivered shall execute the same without delay as follows:

(1) Real property standing upon the records of the county in the name of the defendant shall be attached by filing a copy of the writ, together with a description of the property attached, with the recorder of the county.

(2) Real property, or any interest therein belonging to the defendant, and held by any person, or standing upon the records of the county in the name of any other person but belonging to the defendant, shall be attached by leaving with such person or the person's agent, if either be found in the county, a copy of the writ and a notice that such real property (giving a description thereof), and any interest therein belonging to the defendant, are attached pursuant to such writ, and filing a copy of such writ and notice with the recorder of the county.

(3) Personal property shall be attached by taking it into custody.

(i) Return of Writ. The sheriff shall return the writ of attachment within 21 days after its receipt, with a certificate of his proceedings endorsed thereon, or attached thereto, making a full inventory of the property attached as a part of his return upon the writ.

(j) Execution of Writ on Sunday or Legal Holiday. If an affidavit or testimony is received stating that it is necessary to execute the writ of attachment on Sunday or on a legal holiday, to secure property sufficient to satisfy the judgment to be obtained, and if the court is so satisfied, the court shall endorse on the writ an order to the officer directing the writ to be executed on such day.

(k) No Final Judgment Until 35 Days After Levy.

(1) **Creditors.** No final judgment shall be rendered in a cause wherein an attachment writ has been issued and a levy made thereunder, until the expiration of 35 days after such levy has been made; and any creditor of the defendant making and filing within said 35-day period an affidavit and undertaking, as hereinbefore required of the plaintiff, together with the complaint setting forth the claim against the defendant, shall be made a party plaintiff and have like remedies against the defendant to secure the claim, as the law

gives to the original plaintiff.

(2) **Judgment Creditors.** Any other creditor whose claim has been reduced to judgment in this state may upon motion filed within said 35 days be made a party and have like remedies against the attached property. Such judgment creditor shall not be required to make or file an affidavit, undertaking or complaint, or have summons issue, provided, that any such judgment creditor may be required to prove to the satisfaction of the court that the judgment is bona fide and not in fraud of the rights of other creditors.

(l) Dismissal by One Creditor Does Not Affect Others. After any additional creditor has been made a party to the action, as hereinbefore provided, a dismissal by the first or any subsequent attaching creditor of the cause of action, or proceedings in attachments, shall not operate as a dismissal of the attachment proceedings as to any other attaching creditor; but the remaining creditors may proceed to final judgment therein the same as though no such dismissal has been made.

(m) Final Judgment Prorated; When Creditors Preferred. The final judgment in said action shall be a several judgment, wherein each creditor named as plaintiff shall have and recover of the defendant the amount of the claim or demand, as found by the court to be due, together with costs incurred; and the money realized from the attachment proceedings, after paying all costs taxed in the attachment action, shall be paid to the participating creditors in proportion to the amounts of their several judgments; and any surplus moneys, if any, shall be paid to the defendant by order of the court, upon proof thereof. Provided, when the property is attached while the defendant is removing the same or after the same has been removed from the county, and the same is overtaken and returned, or while same is secreted by the defendant, or put out of the defendant's hands, for the purpose of defrauding the defendant's creditors, the court may allow the creditor or creditors through whose diligence the same shall have been secured a priority over other attachments or judgment creditors.

(n) When Suit Transferred to District Court.

(1) **Indivisible Property Over $15,000.00.** Whenever in any attachment proceedings in the county court it is determined by the court that the ownership of indivisible property of the value of more than $15,000.00 is in issue, the county court shall suspend all proceedings in the entire action and certify the same, including a transcript of any judgment which may have been rendered, and transmit all papers therein to the district court of the same county, and the entire actions shall thereupon proceed as if originally instituted in the said district court, and any judgment so certified shall be entered in the judgment docket of the district court and when so entered shall have the same force and effect as if rendered originally by such district court; provided, however, that the judgment of the district court may be reviewed by the Supreme Court on writ of certiorari.

(2) **Intervenor or Attachment Creditor.** Whenever the original suit in which a writ of attachment shall be issued and served shall be begun in the county court of any county in this state, and the claim of an attaching creditor therein, as hereinbefore provided, shall exceed the sum of $15,000.00 exclusive of costs, it shall be the duty of such court to forthwith certify such case and transmit all papers issued or filed therein the district court of such county, and thereafter the case shall proceed in the same manner as if it had been originally begun in such district court.

(o) Traverse of Affidavit. (1) The defendant may, at any time before trial, by affidavit, traverse and put in issue the matters alleged in the affidavit, testimony, or other evidence upon which the attachment is based and if the plaintiff shall establish the reasonable probability that any one of the causes alleged in the affidavit exists, said attachment shall be sustained; otherwise the same shall be dissolved. A hearing on the defendant's traverse shall be held within 7 days from the filing of the traverse and upon no less than two business days' notice to the plaintiff. If the debt for which the action is brought is not due and for that reason the attachment is not sustained, the action shall be dismissed; but if the debt is due, but the attachment nevertheless is not sustained, the action may proceed to judgment after the attachment is dissolved, as in other actions where no attachment is issued.

(2) A plaintiff who fails to prevail at the hearing provided by this section is liable to the defendant for any damages sustained as a result of the issuance of process, costs, and

reasonable attorney's fees. A claim for damages under this subsection may be brought as part of the existing action, and the defendant shall be permitted to amend the answer and any counterclaim for this purpose.

(p) Amendment of Affidavit. If at the hearing of issues formed by the traverse it shall appear that the evidence introduced does not prove the cause or causes alleged in the affidavits, but the evidence does tend to prove another cause of attachment in existence at the time of the issuance of the writ, then on motion the affidavits may be amended to conform to proof the same as pleadings are allowed to be amended in cases of variance.

(q) Intervention; Damages. Any third person claiming any of the property attached, or any lien thereon or interest therein, may intervene under the provisions of Rule 324, and in case of a judgment in that person's favor may also recover such damages as have been suffered by reason of the attachment of the property.

(r) Perishable Property May Be Sold. Where property taken by writ of execution or attachment, or seized under order of court, is in danger of serious and immediate decay or waste, or likely to depreciate rapidly in value pending the determination of the issues, or, where the keeping of it will be attended with great expense, any party to the action may apply to the court, upon due notice, for a sale thereof, and, thereupon the court may, in its discretion, order the property sold in the manner provided for in said order and the proceeds of said sale shall, thereupon, be deposited with the clerk to abide the further order of the court.

(s) Application of Proceeds; Satisfaction of Judgment. If judgment is recovered by the plaintiff or any intervenor, on order of court, all funds previously deposited with the clerk, or in the hands of the sheriff, shall be first applied thereto. If any balance remain due, execution shall issue and be delivered to the sheriff who shall sell so much of the attached property as may be sufficient to satisfy the judgment. Sales shall be conducted as in cases of sales on execution. If there is a personal judgment and after such sale the same is not satisfied in full, the sheriff shall thereupon collect the balance as upon an execution in other cases.

(t) Balance Due; Surplus. Whenever the judgment shall have been paid, the sheriff, upon demand, shall deliver over to the defendant the attached property remaining in the sheriff's hands, and any proceeds of the property attached unapplied on the judgment.

(u) Procedure When Judgment Is For Defendant. If the defendant recovers judgment against the plaintiff, any undertaking received in the action, all the proceeds of sales, all money collected by the sheriff, and all the property attached remaining in the sheriff's hands shall be delivered to the defendant, the writ of attachment shall be discharged, and the property released therefrom.

(v) Defendant May Release Property; Bond. The defendant may at any time before judgment have released any money in the hands of the clerk or any property in the hands of the sheriff, by virtue of any writ of attachment, by executing the undertaking provided in section (w) of this Rule. All the proceeds of sales all money collected by the sheriff, and all the property attached remaining in the sheriff's hands shall thereupon be released from the attachment and delivered to the defendant upon the delivery and approval of the undertaking.

(w) Conditions of Bond; Liability of Sheriff. Before releasing the attached property to the defendant, the sheriff shall require and approve an undertaking executed by the defendant to the plaintiff either of a corporate surety company or with at least two sureties in such sum as may be fixed by the sheriff in not less than the value of the property, to the effect that in case the plaintiff recover judgment in the action, and the attachment is not dissolved, defendant will, on demand, redeliver such attached property so released to the proper officer, to be applied to the payment of the judgment, and that in default thereof the defendant and sureties will pay to the plaintiff the full value of the property so released. If a sheriff shall release any property held under any writ of attachment without taking a sufficient bond, the sheriff and the sheriff's sureties shall be liable to the plaintiff for the damages sustained thereby.

(x) Application to Discharge Attachment. The defendant may also, at any time before trial, move that the attachment be discharged, on the ground that the writ was improperly issued, for any reason appearing upon the face of the papers and proceedings in

the action. If on such application it shall satisfactorily appear that the writ of attachment was improperly issued, it shall be discharged.

(y) New Bond; When Ordered; Failure to Furnish. If at any time where an attachment has been issued it shall appear to the court that the undertaking is insufficient, the court shall order another undertaking, and if the plaintiff fails to comply with such order within 21 days after the same shall be made, all or any writs of attachment issued therein shall be quashed. The additional undertaking shall be executed in the same manner as the original, and the sureties therein shall be jointly and severally liable with those in the original undertaking.

(z) New Trial; Appeal and Writs of Certiorari. Motions for new trial may be made in the same time and manner, and shall be allowed in attachment proceedings, as in other actions. Appeals from the county court to the district court and writs of certiorari may be taken and prosecuted from any final judgment or order in such proceedings as in other civil cases. Any order by which an attachment is released or sustained is a final judgment.

Source: (n)(1) and (n)(2) amended and effective July 1, 1993; (a), (b), (c)(4) to (c)(9), (d), (e), (f), (h)(2), (i), (k), (l), (m), (o)(2), (q), (t), (v), and (w) amended July 22, 1993, effective January 1, 1994; (n)(1) and (n)(2) amended and adopted October 10, 2002, effective January 1, 2003; (i), (k), (o)(1), and (y) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Rule 403. Garnishment

NOTE: County Court Rule 403 is identical to C.R.C.P. 103 except for cross references within the County Court Rule to other County Court Rules. Forms used with the County Court are identical to those used with C.R.C.P. 103, and because County Court Rule 403 cites to and incorporates C.R.C.P. Forms 26 through 34, they need not be duplicated in the County Court Forms Section.

This rule sets forth the exclusive process for garnishment. There shall be five (5) types of writs: (1) Writ of Continuing Garnishment, (2) Writ of Garnishment with Notice of Exemption and Pending Levy, (3) Writ of Garnishment for Support, (4) Writ of Garnishment — Judgment Debtor Other Than Natural Person, and (5) Writ of Garnishment in Aid of Writ of Attachment.

SECTION 1
WRIT OF CONTINUING GARNISHMENT
(ON EARNINGS OF A NATURAL PERSON)

(a) Definitions.

(1) "Continuing garnishment" means the exclusive procedure for withholding the earnings of a judgment debtor for successive pay periods for payment of a judgment debt other than a judgment for support as provided in subsection (c) of this rule.

(2) "Earnings" shall be defined in Section 13-54.5-101(2), C.R.S., as applicable.

(b) Form of Writ of Continuing Garnishment and Related Forms. A writ of continuing garnishment shall be in the form and content of Appendix to Chapters 1 to 17, Form 26, C.R.C.P. It shall also include at least four (4) "Calculation of Amount of Exempt Earnings" forms to be in the form and content of Appendix to Chapters 1 to 17, Form 27, C.R.C.P. Objection to the calculation of exempt earnings shall be in the form and content of Appendix to Chapters 1 to 17, Form 28, C.R.C.P.

(c) When Writ of Continuing Garnishment Issues. After entry of judgment when a writ of execution can issue, a writ of continuing garnishment against earnings shall be issued by the clerk of the court upon request. Under a writ of continuing garnishment, a judgment creditor may garnish earnings except to the extent such earnings are exempt under law. Issuance of a writ of execution shall not be required.

(d) Service of Writ of Continuing Garnishment. A judgment creditor shall serve two (2) copies of the writ of continuing garnishment, together with a blank copy of C.R.C.P. Form 28, "Objection to the Calculation of the Amount of Exempt Earnings" (Appendix to

Chapters 1 to 17, Form 28, C.R.C.P.), upon the garnishee, one copy of which the garnishee shall deliver to the judgment debtor as provided in subsection (h)(1) of this rule. Service of the writ shall be in accordance with C.R.C.P. 304, and the person who serves the writ shall note the date and time of such service on the return service. In any civil action, a judgment creditor shall serve no more than one writ of continuing garnishment upon any one garnishee for the same judgment debtor during the Effective Garnishment Period. This restriction shall not preclude the issuance of a subsequent writ within the Effective Garnishment Period.

(e) Jurisdiction. Service of a writ of continuing garnishment upon the garnishee shall give the court jurisdiction over the garnishee and any earnings of the judgment debtor within the control of the garnishee.

(f) Effective Garnishment Period.

(1) A writ of continuing garnishment shall be a lien and continuing levy against the nonexempt earnings of the judgment debtor until such time as earnings are no longer due, the underlying judgment is vacated, modified or satisfied in full, the writ is dismissed, or for 91 days (13 weeks) following service of the writ, if the judgment was entered prior to August 8, 2001, and 182 days (26 weeks) following service of the writ if the judgment was entered on or after August 8, 2001, except when such writ is suspended pursuant to subsection (j) of this rule.

(2) When a writ of continuing garnishment is served upon a garnishee during the Effective Garnishment Period of a prior writ, it shall be effective for the Effective Garnishment Period following the Effective Garnishment Period of any prior writ.

(3) If a writ of garnishment for support pursuant to C.R.S. 14-14-105 is served during the effective period of a writ of continuing garnishment, the Effective Garnishment Period shall be tolled and all priorities preserved until the termination of the writ of garnishment for support.

(g) Exemptions. A garnishee shall not be required to deduct, set up or plead any exemption for or on behalf of a judgment debtor excepting as set forth in the writ.

(h) Delivery of Copy to Judgment Debtor.

(1) The garnishee shall deliver a copy of the writ of continuing garnishment, together with the calculation of the amount of exempt earnings and the blank copy of C.R.C.P. Form 28, "Objection to the Calculation of the Amount of exempt Earnings" (Appendix to Chapters 1 to 17, Form 28, C.R.C.P.), to the judgment debtor at the time the judgment debtor receives earnings for the first pay period affected by such writ.

(2) For all subsequent pay periods affected by the writ, the garnishee shall deliver a copy of the calculation of the amount of exempt earnings to the judgment debtor at the time the judgment debtor receives earnings for that pay period.

(i) Objection to Calculation of Amount of Exempt Earnings. A judgment debtor may object to the calculation of exempt earnings. A judgment debtor's objection to calculation of exempt earnings shall be in accordance with Section 6 of this rule.

(j) Suspension. A writ of continuing garnishment may be suspended for a specified period of time by the judgment creditor upon agreement with the judgment debtor, which agreement shall be in writing and filed by the judgment creditor with the clerk of the court in which judgment was entered and a copy shall be delivered by the judgment creditor to the garnishee. No suspension shall extend the running of the Effective Garnishment Period nor affect priorities.

(k) Answer and Tender of Payment by Garnishee.

(1) The garnishee shall file the answer to the writ of continuing garnishment with the clerk of the court and send a copy to the judgment creditor no less than 7 nor more than 14 days following the time the judgment debtor receives earnings for the first pay period affected by such writ, or 42 days following the date such writ was served pursuant to section (1)(d) of this rule, whichever is less. However, if the judgment creditor is represented by an attorney, or is a collection agency licensed pursuant to section 12-14-101, et seq., C.R.S., the garnishee may be directed to pay any nonexempt earnings and deliver a calculation of the amount of exempt earnings to the attorney or the licensed collection agency.

(2) The garnishee shall pay any nonexempt earnings and deliver a calculation of the

amount of exempt earnings to the clerk of the court which issued such writ no less than 7 nor more than 14 days following the time the judgment debtor receives earnings affected by such writ. However, if the answer and subsequent calculations are only mailed to an attorney or licensed collection agency under subsection (k)(1), the payment shall accompany the answer.

(3) Any writ of continuing garnishment served upon the garnishee while any previous writ is still in effect shall be answered by the garnishee with a statement that the garnishee has been previously served with one or more writs of continuing garnishment and/or writs of garnishment for support and specify the date on which such previously served writs are expected to terminate.

(l) Disbursement of Garnished Earnings.

(1) If no objection is filed by the judgment debtor within 7 days, the garnishee shall send the nonexempt earnings to the attorney, collection agency licensed pursuant to section 12-14-101, et seq., C.R.S., or court designated on the writ of continuing garnishment (C.R.C.P. Form 26, page 1, paragraph e). The judgment creditor shall refund to the judgment debtor any disbursement in excess of the amount necessary to satisfy the judgment.

(2) If a written objection to the calculation of exempt earnings is filed with the clerk of the court, the garnishee shall send the garnished nonexempt earnings to the clerk of the court. The garnished nonexempt earnings shall be placed in the registry of the court pending further order of the court.

(m) Request for accounting of garnished funds by judgment debtor. Upon reasonable written request by a judgment debtor, the judgment creditor shall provide an accounting in writing of all funds received to the date of the request, including the balance due at the date of the request.

SECTION 2
WRIT OF GARNISHMENT
(ON PERSONAL PROPERTY OTHER THAN EARNINGS OF A NATURAL PERSON)
WITH NOTICE OF EXEMPTION AND PENDING LEVY

(a) Definition. "Writ of garnishment with notice of exemption and pending levy" means the exclusive procedure through which the personal property of any kind (other than earnings of a natural person) in the possession or control of a garnishee including the credits, debts, choses in action, or money owed to the judgment debtor, whether they are due at the time of the service of the writ or are to become due thereafter, is required to be held for payment of a judgment debt. For the purposes of this rule such writ is designated "writ with notice."

(b) Form of Writ With Notice and Claim of Exemption. A writ with notice shall be in the form and content of Appendix to Chapters 1 to 17, Form 29, C.R.C.P. A judgment debtor's written claim of exemption shall be in the form and content of Appendix to Chapters 1 to 17, Form 30, C.R.C.P.

(c) When Writ With Notice Issues. After entry of a judgment when a writ of execution may issue, a writ with notice shall be issued by the clerk of the court upon request. Under such writ any indebtedness, intangible personal property, or tangible personal property capable of manual delivery, other than earnings of a natural person, owed to, or owned by, the judgment debtor, and in the possession or control of the garnishee at the time of service of such writ upon the garnishee, shall be subject to the process of garnishment. Issuance of a writ of execution shall not be required before the issuance of a writ with notice.

(d) Service of Writ With Notice.

(1) Service of a writ with notice shall be made in accordance with C.R.C.P. 304.

(2) Following service of the writ with notice on the garnishee, a copy of the writ with notice, together with a blank copy of C.R.C.P. Form 30 "Claim of Exemption to Writ of Garnishment with Notice" (Appendix to Chapters 1 to 17, Form 30, C.R.C.P.), shall be served upon each judgment debtor whose property is subject to garnishment by such writ as soon thereafter as practicable. Such service shall be in accordance with C.R.S. 13-54.5-

107 (2).

(e) Jurisdiction. Service of a writ with notice upon the garnishee shall give the court jurisdiction over the garnishee and any personal property of any description, owned by, or owed to the judgment debtor in the possession or control of the garnishee.

(f) Claim of Exemption. A judgment debtor's claim of exemption shall be in accordance with Section 6 of this rule.

(g) Court Order on Garnishment Answer.

(1) If an answer to a writ with notice shows the garnishee is indebted to the judgment debtor, the clerk shall enter judgment in favor of the judgment debtor and against the garnishee for the use of the judgment creditor in an amount not to exceed the total amount due and owing on the judgment and request such indebtedness paid into the registry of the court.

(2) No such judgment and request shall enter until the judgment creditor has made a proper showing that: (A) a copy of the writ with notice was properly served upon the judgment debtor, and (B) no written claim of exemption was filed within 14 days after such service or a written claim of exemption was properly filed and the same was disallowed.

(3) If an answer to a writ with notice shows the garnishee to possess or control intangible personal property or personal property capable of manual delivery owned by the judgment debtor, the court shall order the garnishee to deliver such property to the sheriff to be sold as upon execution and the court may enter any order necessary to protect the interests of the parties. Any proceeds received by the sheriff upon such sale shall be paid to the registry of the court to be applied to the judgment debt, but any surplus of property or proceeds shall be delivered to the judgment debtor.

(4) No such order shall enter until the judgment creditor has made a proper showing that: (A) a copy of the writ with notice was properly served upon the judgment debtor, and (B) no written claim of exemption was filed within 14 days after such service or a written claim of exemption was properly filed with the court and the same was disallowed.

(h) Disbursement by Clerk of Court. The clerk of the court shall disburse funds to the judgment creditor without further application or order and enter the disbursement in the court records. The judgment creditor shall refund to the clerk of the court any disbursement in excess of the amount necessary to satisfy the judgment.

(i) Automatic Release of Garnishee. If a garnishee answers a writ with notice that the garnishee is indebted to the judgment debtor in an amount less than $50.00 and no traverse has been filed, the garnishee shall automatically be released from said writ if the garnishee shall not have been ordered to pay the indebtedness to the clerk of the court within six (6) months from the date of service of such writ.

SECTION 3
WRIT OF GARNISHMENT FOR SUPPORT

(a) Definitions.

(1) "Writ of garnishment for support" means the exclusive procedure for withholding the earnings of a judgment debtor for payment of a judgment debt for child support arrearages, maintenance when combined with child support, or child support debts, or maintenance.

(2) "Earnings" shall be as defined in Section 13-54.5-101(2), C.R.S., as applicable.

COMMITTEE COMMENT

The Colorado Legislature amended Section 13-54-104 and 13-54.5-101, C.R.S. (Section 7 of Chapter 65, Session Laws of Colorado 1991), which changed the definition of "earnings" applicable only to actions commenced on or after May 1, 1991. The amendment impacts the ability to garnish certain forms of income, depending upon when the original action was commenced. Sections 1 and 3 of the Rule and Forms 26 and 31 have been revised to deal with this legislative amendment.

(b) Form of Writ of Garnishment for Support. A writ of garnishment for support shall be in the form and content of Appendix to Chapters 1 to 17, Form 31, C.R.C.P. and shall include at least four (4) "Calculation of Amount of Exempt Earnings" forms which shall be in the form and content of Appendix to Chapters 1 to 17, Form 27, C.R.C.P.

(c) When Writ of Garnishment for Support Issues. Upon compliance with C.R.S. 14-10-122 (1)(c), a writ of garnishment for support shall be issued by the clerk of the court upon request. Under such writ a judgment creditor may garnish earnings except to the extent such are exempt under law. Issuance of a writ of execution shall not be required.

(d) Service of Writ of Garnishment for Support. Service of a writ of garnishment for support shall be in accordance with C.R.C.P. 304.

(e) Jurisdiction. Service of a writ of garnishment for support upon the garnishee shall give the court jurisdiction over the garnishee and any earnings of the judgment debtor within the control of the garnishee.

(f) Effective Garnishment Period and Priority.

(1) A writ of garnishment for support shall be continuing and shall require the garnishee to withhold, pursuant to law, the portion of earnings subject to garnishment at each succeeding earnings disbursement interval until the judgment is satisfied or the garnishment released by the court or released in writing by the judgment creditor.

(2) A writ of garnishment for support shall have priority over any writ of continuing garnishment notwithstanding the fact such other writ may have been served upon the garnishee previously.

(g) Answer and Tender of Payment by Garnishee.

(1) The garnishee shall answer the writ of garnishment for support no less than 7 nor more than 14 days following the time the judgment debtor receives earnings for the first pay period affected by such writ. If the judgment debtor is not employed by the garnishee at the time the writ is served, the garnishee shall answer the writ within 14 days from the service thereof.

(2) The garnishee shall pay any nonexempt earnings and deliver a calculation of the amount of exempt earnings, to the clerk of the court which issued such writ no less than 7 nor more than 14 days following the time the judgment debtor receives earnings during the Effective Garnishment Period to such writ.

(h) Disbursement of Garnished Earnings. The clerk of the court shall disburse nonexempt earnings to the judgment creditor without further application or order and enter such disbursement in the court records. The judgment creditor shall refund to the clerk of the court any disbursement in excess of the amount necessary to satisfy the judgment.

SECTION 4
WRIT OF GARNISHMENT — JUDGMENT DEBTOR OTHER THAN NATURAL PERSON

(a) Definition. "Writ of garnishment — judgment debtor other than natural person" means the exclusive procedure through which personal property of any kind of a judgment debtor other than a natural person in the possession or control of the garnishee including the credits, debts, choses in action, or money owed to the judgment debtor, whether they are due at the time of the service of the writ or are to become due thereafter is required to be held by the garnishee for payment of a judgment debt. For purposes of this rule, such writ is designated "writ of garnishment — other than natural person."

(b) Form of Writ of Garnishment — Other Than Natural Person. A writ of garnishment under this Section shall be in the form and content of Appendix to Chapters 1 to 17, Form 32, C.R.C.P.

(c) When Writ of Garnishment — Other Than Natural Person Issues. When the judgment debtor is other than a natural person, after entry of a judgment, and when a writ of execution may issue, a writ of garnishment shall be issued by the clerk of the court upon request. Under such writ of garnishment, the judgment creditor may garnish personal property of any description owned by, or owed to, such judgment debtor and in the

possession or control of the garnishee. Issuance of a writ of execution shall not be required.

(d) Service of Writ of Garnishment — Other Than Natural Person. Service of the writ of garnishment — other than natural person shall be made in accordance with C.R.C.P. 304. No service of the writ or other notice of levy need be made on the judgment debtor.

(e) Jurisdiction. Service of the writ of garnishment — other than natural person shall give the court jurisdiction over the garnishee and personal property of any description, owned by, or owed to, a judgment debtor who is other than a natural person, in the possession or control of the garnishee.

(f) Court Order on Garnishment Answer. When the judgment debtor is other that a natural person:

(1) If the answer to a writ of garnishment shows the garnishee is indebted to such judgment debtor, the clerk shall enter judgment in favor of such judgment debtor and against the garnishee for the use of the judgment creditor for the amount of the indebtedness shown in such answer and order such amount paid into the registry of the court. In no event shall any judgment against the garnishee be more than the total amount due and owing on the judgment.

(2) If the answer to a writ of garnishment shows the garnishee to possess or control personal property of any description, owned by, or owed to, such judgment debtor, the court shall order the garnishee to deliver such property to the sheriff to be sold as upon execution and the court may enter any order necessary to protect the interests of the parties. Any proceeds received by the sheriff upon such sale shall be paid to the registry of the court to be applied to the judgment debt, but any surplus of property or proceeds shall be delivered to the judgment debtor.

(g) Disbursement by Clerk of Court. The clerk of the court shall disburse any funds in the registry of court to the judgment creditor without further application or order and enter such disbursement in the court records. The judgment creditor shall refund to the clerk of the court any disbursement in excess of the amount necessary to satisfy the judgment.

SECTION 5
WRIT OF GARNISHMENT IN AID OF WRIT OF ATTACHMENT

(a) Definition. "Writ of garnishment in aid of writ of attachment" means the exclusive procedure through which the personal property of any kind of a defendant in an attachment action (other than earnings of a natural person) in the possession or control of the garnishee including the credits, debts, choses in action, or money owed to the judgment debtor, whether they are due at the time of the service of the writ or are to become due thereafter, is required to be held by a garnishee. For the purposes of this rule such writ is designated "writ of garnishment in aid of attachment."

(b) Form of Writ of Garnishment in Aid of Attachment and Form of Notice of Levy. A writ of garnishment in aid of attachment shall be in the form and content of Appendix to Chapters 1 to 17, Form 33, C.R.C.P. A Notice of Levy shall be in the form and content of Appendix to Chapters 1 to 17, Form 34, C.R.C.P.

(c) When Writ of Garnishment in Aid of Attachment Issues. At any time after the issuance of a writ of attachment in accordance with C.R.C.P. 402, a writ of garnishment shall be issued by the clerk of the court upon request. Under such writ of garnishment the plaintiff in attachment may garnish personal property of any description, except earnings of a natural person, owed to, or owned by, such defendant in attachment and in the possession or control of the garnishee.

(d) Service of Writ of Garnishment in Aid of Attachment. Service of the writ of garnishment in aid of attachment shall be made in accordance with C.R.C.P. 304. If the defendant in attachment is a natural person, service of a notice of levy shall be made as required by C.R.S. 13-55-102. If the defendant in attachment is other than a natural person, a notice of levy need not be served on the defendant in attachment.

(e) Jurisdiction. Service of the writ of garnishment in aid of attachment shall give the court jurisdiction over the garnishee and personal property of any description (except

earnings of a natural person), owned by, or owed to, a defendant in attachment in the possession or control of the garnishee.

(f) Court Order on Garnishment Answer.

(1) When the defendant in attachment is an entity other than a natural person:

(A) If the answer to a writ of garnishment in aid of attachment shows the garnishee is indebted to such defendant in attachment, the clerk shall enter judgment in favor of such defendant in attachment and against the garnishee for the use of the plaintiff in attachment for the amount of the indebtedness shown in such answer and order such amount paid into the registry of the court. In no event shall any judgment against the garnishee be more than the total amount due and owing nor shall such judgment enter for the benefit of a plaintiff in attachment until a judgment has been entered by the court against such defendant in attachment.

(B) If the answer to a writ of garnishment in aid of attachment shows the garnishee to possess or control personal property of any description, owned by, or owed to, such defendant in attachment, at any time after judgment has entered against such defendant in attachment, the court shall order the garnishee to deliver such property to the sheriff to be sold as upon execution and the court may enter any order necessary to protect the interests of the parties. Any proceeds received by the sheriff upon such sale shall be paid to the registry of the court to be applied to the judgment debt, but any surplus of property or proceeds shall be delivered to the judgment debtor/defendant in attachment.

(2) When the defendant in attachment is a natural person:

(A) If the answer to a writ of garnishment in aid of attachment shows the garnishee is indebted to such defendant in attachment, after judgment has entered against such defendant in attachment/judgment debtor upon a showing that such defendant in attachment has been served with a notice of levy as required by C.R.S. 13-55-102, the court shall enter judgment in favor of the defendant in attachment/judgment debtor and against the garnishee for the use of the plaintiff in attachment/judgment creditor for the amount of the indebtedness shown in such answer and order such amount paid into the registry of the court. In no event shall any judgment against the garnishee be more than the amount of the judgment against the defendant in attachment/judgment debtor.

(B) If the answer to a writ of garnishment in aid of attachment shows the garnishee to possess or control personal property owned by, or owed to, such defendant in attachment, after judgment has entered against such defendant in attachment/judgment debtor and upon a showing that such defendant in attachment has been served with a notice of levy as required by C.R.S. 13-55-102, the court shall order the garnishee to deliver the property to the sheriff to be sold as upon execution and the court may enter any order necessary to protect the interests of the parties. Any proceeds received by the sheriff upon such sale shall be paid to the registry of the court to be applied to the judgment debt but any surplus of property or proceeds shall be delivered to the defendant in attachment/judgment debtor.

(g) Disbursement by Clerk of Court. The clerk of the court shall disburse any funds in the registry of the court to the judgment creditor without further application or order and enter such disbursement in the court records. The judgment creditor shall refund to the clerk of the court any disbursement in excess of the amount necessary to satisfy the judgment.

SECTION 6
JUDGMENT DEBTOR'S OBJECTION — WRITTEN CLAIM OF EXEMPTION — HEARING

(a) Judgment Debtor's Objection to Calculation of Exempt Earnings Under Writ of Continuing Garnishment.

(1) If a judgment debtor objects to the initial or a subsequent calculation of the amount of exempt earnings, the judgment debtor shall have 7 days from the receipt of the copy of the writ of garnishment or calculation of the amount of exempt earnings for subsequent pay periods, within which to resolve the issue of such miscalculation by agreement with the garnishee.

(2) If the judgment debtor's objection is not resolved with the garnishee within 7 days upon good faith effort, the judgment debtor may file a written objection setting forth, with reasonable detail, the grounds for such objection. Such objection must be filed within 14 days from receipt of the copy of writ of garnishment or calculation of the amount of exempt earnings for subsequent pay periods.

(3) The written objection shall be filed with the clerk of the court by the judgment debtor in the form and content of Appendix to Chapters 1 to 17, Form 28, C.R.C.P.

(4) The judgment debtor shall, by certified mail, return receipt requested, immediately deliver a copy of such objection to the garnishee and the judgment creditor's attorney of record, or if none, to the judgment creditor. If the garnishee has been directed to transmit the nonexempt earnings to an attorney or a collection agency licensed pursuant to section 12-14-101, et seq, C.R.S., then upon receipt of the objection, the garnishee shall transmit the nonexempt earnings to the clerk of the court.

(5) Upon the filing of a written objection, all proceedings with relation to the earnings of the judgment debtor in possession and control of the garnishee, the judgment creditor, the attorney for the judgment creditor, or in the registry of the court shall be stayed until the written objection is determined by the court.

(b) Judgment Debtor's Claim of Exemption Under a Writ With Notice.

(1) When a garnishee, pursuant to a writ with notice, holds any personal property of the judgment debtor, other than earnings, which the judgment debtor claims to be exempt, the judgment debtor, within 14 days after being served a copy of such writ as required by Section 2(d)(2) of this rule, shall make and file a written claim of exemption with the clerk of the court in which the judgment was entered.

(2) The claim of exemption to the writ of garnishment with notice shall be in the form and content of Appendix to Chapters 1 to 17, Form 30, C.R.C.P.

(3) The judgment debtor shall, by certified mail, return receipt requested, deliver a copy of the claim of exemption to the garnishee and the judgment creditor's attorney of record, or if none, to the judgment creditor.

(4) Upon the filing of a claim of exemption to a writ with notice, all proceedings with relation to property in the possession or control of the garnishee shall be stayed until such claim is determined by the court.

(c) Hearing on Objection or Claim of Exemption.

(1) Upon the filing of an objection pursuant to Section 6(a) of this rule or the filing of a claim of exemption pursuant to Section 6(b) of this rule, the court in which the judgment was entered shall set a time for hearing of such objection or claim of exemption which hearing shall not be more than 14 days after the filing of such objection or claim of exemption.

(2) When an objection or claim of exemption is filed, the clerk of the court shall immediately inform the judgment creditor, the judgment debtor and the garnishee, or their attorneys of record, by telephone, by mail, or in person, of the date and time of such hearing.

(3) The clerk of the court shall document in the court record that notice of the hearing has been given in the manner required by this rule. Said documentation in the court record shall constitute a sufficient return and prima facie evidence of such notice.

(4) The court in which judgment was entered shall conduct a hearing at which all interested parties may testify, and shall determine the validity of the objection or claim of exemption filed by the judgment debtor and shall enter a judgment in favor of the judgment debtor to the extent of the validity of the objection or claim of exemption, which judgment shall be a final judgment for the purpose of appellate review.

(5) If the court shall find the amount of exempt earnings to have been miscalculated or if said property is found to be exempt, the court shall order the clerk of the court to remit the amount of over-garnished earnings, or the garnishee to remit such exempt property to the clerk of the court for the use and benefit of the judgment debtor within three (3) business days.

(d) Objection or Claim of Exemption Within Six (6) Months.

(1) Notwithstanding the provisions of Section 6(a)(2) and Section 6(b)(1) of this rule, a judgment debtor failing to make and file a written objection or claim of exemption within

the time therein provided, may, at any time within six (6) months from receipt of the copy of the writ with notice or a copy of the writ of continuing garnishment or the calculation of the amount of exempt earnings, move the court in which the judgment was entered to hear an objection or claim of exemption as to any earnings of property levied in garnishment which the judgment debtor claims to have been miscalculated or which the judgment debtor claims to be exempt.

(2) A hearing pursuant to this subsection shall be held only upon a verified showing, under oath, of good cause which shall include: mistake, accident, surprise, irregularity in proceedings, newly discovered evidence, events not in the control of the judgment debtor, or such other grounds as the court may allow, but in no event shall a hearing be held pursuant to this subsection on grounds available to the judgment debtor as the basis of an objection or claim of exemption within the time periods provided in Section 6(a)(2) and Section 6(b)(1).

(3) At such hearing, if the judgment giving rise to such claim has been satisfied against property or earnings of the judgment debtor, the court shall hear and summarily try and determine whether the amount of the judgment debtor's earnings paid to the judgment creditor was correctly calculated and whether the judgment debtor's property sold as upon execution was exempt. If the court finds earnings to have been miscalculated of if property is found to be exempt, the court shall enter judgment in favor of the judgment debtor for the amount of the over-garnished earnings or such exempt property or the value thereof which judgment shall be satisfied by payment to the clerk of the court or the return of exempt property to the judgment debtor within three (3) business days.

(e) Reinstatement of Judgment Debt. If at any time the court orders a return of over-garnished earnings or exempt property or the value of such exempt property pursuant to Sections 6(c)(5) and 6(d)(3) of this rule, the court shall thereupon reinstate the judgment to the extent of the amount of such order.

SECTION 7
FAILURE OF GARNISHEE TO ANSWER
(ALL FORMS OF GARNISHMENT)

(a) Default Entered by Clerk of Court.

(1) If a garnishee, having been served with any form of writ provided for by this rule, fails to answer or pay any nonexempt earnings as directed within the time required, the clerk of the court shall enter a default against such garnishee upon request.

(2) No default shall be entered in an attachment action against the garnishee until the expiration of 35 days after service of a writ of garnishment upon the garnishee.

(b) Procedure After Default of Garnishee Entered.

(1) After a default is entered, the judgment creditor, plaintiff in attachment or any intervenor in attachment, may proceed before the court to prove the liability of the garnishee to the judgment debtor or defendant in attachment.

(2) If a garnishee is under subpoena to appear before the court for a hearing to prove such liability and such subpoena shall have been issued and served in accordance with C.R.C.P. 345 and shall fail to appear, the court shall thereupon enter such sanctions as are just, including, but not limited to, contempt of court, issuance of a bench warrant, reasonable attorney fees and the cost and expense of the judgment creditor, plaintiff in attachment or intervenor in attachment.

(3) Upon hearing, if the court finds the garnishee liable to the judgment debtor or defendant in attachment or in the possession or control of personal property of the judgment debtor or defendant in attachment at the time of service of the writ:

(A) The court shall enter judgment in favor of the judgment debtor or defendant in attachment against the garnishee for the use and benefit of the judgment creditor, plaintiff in attachment or intervenor in attachment, if the garnishee was liable to the judgment debtor or defendant in attachment;

(B) The court shall order the garnishee to deliver the personal property to the sheriff to be sold as upon execution in the same manner as section 4(f)(2) of this rule, if the garnishee was in the possession or control of personal property of the judgment debtor or defendant in attachment and may enter any order necessary to protect the interests of the parties. Provided, however, in the event that the garnishee no longer has possession or control over the personal property, the court may either enter a judgment for the value of such property at the time of the service of the writ or enter any order necessary to protect the interests of the parties or both.

(4) At any hearing the court shall make such orders as to reasonable attorney's fees, costs and expense of the parties to such hearing, as are just.

SECTION 8
TRAVERSE OF ANSWER
(ALL FORMS OF GARNISHMENT)

(a) Time for Filing of Traverse. The judgment creditor, plaintiff in attachment or intervenor in attachment, may file a traverse of an answer to any form of writ provided by this rule provided such traverse is filed within the greater time period of 21 days from the date such answer should have been filed with the court or 21 days after such answer was filed with the court. The failure to timely file a traverse shall be deemed an acceptance of the answer as true.

(b) Procedure.

(1) Within the time provided, the judgment creditor, plaintiff in attachment, or intervenor in attachment, shall state, in verified form, the grounds of traverse and shall mail a copy of the same to the garnishee in accordance with C.R.C.P. 305.

(2) Upon application of the judgment creditor, plaintiff in attachment, or intervenor in attachment, the traverse shall be set for hearing before the court at which hearing the statements in the traverse shall be deemed admitted or denied.

(3) Upon hearing of the traverse, if the court finds the garnishee liable to the judgment debtor or defendant in the attachment or in the possession or control of personal property of the judgment debtor or defendant in attachment at the time of service of the writ:

(A) The court shall enter judgment in favor of the judgment debtor or defendant in attachment against the garnishee for the use and benefit of the judgment creditor, plaintiff in attachment of intervenor in attachment, if the garnishee was liable to the judgment debtor or defendant in attachment;

(B) The court shall order the garnishee to deliver the personal property to the sheriff to be sold as upon execution in the same manner as section 4(f)(2) of this rule, if the garnishee was in the possession or control of personal property of the judgment debtor or defendant in attachment and may enter any order necessary to protect the interests of the parties. Provided, however, in the event that the garnishee no longer has possession or control over the personal property, the court may either enter a judgment for the value of such property at the time of the service of the writ or enter any order necessary to protect the interests of the parties or both.

(4) If a garnishee is under subpoena to appear for a hearing upon a traverse and such subpoena shall have been issued and served in accordance with C.R.C.P. 345, and shall fail to appear, the court shall thereupon enter such sanctions as are just, including, but not limited to, contempt of court, issuance of a bench warrant, reasonable attorney fees and the cost and expense of the judgment creditor, plaintiff in attachment or intervenor in attachment.

(5) At any hearing upon a traverse, the court shall make such orders as to reasonable attorney fees, costs and expense of the parties to such hearing as are just.

SECTION 9
INTERVENTION
(ALL FORMS OF GARNISHMENT)

Any person who claims an interest in any personal property of any description of a judgment debtor or defendant in attachment which property is the subject of any answer made by a garnishee, may intervene as provided in C.R.C.P. 324 at any time prior to entry of judgment against the garnishee.

SECTION 10
SET-OFF BY GARNISHEE
(ALL FORMS OF GARNISHMENT)

Every garnishee shall be allowed to claim as a set-off and retain or deduct all demands or claims on the part of the garnishee against any party to the garnishment proceedings, which the garnishee might have claimed if not summoned as a garnishee, whether such are payable or not at the time of service of any form or writ provided for by this rule.

SECTION 11
GARNISHEE NOT REQUIRED TO
DEFEND CLAIMS OF THIRD PERSONS
(ALL FORMS OF GARNISHMENT)

(a) Garnishee With Notice. A garnishee with notice of the claim of a third person in any property of any description of a judgment debtor or defendant in attachment which is the subject of any answer made by the garnishee in response to any form of writ provided for by this rule shall not be required to defend on account of such claim, but shall state in such answer that the garnishee is informed of such claim of a third person.

(b) Court to Issue Summons. When such an answer has been filed, the clerk of the court, upon application, shall issue a summons requiring such third person to appear within the time specified in C.R.C.P. 312 to answer, set up, and assert a claim or be barred thereafter.

(c) Delivery of Property by Garnishee.

(1) If the answer states that the garnishee is informed of the claim of a third person, the garnishee may at any time pay to the clerk of the court any garnished amount payable at the time of the service of any writ provided for by this rule, or deliver to the sheriff any property the garnishee is required to hold pursuant to any form of writ provided for in this rule.

(2) Upon service of the summons upon such third person pursuant to C.R.C.P. 304, the garnishee shall thereupon be released and discharged of any liability to any person on account of such indebtedness to the extent of any amount paid to the clerk of the court or any property delivered to the sheriff.

SECTION 12
RELEASE AND DISCHARGE OF GARNISHEE
(ALL FORMS OF GARNISHMENT)

(a) Effect of Judgment. A judgment against a garnishee shall release and discharge such garnishee from all claims or demands of the judgment debtor or defendant in attachment to the extent of all sums paid or property delivered by the garnishee pursuant to such judgment.

(b) Effect of Payment. Payment by a garnishee of any sums required to be remitted by such garnishee pursuant to Sections 1(k)(2) or 3(g)(2) of this rule shall release and

discharge such garnishee from all claims or demands of the judgment debtor to the extent of all such sums paid.

(c) **Release by Judgment Creditor or Plaintiff in Attachment.** A judgment creditor or plaintiff in attachment may issue a written release of any writ provided by this rule. Such release shall state the effective date of the release and shall be promptly filed with the clerk of the court.

SECTION 13
GARNISHMENT OF PUBLIC BODY
(ALL FORMS OF GARNISHMENT)

Any writ provided for in this rule wherein a public body is designated as the garnishee, shall be served upon the officer of such body whose duty it is to issue warrants, checks or money to the judgment debtor or defendant in attachment, or, such officer as the public body may have designated to accept service. Such officer need not include in any answer to such writ, as money owing, the amount of any warrant or check drawn and signed prior to the time of service of such writ.

**EFFECTIVE DATE OF RULE
AND AMENDMENTS OF THIS RULE**

Repealed October 31, 1991, effective November 1, 1991.

Source: Repealed and readopted November 5, 1984, effective January 1, 1985; section 1(d), (f)(1), (f)(2), and (h)(1), section 2(a), (d)(2), and (e), section 3(a)(1) and (c), section 4(a) and (d), section 5(a) and (d), section 7(a)(1), (b)(3), and (b)(4), section 8(b)(3), section 12, and effective date amended February 16, 1989, effective July 1, 1989; section 1(a)(2) and section 3(a)(2) amended, section 3(a)(2) committee comment added, and effective date repealed October 31, 1991, effective November 1, 1991; section 1(k)(1), (k)(2) and (l) amended and (m) added, section 6(a)(3), (a)(4), and (a)(5) amended, section 7(a)(1) amended, and section 12(b) amended and adopted October 30, 1997, effective January 1, 1998; section 1(d), (f), and (j) and section 3(f) and (g)(2) amended and adopted June 28, 2001, effective August 8, 2001; section 1(k)(1) and (k)(2) amended and effective November 18, 2010; section 1(f)(1), (k)(1), (k)(2), and (l)(1), section 2(g)(2) and (g)(4), section 3(g), section 6(a)(1), (a)(2), (b)(1), and (c)(1), section 7(a)(2), and section 8(a) amended and adopted December 14, 2011, effective July 1, 2012; section 2(g)(2) and (g)(4) corrected June 15, 2012, nunc pro tunc, December 14, 2011, effective July 1, 2012.

Rule 404. Replevin

(a) **Personal Property.** The plaintiff in an action in the county court to recover the possession of personal property, the value of which does not exceed fifteen thousand dollars, may, at the time of the commencement of the action, or at any time before trial, claim the delivery of such property to the plaintiff as provided in this Rule.

(b) **Causes, Affidavit.** Where a delivery is claimed, the plaintiff, the plaintiff's agent or attorney, or some credible person for the plaintiff, shall, by verified complaint or by complaint and affidavit under penalty of perjury show to the court as follows:

(1) That the plaintiff is the owner of the property claimed or is entitled to possession thereof and the source of such title or right; and if plaintiff's interest in such property is based upon a written instrument, a copy thereof shall be attached;

(2) That the property is being detained by the defendant against the plaintiff's claim of right to possession; the means by which the defendant came into possession thereof, and the specific facts constituting detention against the right of the plaintiff to possession;

(3) A particular description of the property, a statement of its actual value, and a statement to the plaintiff's best knowledge, information and belief concerning the location

of the property and of the residence and the business address, if any, of the defendant;

(4) That the property has not been taken for a tax assessment or fine pursuant to a statute; or seized under an execution against the property of the plaintiff; or if so seized, that it is by statute exempt from seizure.

(c) Show Cause Order; Hearing within 14 Days. The court shall without delay, examine the complaint and affidavit, and if it is satisfied that they meet the requirements of subsection (b), it shall issue an order directed to the defendant to show cause why the property should not be taken from the defendant and delivered to the plaintiff. Such order shall fix the date and time for the hearing thereof. The hearing date shall be not more than 14 days from the date of the issuance of the order and the order must have been served at least 7 days prior to the hearing date. The plaintiff may request a hearing date beyond 14 days, which request shall constitute a waiver of the right to a hearing not more than 14 days from the date of issuance of the order. Such order shall inform the defendant that if the hearing date on the order to show cause and the appearance date fixed in the summons are different dates, the defendant must appear at both times, that the defendant may file affidavits on the defendant's behalf with the court and may appear and present testimony on the defendant's behalf at the time of such hearing, or that the defendant may, at or prior to such hearing, file with the court a written undertaking to stay the delivery of the property, in accordance with the provisions of section (j) of this Rule, and that, if the defendant fails to appear at the hearing on the order to show cause or to file an undertaking, plaintiff may apply to the court for an order requiring the sheriff to take immediate possession of the property described in the complaint and deliver same to the plaintiff. The summons and complaint, if not previously served, and the order shall be served on the defendant and the order shall fix the manner in which service shall be made, which shall be by service in accordance with the provisions of Rule 4, C.R.C.P., or in such manner as the court may determine to be reasonably calculated to afford notice thereof to the defendant under the circumstances appearing from the complaint and affidavit.

(d) Order for Possession prior to Hearing. Subject to the provisions of 5-5-104, C.R.S., and upon examination of the complaint and affidavit and such other evidence or testimony as the court may thereupon require, an order of possession may be issued prior to hearing, if probable cause appears that any of the following exist:

(1) The defendant gained possession of the property by theft.

(2) The property consists of one or more negotiable instruments or credit cards.

(3) By reason of specific, competent evidence shown, by testimony with the personal knowledge of an affiant or witness, the property is perishable, and will perish before any noticed hearing can be had, or that the defendant may destroy, dismantle, remove parts from, or in any way substantially change the character of the property, or the defendant may conceal or remove the property from the jurisdiction of the court to sell the property to an innocent purchaser.

(4) That the defendant has by contract voluntarily and intelligently and knowingly waived the right to a hearing prior to losing possession of the property by means of a court order.

Where an order of possession has been issued prior to hearing under the provisions of this section, the defendant or other persons from whom possession of said property has been taken, may apply to the court for an order shortening time for hearing on the order to show cause, and the court may, upon such application, shorten the time for hearing, and direct that the matter shall be heard on not less than forty-eight hours' notice to the plaintiff.

(e) Bond. An order of possession shall not issue pursuant to section (d) of this Rule until plaintiff has filed with the court in an amount set by the court in its discretion not to exceed double the value of the property a written undertaking executed by plaintiff and such surety as the court may require for the return of the property to the defendant, if return thereof be ordered, and for the payment to the defendant of any sum that may from any cause be recovered against the plaintiff.

(f) Temporary Order to Preserve Property. Under the circumstances described in section (b) of this Rule, or in lieu of the immediate issuance of an order of possession under any circumstances described in section (d) of this Rule, the court may, in addition to

the issuance of the order to show cause, issue such temporary orders, directed to the defendant, prohibiting or requiring such acts with respect to the property as may appear to be necessary for the preservation of the rights of the parties and the status of the property.

(g) Order for Possession after Hearing; Bond; Directed to Sheriff. Upon the hearing on the order to show cause, which hearing shall be held as a matter of course by the court, the court shall consider the showing made by the parties appearing, and shall make a preliminary determination of which party, with reasonable probability, is entitled to possession, use, and disposition of the property pending final adjudication of the claims of the parties. If the court determines that the action is one in which a prejudgment order of possession should issue, it shall direct the issuance of such order and may require a bond in such amount and with such surety as the court may determine to protect the rights of the parties. Failure of the defendant to be present or represented at the hearing on the order to show cause shall not constitute a default in the main action. The order of possession shall be directed to the sheriff within whose jurisdiction the property is located.

(h) Contents of Possession Order. The order of possession shall describe the specific property to be seized, and shall specify the location or locations where there is probable cause to believe the property or some part thereof will be found. It shall direct the sheriff to seize the same as it is found, and to retain it in the sheriff's custody. There shall be attached to such order a copy of the written undertaking filed by the plaintiff, and such order shall inform the defendant of the right to except to the sureties or to the amount of the bond upon the undertaking or to file a written undertaking for the redelivery of such property as provided in section (j).

Upon probable cause shown by further affidavit or declaration by the plaintiff or someone in the plaintiff's behalf, filed with the court, an order of possession may be endorsed by the court, without further notice, to direct the sheriff to search for the property at another specified location or locations and to seize the same if found. The sheriff shall forthwith take the property if it be in the possession of the defendant or the defendant's agent, and retain it to the sheriff's custody.

(i) Sheriff May Break Building: When. If the property or any part thereof is in a building or an enclosure, the sheriff shall demand its delivery, announcing the sheriff's identity, purpose, and authority under which the sheriff acts. If it is not voluntarily delivered, the sheriff shall cause the building or enclosure to be broken open in such a manner as the sheriff reasonably believes will cause the least damage to the building or enclosure, and take the property into the sheriff's possession. The sheriff may call upon the power of the county to provide aid and protection, but if the sheriff reasonably believes that entry and seizure of the property will involve a substantial risk of death or serious bodily harm to any person, the sheriff shall refrain from seizing the property, and shall forthwith make a return before the court from which the order was issued, setting forth the reasons for the belief that such risk exists. The court may make such orders and decrees as may be appropriate.

The sheriff shall, without delay, serve upon the defendant a copy of the order of possession and written undertaking by delivering the same to the defendant personally, if the defendant can be found or to the defendant's agent for whose possession the property is taken; or, if neither can be found, by leaving them at the usual place of abode of either with some person of suitable age and discretion; or if neither has any known place of abode, by mailing them to the last known address of either.

(j) When Returned to Defendant; Bond. At any time prior to the hearing on the order to show cause, or before the delivery of the property to the plaintiff, the defendant may require the return thereof upon filing with the court a written undertaking, in an amount set by the court in its discretion not to exceed double the value of the property and executed by the defendant and such surety as the court may direct for the delivery of the property to the plaintiff, if such delivery be ordered, and for the payment to the plaintiff of such sum as may for any cause be recovered against the defendant. At the time of filing such undertaking, the defendant shall serve upon the plaintiff or Plaintiff's attorney, in the manner provided by Rule 305, C.R.C.P., a notice of filing of such undertaking, to which a copy of such undertaking shall be attached, and shall cause proof of service thereof to be filed with the court. If such undertaking be filed prior to hearing on the order to show

cause, proceedings thereunder shall terminate, unless exception is taken to the amount of the bond or the sufficiency of the surety. If, at the time of filing of such undertaking, the property shall be in the custody of the sheriff, such property shall be redelivered to the defendant 7 days after service of notice of filing such undertaking upon the plaintiff or his attorney.

(k) Exception to Sureties. Either party may, within two business days after service of an undertaking or notice of filing and undertaking under the provisions of this Rule, give written notice to the court and the other party that the party excepts to do the sufficiency of the surety or the amount of the bond. If the party fails to do so, the party is deemed to have waived all objections to them. When a party excepts the court shall hold a hearing to determine the sufficiency of the bond or surety. If the property be in the custody of the sheriff, he shall retain custody thereof until the hearing is completed or waived. If the excepting party prevails at the hearing, the sheriff shall proceed as if no such undertaking has been filed. If the excepting party does not prevail at the hearing, or the exception is waived, the sheriff shall deliver the property to the party filing such undertaking.

(l) Duty of Sheriff in Holding Goods. When the sheriff has taken property as provided in this Rule, it shall be kept in a secure place and delivered to the party entitled thereto, upon receiving the sheriff's fees for taking and the necessary expenses for keeping the same, after expiration of the time for filing of an undertaking for redelivery and for the exception to the sufficiency of the bond, unless the court shall by order stay such delivery.

(m) Claim by Third Person. If the property taken is claimed by any other person than the defendant or the plaintiff, such person may intervene under the provisions of Rule 324, C.R.C.P., and in the event of a judgment in the person's favor, the person may also recover such damages as may have been suffered by reason of any wrongful detention of the property.

(n) Return; Papers by Sheriff. The sheriff shall return the order of possession and undertakings and affidavits with the sheriff's proceedings thereon, to the court in which the action is pending, within 21 days after taking the property mentioned therein.

(o) Precedence on Docket. In all proceedings brought to recover the possession of personal property, all courts, in which such actions are pending, shall, upon request of any party thereto, give such actions precedence over all other civil actions, except actions to which special precedence is otherwise given by law, in the matter of the setting of the same for hearing or trial, and in hearing or trial thereof, to the end that all such actions shall be quickly heard and determined.

(p) Judgment. In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession or the value thereof in case a delivery cannot be had, and damages for the detention. If the property has been delivered to the plaintiff, and the defendant claims a return thereof, judgment for the defendant may be for a return of the property, or the value thereof in case a return cannot be had, and damages for taking and withholding the same. The provisions of Rule 313, C.R.C.P., shall apply to replevin actions.

Source: (a) amended and effective July 1, 1993; (a), (b)(3), (c), (d)(4), and (h) to (n) amended July 22, 1993, effective January 1, 1994; (c), (d)(4), (h), and (m) corrected and effective January 9, 1995; (c) corrected and effective January 23, 1995; (a) amended and adopted October 10, 2002, effective January 1, 2003; entire rule amended and adopted December 4, 2003, effective January 1, 2004; (c), (j), (k), and (n) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Rule 405. No Colorado Rule

Rule 406. Remedial Writs

Except for certiorari to the Supreme Court as provided by these rules the common law writs and any relief as provided in Rule 106, C.R.C.P., are not available in the county court.

Rule 407. Remedial and Punitive Sanctions for Contempt

(a) Definitions. (1) Contempt: Disorderly or disruptive behavior, a breach of the peace, boisterous conduct or violent disturbance toward the court, or conduct that unreasonably interrupts the due course of judicial proceedings; behavior that obstructs the administration of justice; disobedience or resistance by any person to or interference with any lawful writ, process, or order of the court; or any other act or omission designated as contempt by the statutes or these rules.

(2) Direct Contempt. Contempt that the court has seen or heard and is so extreme that no warning is necessary or that has been repeated despite the court's warning to desist.

(3) Indirect Contempt: Contempt that occurs out of the direct sight or hearing of the court.

(4) Punitive Sanctions for Contempt: Punishment by unconditional fine, fixed sentence of imprisonment, or both, for conduct that is found to be offensive to the authority and dignity of the court.

(5) Remedial Sanctions for Contempt: Sanctions imposed to force compliance with a lawful order or to compel performance of an act within the person's power or present ability to perform.

(6) Court: For purposes of this rule, "court" means any judge, magistrate, commissioner, referee, or a master while performing official duties.

(b) Direct Contempt Proceedings. When a direct contempt is committed, it may be punished summarily. In such case an order shall be made on the record or in writing reciting the facts constituting the contempt, including a description of the person's conduct, a finding that the conduct was so extreme that no warning was necessary or the person's conduct was repeated after the court's warning to desist, and a finding that the conduct is offensive to the authority and dignity of the court. Prior to the imposition of sanctions, the person shall have the right to make a statement in mitigation.

(c) Indirect Contempt Proceedings. When it appears to the court by motion supported by affidavit that indirect contempt has been committed, the court may ex parte order a citation to issue to the person so charged to appear and show cause at a date, time and place designated why the person should not be punished. The citation and a copy of the motion, affidavit and order shall be served directly upon such person at least 21 days before the time designated for the person to appear. If such person fails to appear at the time so designated, and it is evident to the court that the person was properly served with copies of the motion, affidavit, order, and citation, a warrant for the person's arrest may issue to the sheriff. The warrant shall fix the date, time and place for the production of the person in court. The court shall state on the warrant the amount and kind of bond required. The person shall be discharged upon delivery to and approval by the sheriff or clerk of the bond directing the person to appear at the date, time and place designated in the warrant, and at any time to which the hearing may be continued, or pay the sum specified. If the person fails to appear at the time designated in the warrant, or at any time to which the hearing may be continued, the bond may be forfeited upon proper notice of hearing to the surety, if any, and to the extent of the damages suffered because of the contempt, the bond may be paid to the aggrieved party. If the person fails to make bond, the sheriff shall keep the person in custody subject to the order of the court.

(d) Trial and Punishment. (1) Punitive Sanctions. In an indirect contempt proceeding where punitive sanctions may be imposed, the court may appoint special counsel to prosecute the contempt action. If the judge initiates the contempt proceedings, the person shall be advised of the right to have the action heard by another judge. At the first appearance, the person shall be advised of the right to be represented by an attorney and, if indigent and if a jail sentence is contemplated, the court will appoint counsel. The maximum jail sentence shall not exceed six months unless the person has been advised of the right to a jury trial. The person shall also be advised of the right to plead either guilty or not guilty to the charges, the presumption of innocence, the right to require proof of the charge beyond a reasonable doubt, the right to present witnesses and evidence, the right to cross-examine all adverse witnesses, the right to have subpoenas issued to compel attendance of witnesses at trial, the right to remain silent, the right to testify at trial, and the

right to appeal any adverse decision. The court may impose a fine or imprisonment or both if the court expressly finds that the person's conduct was offensive to the authority and dignity of the court. The person shall have the right to make a statement in mitigation prior to the imposition of sentence.

(2) Remedial Sanctions. In a contempt proceeding where remedial sanctions may be imposed, the court shall hear and consider the evidence for and against the person charged and it may find the person in contempt and order sanctions. The court shall enter an order in writing or on the record describing the means by which the person may purge the contempt and the sanctions that will be in effect until the contempt is purged. In all cases of indirect contempt where remedial sanctions are sought, the nature of the sanctions and remedies that may be imposed shall be described in the motion or citation. Costs and reasonable attorney's fees in connection with the contempt proceeding may be assessed in the discretion of the court. If the contempt consists of the failure to perform an act in the power of the person to perform and the court finds the person has the present ability to perform the act so ordered, the person may be fined or imprisoned until its performance.

(e) Limitations. The court shall not suspend any part of a punitive sanction based upon the performance or non-performance of any future acts. The court may reconsider any punitive sanction. Probation shall not be permitted as a condition of any punitive sanction. Remedial and punitive sanctions may be combined by the court, provided appropriate procedures are followed relative to each type of sanction and findings are made to support the adjudication of both types of sanctions.

(f) Appeal. For the purposes of appeal, an order deciding the issue of contempt and sanctions shall be final.

Source: Entire rule amended January 26, 1995, effective April 1, 1995; (c) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

Rule 408. Affidavits

An affidavit may be sworn to either within or without this state before any officer authorized by law to take and certify the acknowledgment of deeds conveying lands.

Rule 409. No Colorado Rule

Rule 410. Miscellaneous

(a) Amendments. No writ or process shall be quashed, nor any order or decree set aside, nor any undertaking be held invalid, nor any affidavit, traverse or other paper be held insufficient if the same be corrected within the time and manner prescribed by the court, which shall be liberal in permitting amendments.

(b) Use of Terms. Words used in the present tense shall include the future; singular shall include the plural; masculine shall include the feminine; person or party shall include all manner of organizations which may sue or be sued. The use of the word clerk, sheriff, marshal, or other officer means such officer or his deputy or other person authorized to perform his duties. The word "oath" includes the word "affirmation"; and the phrase "to swear" includes "to affirm"; signature or subscription shall include mark, when the person is unable to write, his name being written near it and witnessed by a person who writes his own name as a witness. A superintendent, overseer, foreman, sales director, or person occupying a similar position, may be considered a managing agent for the purposes of these rules.

(c) Certificates. Certificates shall be made in the name of the officer either by the officer or by his deputy.

(d) Counterclaimants. Where a counterclaim is filed, the claimant thereunder shall have the same rights and remedies as the plaintiff.

Rule 411. Appeals

(a) Notice of Appeal; Time for Filing; Bond. If either party in a civil action believes that the judgment of the county court is in error, that party may appeal to the district court

by filing a notice of appeal in the county court within 21 days after the date of entry of judgment. The notice shall be in the form appearing in the Appendix to Chapter 25, Form 4, C.R.C.P. If the notice of the entry of judgment is transmitted to the parties by mail, the time for the filing of the notice of appeal shall commence from the date of the mailing of the notice. The appealing party shall also file within the said 21 days an appeal bond with the clerk of the county court. The bond shall be furnished by a corporate surety authorized and licensed to do business in this state as a surety, or one or more sufficient private sureties, or may be a cash deposit by the appellant and, if the appeal is taken by the plaintiff, shall be conditioned to pay the costs of the appeal and the counterclaim, if any, and, if the appeal be taken by the defendant, shall be conditioned to pay the costs and judgment if the appealing party fail. The bond shall be approved by the judge or the clerk. Upon filing of the notice of appeal, the posting and approval of the bond, and the deposit by the appellant of an estimated fee in advance for preparing the record, the county court shall discontinue all further proceedings and recall any execution issued. The appellant shall also, within 35 days after the filing of the notice of appeal, docket the case in the district court and pay the docket fee.

(b) Preparation of Record on Appeal. Upon the deposit of the estimated record fee, the clerk of the court shall prepare and issue as soon as may be possible a record of the proceedings in the county court, including the summons, the complaint, proof of service, and the judgment. The record shall also include a transcription of such part of the actual evidence and other proceedings as the parties may designate or, in lieu of transcription, to which they may stipulate. If a stenographic record has been maintained or the parties agree to stipulate, the party appealing shall lodge with the clerk of the court the reporter's transcript of the designated evidence or proceedings, or a stipulation covering such items within 42 days after judgment. If the proceedings have been electrically recorded, the transcription of designated evidence and proceedings shall be prepared in the office of the clerk of the county court or under the supervision of the clerk, within 42 days after judgment. The clerk shall notify, in writing, the opposing parties of the completion of the record, and such parties shall have 21 days within which to file objections. If none are received, the record shall be certified forthwith by the judge. If objections are made, the parties shall be called for hearing and the objections settled by the county judge as soon as possible, and the record then certified.

(c) Filing of record. When the record has been duly certified and any additional fees therefor paid, it shall be filed with the clerk of the district court by the clerk of the county court, and the opposing parties shall be notified of such filing by the clerk of the county court.

(d) Briefs. A written brief shall contain a statement of the matters relied upon as constituting error and the arguments with respect thereto. It shall be filed in the district court by the appellant 21 days after filing of the record therein. A copy of such brief shall be served on the appellee. The appellee may file an answering brief within 21 days after such service. In the discretion of the district court, the time for filing of briefs and answers may be extended. When the briefs have been filed the matter shall stand at issue and shall be determined on the record and the briefs, with such oral argument as the court in its discretion may allow. No trial shall be held de novo in the district court unless the record of the proceedings in the county court have been lost or destroyed or for some other valid reason cannot be produced; or unless a party by proper proof to the court establishes that there is new and material evidence unknown and undiscoverable at the time of the trial in the county court which, if presented in a de novo trial in the district court, might affect the outcome.

(e) Determination of Appeal. Unless there is further review by the Supreme Court upon writ of certiorari and pursuant to the rules of such court, after final disposition of the appeal by the district court, the judgment on appeal therein shall be certified to the county court for action as directed by the district court, except upon trials de novo held in the district court or in cases in which the judgment is modified, in which cases the judgment shall be that of the district court and enforced therefrom.

Source: (a)(2) amended June 9, 1988, effective January 1, 1989; entire rule amended July 22, 1993, effective January 1, 1994; (a), (b), and (d) amended and adopted December 14, 2011, effective July 1, 2012; (a) and (b) corrected June 15, 2012, nunc pro tunc, December 14, 2011, effective July 1, 2012.

ANNOTATION

The provisions of this section requiring the filing of an appeal bond for costs are not applicable to indigent plaintiffs. Bell v. Simpson, 918 P.2d 1123 (Colo. 1996).

A county court party found to be indigent and allowed to proceed in forma pauperis is not required to post a judgment bond before appealing to district court. O'Donnell v. State Farm Mut. Auto. Ins. Co., 186 P.3d 46 (Colo. 2008).

However, as with appeals from the district court to the court of appeals, the prevailing party in the county court would be able to execute the judgment while the appeal is still pending because the judgment would not have been stayed by a judgment bond. O'Donnell v. State Farm Mut. Auto. Ins. Co., 186 P.3d 46 (Colo. 2008).

Time for docketing appeals. Subsection (1)(b) of § 13-6-311, relating to appeals from county court, and section (a)(1) of this rule clearly provide that the docketing must take place no later than the time allowed for completing and lodging the record. Tumbarello v. Superior Court, 195 Colo. 83, 575 P.2d 431 (1978).

Applied in Bachman v. County Court, 43 Colo. App. 175, 602 P.2d 899 (1979).

Rules 412 to 420.

(There are no present Colorado Rules 412 to 420.)

APPENDIX TO CHAPTER 25

The Colorado Rules of County Court Civil Procedure

APPENDIX TO CHAPTER 25

FORMS

(Some forms in this Appendix are available from the Colorado courts web page at http://www.courts.state.co.us/chs/court/forms/selfhelpcenter.htm.)

Introductory Statement.

1. Except where otherwise indicated, each form shown in this chapter should have a caption similar to the samples shown below. Each caption shall contain a document name and party designation that may vary depending on the type of form being used. See the applicable form shown below to determine the correct name and party designation for that particular form. Documents initiated by a party shall use a form of caption shown in sample caption A. Documents issued by the court under the signature of the clerk or judge should omit the attorney section as shown in sample caption B.

2. An addendum should be used for identifying additional parties or attorneys when the space provided on a pre-printed or computer-generated form is not adequate.

3. Forms of captions are to be consistent with Rule 10, C.R.C.P.

Sample Caption A for documents initiated by a party

☐ County Court _____ County, Colorado Court Address:	
Plaintiff(s): v. [Substitute appropriate party designations & names] **Defendant(s):**	
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	▲ COURT USE ONLY ▲ Case Number: Division: Courtroom:
NAME OF DOCUMENT	

Sample Caption B for documents issued by the court under the signature of the clerk or judge

☐ County Court _____ County, Colorado Court Address:	
Plaintiff(s): v. [Substitute appropriate party designations & names] **Defendant(s):**	▲ **COURT USE ONLY** ▲ Case Number: Division: Courtroom:
NAME OF DOCUMENT	

SPECIAL FORM INDEX

Form 1.
SUMMONS

County Court _____ County, Colorado Court Address: Plaintiff(s): v. Defendant(s):	▲ COURT USE ONLY ▲
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom
SUMMONS	

To the above named Defendant(s): Take notice that

1. On _____ (date) at _____(time) in the _____ County Court, _____, Colorado, if an answer is not filed, the Court may be asked to enter judgment against you as set forth in the complaint.
2. A copy of the complaint against you and an answer form which you must use if you file an answer are attached.
3. If you do not agree with the complaint, then you must either:
   a. Go to the Court, located at _____, Colorado, at the above date and time and file the answer stating any legal reason you have why judgment should not be entered against you,

      OR

   b. File the answer with the Court before that date and time.
4. When you file your answer, you must pay a filing fee to the Clerk of the Court.
5. If you file an answer, you must give or mail a copy to the Plaintiff(s) or the attorney who signed the complaint.
6. If you do not file an answer, then the Court may enter a default judgment against you for the relief requested in the complaint.
7. If you want a jury trial, you must ask for one in the answer and pay a jury fee in addition to the filing fee.
8. If you want to file an answer or request for a jury trial and you are indigent, you must appear at the above date and time, fill out a financial affidavit, and ask the Court to waive the fee.

Dated at _____, Colorado, this _____ day of _____, 20 _____.

CLERK OF COURT

by _____
Deputy Clerk of Court

_____
Signature of Attorney for Plaintiff(s) (if applicable)

_____
Address(es) of Plaintiff(s)

_____
Telephone Number(s) of Plaintiff's:

This Summons is issued pursuant to Rule 303, Rules of County Court Civil Procedure, as amended. A copy of the Complaint together with a blank answer form must be served with this Summons. This form should not be used where service by publication is desired.

To the clerk: If this Summons is issued by the Clerk of the Court, the signature block for the clerk, deputy and the seal of the Court should be provided by stamp, or typewriter, in the space to the left of the attorney's name.

WARNING: ALL FEES ARE NON-REFUNDABLE. IN SOME CASES, A REQUEST FOR A JURY TRIAL MAY BE DENIED PURSUANT TO LAW EVEN THOUGH A JURY FEE HAS BEEN PAID.

C.R.C.P. FORM 1 R7/02 SUMMONS

Form 1A.
SUMMONS IN FORCIBLE ENTRY AND UNLAWFUL DETAINER

County Court _____ County, Colorado Court Address: _____ Plaintiff(s): v. Defendant(s):	▲ COURT USE ONLY ▲
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom
SUMMONS IN FORCIBLE ENTRY AND UNLAWFUL DETAINER	

To the above named Defendant(s), take notice that:

1. On _____, 20____, at _____ o'clock_.M. in the _____County Court, _____, Colorado, the Court may be asked to enter judgment against you as set forth in the complaint.

2. A copy of the complaint against you and an answer form that you must use if you file an answer are attached.

3. If you do not agree with the complaint, then you must either:
   a. Go to the Court, located at: _____, Colorado, at the above date and time and file an answer stating any legal reason you have why judgment should not be entered against you, **OR**
   b. File the answer with the Court before that date and time.

4. When you file your answer, you must pay a filing fee to the Clerk of the Court.

5. If you file an answer, you must personally serve or mail a copy to the Plaintiff(s) or the attorney who signed the complaint.

6. If you do not file with the Court, at or before the time for appearance specified in this summons, an answer to the complaint setting forth the grounds upon which you base your claim for possession and denying or admitting all of the material allegations of the complaint, judgment by default may be taken against you for the possession of the property described in the complaint, for the rent, if any, due or to become due, for present and future damages and costs, and for any other relief to which the Plaintiff(s) is (are) entitled.

7. If you are claiming that the landlord's failure to repair the residential premises is a defense to the landlord's allegation of nonpayment of rent, the Court will require you to pay into the registry of the Court, at the time of filing your answer, the rent due less any expenses you have incurred based upon the landlord's failure to repair the residential premises. In addition to filing an answer, you are required to complete an Affidavit (JDF 109) to support the amount you will need to pay into the registry of the Court.

8. If you want a jury trial, you must ask for one in the answer and pay a jury fee in addition to the filing fee.

9. If you want to file an answer or request a jury trial and you are indigent, you must appear at the above date and time, fill out a financial affidavit, and ask the Court to waive the fee.

Dated at _____, Colorado, this _____day of _____ 20 ____.

Clerk of the Court

By _____
Deputy Clerk

_____
Attorney for Plaintiff(s) (if applicable)

_____
Address(es) of Plaintiff(s)

_____
Telephone Number(s) of Plaintiff(s)

This Summons is issued pursuant to §13-40-111, C.R.S. A copy of the Complaint together with a blank answer form must be served with this Summons. This form should be used only for actions filed under Colorado's Forcible Entry and Detainer Act.

To the clerk: If this Summons is issued by the Clerk of the Court, the signature block for the clerk, deputy and the seal of the Court should be provided by stamp, or typewriter, in the space to the left of the attorney's name.

WARNING: ALL FEES ARE NON-REFUNDABLE. IN SOME CASES, A REQUEST FOR A JURY TRIAL MAY BE DENIED PURSUANT TO LAW EVEN THOUGH A JURY FEE HAS BEEN PAID.

CERTIFICATE OF MAILING

I/we, the undersigned Plaintiff(s) (or agent for Plaintiff(s)), certify that on _____(date), the date on which the Summons, Complaint, and Answer were filed, I/we mailed a copy of the Summons/Alias Summons, a copy of the Complaint, and Answer form by postage prepaid, first class mail, to _____, the Defendant(s) at the following address(es):

_____.

_____

Plaintiff/(s)Agent for Plaintiff(s)

Section 13-40-111 Colorado Revised Statutes, as amended.

13-40-111. Issuance and return of summons.

(1) Upon filing the complaint as provided in §13-40-110, C.R.S., the clerk of the court or the attorney for the plaintiff shall issue a summons. The summons shall command the Defendant to appear before the Court at a place named in such summons and at a time and on a day which shall be not less than five business days nor more than ten calendar days from the day of issuing the same to answer the complaint of Plaintiff. The summons shall also contain a statement addressed to the Defendant stating: "If you fail to file with the Court, at or before the time for appearance specified in the summons, an answer to the complaint setting forth the grounds upon which you base your claim or possession and denying or admitting all of the material allegations of the complaint, judgment by default may be taken against you for the possession of the property described in the complaint, for the rent, if any, due or to become due, for present and future damages and costs, and for any other relief to which the Plaintiff is entitled". If you are claiming that the landlord's failure to repair the residential premises is a defense to the landlord's allegation of nonpayment of rent, the Court will require you to pay into the registry of the Court, at the time of filing your answer, the rent due less any expenses you have incurred based upon the landlord's failure to repair the residential premises.

(2) For purposes of this section, "business days" means any calendar day excluding Saturdays, Sundays, and legal holidays.

13-40-112. Service.

(1) Such summons may be served by personal service as in any civil action. A copy of the complaint must be served with the summons.

(2) If personal service cannot be had upon the Defendant by a person qualified under the Colorado Rules of Civil Procedure to serve process, after having made diligent effort to make such personal service, such person may make service by posting a copy of the summons and the complaint in some conspicuous place upon the premises. In addition thereto, the Plaintiff shall mail, no later than the next day following the day on which he/she files the complaint, a copy of the summons, or, in the event that an alias summons is issued, a copy of the alias summons, and a copy of the complaint to the Defendant at the premises by postage prepaid, first class mail.

(3) Personal service or service by posting shall be made at least five business days before the day for appearance specified in such summons, and the time and manner of such service shall be endorsed upon such summons by the person making service thereof.

(4) For purposes of this section, "business days" means any calendar day excluding Saturdays, Sundays, and legal holidays.

Form 1B.
SUMMONS FOR INJUNCTIVE RELIEF
FOR BREACH OF RESTRICTIVE COVENANTS

[Insert caption A from page _____ with the following designation of parties]

Plaintiff(s):

v.

Defendant(s):

To the above named defendant(s): Take notice that

1. On _____, 20_____ , at _____ o'clock _____.M., in the County Court, _____, Colorado, if an answer is not filed, the court may be asked to enter judgment and injunctive relief against you as set forth in the complaint.

2. A copy of the complaint against you and an answer form which you must use if you file an answer are attached.

3. If you do not agree with the complaint, then you must go to the court, located at , , Colorado, at the above date and time and file the answer stating any legal reason you have why injunctive relief or judgment should not be entered against you. If you file an answer, a hearing for a preliminary injunction will be held at that time.

4. When you file your answer, you must pay a filing fee to the Clerk of the Court.

5. If you file an answer, you must give or mail a copy to the Plaintiff(s) or the attorney who signed the complaint.

6. If you do not file an answer, then the court may enter a default judgment against you for the relief requested in the complaint.

7. If you want a jury trial, you must ask for one in the answer and pay a jury fee in addition to the filing fee.

8. If you want to file an answer or request a jury trial and you are indigent, you must appear at the above date and time, fill out a financial affidavit, and ask the court to waive the fee.

Dated at _____, Colorado, this _____ day of _____, 20_____ .

by _____
County Court Judge

_____
Attorney for Plaintiff(s) (if applicable)

_____
Address(es) of Plaintiff(s)

_____
Telephone Number(s) of Plaintiff(s)

This summons is issued pursuant to Rule 365, Rules of County Court Civil Procedure, as amended. A copy of the complaint together with a blank answer form must be served with this summons. This form should not be used where service by publication is desired.

WARNING: ALL FEES ARE NON-REFUNDABLE. IN SOME CASES, A REQUEST FOR A JURY TRIAL MAY BE DENIED PURSUANT TO LAW EVEN THOUGH A JURY FEE HAS BEEN PAID.

Form 1C.
SUMMONS BY PUBLICATION

☐ County Court _____ County, Colorado Court Address: _____ **Plaintiff(s):** v. **Defendant(s):**	▲ COURT USE ONLY ▲
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg.#:	Case Number: Division Courtroom
SUMMONS BY PUBLICATION	

THE PEOPLE OF THE STATE OF COLORADO

TO: _____ (Name(s) of Defendant(s))

You are hereby summoned and required to file with the Clerk of the Court an answer or other response to the complaint filed against you in this case. You are required to file your answer or other response on or before _____ at _____ o'clock _____.M., in the _____ County Court, _____, Colorado.

The nature of this action is a proceeding in rem.

The relief sought by the Plaintiff(s) is a _____ (nature of claim) which will affect the following property:

_____
(Description of Personal Property)

If you fail to file your answer or other response on or before the date and time shown above, the relief sought may be granted by default by the Court without further notice.

Dated at _____, Colorado, this _____ day of _____, _____.

CLERK OF THE COURT

By: _____
Deputy Clerk

WARNING: ALL FEES ARE NON-REFUNDABLE. IN SOME CASES, A REQUEST FOR A JURY TRIAL MAY BE DENIED PURSUANT TO LAW EVEN THOUGH A JURY FEE HAS BEEN PAID.

Form 2.
COMPLAINT UNDER SIMPLIFIED CIVIL PROCEDURE

❑ County Court _____ County, Colorado Court Address: _____ **Plaintiff(s):** v. **Defendant(s):**	▲ COURT USE ONLY ▲
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg.#:	Case Number: Division Courtroom
COMPLAINT UNDER SIMPLIFIED CIVIL PROCEDURE	

1. _____, Defendant(s), is (are) resident(s) of _____County, with a post office address of _____ Street, City _____, State of _____.
2. The amount claimed herein does not exceed the jurisdiction of the court.

   OR
3. The amount claimed from _____, Defendant(s), is _____ dollars and _____ cents ($_____), together with proper interest, costs and any other items allocable by statute or specific agreement.
4. Such claim arises from the following event(s) or transaction(s):
5. The Defendant(s) ❑ is (are) ❑ is not (are not) in the military service of the United States. In support of this statement, the Plaintiff(s) set(s) forth the following facts: (State facts concerning military status of the Defendant(s) – if the military status of the Defendant(s) is (are) not known, so state here.)
6. The Plaintiff(s) ❑ does (do) ❑ does (do) not demand trial by jury (if demand is made, a jury fee must be paid).

WARNING: ALL FEES ARE NON-REFUNDABLE. IN SOME CASES, A REQUEST FOR A JURY TRIAL MAY BE DENIED PURSUANT TO LAW EVEN THOUGH A JURY FEE HAS BEEN PAID.

Note: All Plaintiffs filing this complaint must sign unless the complaint is signed by an attorney.

_____ Signature of Plaintiff(s)

_____ Signature of Attorney for Plaintiff(s) (if applicable)

_____ Address(es) of Plaintiff(s)

Telephone Number(s) of Plaintiff(s) _____

Form 3.
ANSWER UNDER SIMPLIFIED CIVIL PROCEDURE

❑ County Court _____ County, Colorado Court Address: _____ **Plaintiff(s):** v. **Defendant(s):**	▲ COURT USE ONLY ▲
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg.#:	Case Number: Division Courtroom
ANSWER UNDER SIMPLIFIED CIVIL PROCEDURE (including counterclaim(s) and/or cross claim(s))	

The Defendant(s) _____,
answer(s) the complaint as follows:

1. The amount of damages claimed to be due to the Plaintiff(s) by the complaint in this action is not due and owing for the following reasons:

   OR the Plaintiff(s) is/are not entitled to possession of the property and Defendant(s) is/are entitled to retain possession for the following reasons:

   OR the injunctive relief requested by the Plaintiff(s) should not be allowed for the following reasons:

2. (If applicable) the Defendant(s), _____,
   assert(s) the following counterclaim(s) or setoff(s) against the Plaintiff(s):

3. (If applicable) the Defendant(s) _____,
   assert(s) the following cross claim(s) against _____,
   named Defendant(s) (you are limited to the jurisdiction of the court):

4. If a counterclaim is asserted above, you must check one of the following statements:
   - ❑ The amount of the counterclaim does not exceed the jurisdiction of the court (County Court filing fee required).
   - ❑ The amount of the counterclaim does exceed the jurisdiction of the court, but I wish to limit my recovery to the jurisdiction of the court (County Court filing fee required).
   - ❑ The amount of the counterclaim does exceed the jurisdiction of the court, and I wish the case transferred to the District Court (District Court filing fee required).

5. The Defendant(s) ❑ does (do) ❑ does (do) not demand trial by jury (if demand is made a jury fee must be paid).

WARNING: ALL FEES ARE NON-REFUNDABLE. IN SOME CASES, A REQUEST FOR A JURY TRIAL MAY BE DENIED PURSUANT TO LAW EVEN THOUGH A JURY FEE HAS BEEN PAID.

Note: All Defendants filing this answer must sign unless the answer is signed by an attorney.

_____ _____

Signature of Defendant(s) Signature of Attorney for Defendant(s) (if applicable)

Address(es) of Defendant(s): _____

Phone Number(s) of Defendant(s): _____

CERTIFICATE OF MAILING

I certify that a true copy of the answer was mailed, postage prepaid, to _____

(Plaintiff(s) or attorney), at _____ (address(es)),

on _____ (date).

_____

Defendant(s) or Attorney for Defendant(s) Signature

Form 4.
NOTICE OF APPEAL

☐ County Court _____ County, Colorado Court Address: Plaintiff(s): v. Defendant(s):	▲ COURT USE ONLY ▲
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom
NOTICE OF APPEAL	

To: The County Court in and for the County of _____, State of Colorado and the above named _____.

Please take notice that the undersigned will file an appeal.

Said appeal will be docketed in the District Court pursuant to Rule 411, Rules of County Court Civil Procedure.

Done this _____ day of _____, 20 _____.

_____ _____
Signature(s) of Appellant(s) Signature of Attorney for Appellant(s), if applicable

_____
Name, Address(es) of Appellant(s)

_____
Telephone Number(s) of Appellant(s)

CERTIFICATE OF MAILING

I certify that a true copy of the Notice of Appeal and the Designation of Record on Appeal was mailed, postage prepaid, to _____ (opposing party(ies) or attorney), at _____ (address), on _____ (date).

_____
Appellant(s) or Attorney for Appellant(s)

Form 5.
DESIGNATION OF RECORD ON APPEAL

❑ County Court _____ County, Colorado Court Address: Plaintiff(s): v. Defendant(s):	▲ COURT USE ONLY ▲
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom
DESIGNATION OF RECORD ON APPEAL	

The clerk will prepare for the District Court a record on appeal which shall include the following:

1. All original process and pleadings on file in the trial court.
2. All exhibits.
3. Jury instructions.
4. Judgments and orders of the Court.
5. Reporter's original transcript - excluding transcript of jury voir dire, opening statements, and closing summation, but including all evidence.

_____

_____

_____

_____

Please prepare and certify with all convenient speed.

Requested this _____ day of _____, 20 ___.

_____
Appellant(s) or Attorney for Appellant(s)

Amount deposited $_____ for record.

Appeal bond in the amount of $_____ filed.

Form 6. (Reserved)

Form 7.
PATTERN INTERROGATORIES UNDER C.R.C.P. 369(g) - INDIVIDUAL

County Court _____ County, Colorado Court Address: Plaintiff(s)/Petitioner(s): v. Defendant(s)/Respondent(s):	▲ COURT USE ONLY ▲
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom

PATTERN INTERROGATORIES UNDER C.R.C.P. 369(g) - INDIVIDUAL

The following Pattern Interrogatories are propounded to _____ (name of Judgment Debtor) pursuant to C.R.C.P. 369(g).

Answer all of the questions and each and every part thereof fully and completely. Your answers must be filed with the Court and a copy mailed to the sender no later than 10 days after you receive them. Use a separate sheet of paper, if necessary. Do not use Post Office boxes for any address provided in your answers unless you request and receive permission from the Court.

1. **State your home address, business address, home phone, business phone, and date of birth:**

   Home address: _____

   Business address: _____

   Home phone: _____ Business phone: _____

   Date of Birth: _____

2. **If you are employed, state the name, address, and phone number of your employer(s). If more than one employer show additional employers on a separate sheet of paper.**

   Name of Employer: _____ Phone Number: _____

   Address: _____

3. **If you have any income from any source other than your employer (for example, rental income, commissions, stock dividends, interest), state the name, address, phone number, amount of income, and dates of payment of the person or business paying you the income.**

   Name of Payor: _____ Phone Number: _____

   Address: _____

   Amount of Payments: _____ Dates of Payments: _____

   Name of Payor: _____ Phone Number: _____

   Address: _____

   Amount of Payments: _____ Dates of Payments: _____

4. **If you are not employed or have other sources of income, state all sources of money you use to pay your living expenses, including the name, address, telephone number, and amounts. Show additional sources on a separate sheet of paper, if necessary:**

Name of Payor: _____ Phone Number: _____

Address: _____

Amount of Payments: $_____ Dates of Payments: _____

Name of Payor: _____ Phone Number: _____

Address: _____

Amount of Payments: $_____ Dates of Payments: _____

5. **State whether you own or rent the home you live in, including the amount of rent or house payments you make:**

❑Rent _____ (monthly rent payment)

❑Own _____ (monthly house payment)

Name(s) of Owner(s): _____

6. **State the name, address, account number and type of account for every financial institution (bank, savings and loan, credit union, brokerage house) where you have an account or where you have signature authority on the account. Provide additional information on a separate sheet of paper, if necessary.**

Name: _____

Address: _____

Type of Account: _____ Account Number (last 4-digits): _____

Name: _____

Address: _____

Type of Account: _____ Account Number (last 4-digits): _____

Name: _____

Address: _____

Type of Account: _____ Account Number (last 4-digits): _____

7. **If you own or owned during the last four years, or regularly use any automobiles, motorcycles, trucks, RV's, ATV's, Jet skis, boats, or trailers, list the make, model, year, VIN, date of purchase, purchase price, name of owner if only used by you. If you no longer own the vehicle, identify date of sale, sale price, and name and address of purchaser. Provide additional information on a separate sheet of paper, if necessary.**

Make: _____ Model: _____ Year: _____ VIN: _____

Purchase Date: _____ Price: _____

Sale Date: _____ Price: _____ Purchaser: _____

Address of Purchaser: _____

Owner if not you: _____

Make: _____ Model: _____ Year: _____ VIN: _____

Purchase Date: _____ Price: _____

Sale Date: _____ Price: _____ Purchaser: _____

Address of Purchaser: _____

Owner if not you: _____

8. **If you own or owned during the last four years, or use any firearms, list the make, model, serial number, date of purchase, purchase price. If you no longer own the firearm, identify date of sale, sale price, and name and address of purchaser. Provide additional information on a separate sheet of paper, if necessary.**

Make: _____ Model: _____ Serial Number: _____

Purchase Date: _____ Price: _____

Sale Date: _____ Price: _____ Purchaser: _____

Address of Purchaser: _____

Owner if not you: _____

Make: _____ Model: _____ Serial Number: _____

Purchase Date: _____ Price: _____

Sale Date: _____ Price: _____ Purchaser: _____

Address of Purchaser: _____

Owner if not you: _____

9. **If you own or owned during the last four years, or regularly use any personal property NOT DESCRIBED ABOVE for which the purchase prices was $500.00 or more, describe each item by make, model, date of purchase, purchase price, name of owner if only used by you. If you no longer own the item, identify date of sale, sale price, and name and address of purchaser. Provide additional information on a separate sheet of paper, if necessary.**

Make: _____ Model: _____ Purchase Date: _____ Price: _____

Sale Date: _____ Price: _____ Purchaser: _____

Address of Purchaser: _____

Owner if not you: _____

Make: _____ Model: _____ Purchase Date: _____ Price: _____

Sale Date: _____ Price: _____ Purchaser: _____

Address of Purchaser: _____

Owner if not you: _____

Make: _____ Model: _____ Purchase Date: _____ Price: _____

Sale Date: _____ Price: _____ Purchaser: _____

Address of Purchaser: _____

Owner if not you: _____

10. State the name, address, and telephone number of your spouse, if you are married and if not, a close relative not living with you, indicating their relationship to you.

Name: _____ Relationship: _____

Address: _____

Phone Number: _____

11. Produce and attach to your answers, copies of the following documents for the last four years:

a. Your federal and state tax returns with all attachments.
b. The deed to or the lease for your home.
c. Your driver's license.
d. Your last pay stub from your employer(s).
e. Your last bank statement(s).

12. If you wish to propose an arrangement to pay the judgment, state the proposed terms:

_____

_____

_____

If your are self-employed, you must also answer the following questions.

13. What is the full name, address, and phone number of the business?

Name: _____ Phone Number: _____

Address: _____

14. What does your business do? _____

15. On a separate sheet of paper, list the name, address and phone number of each business customer during the past three months, including the amount and reason for any money owed, if any.

16. State the name, address, account number and type of account for every financial institution (bank, savings and loan, credit union, brokerage house) where the business has an account. Provide additional information on a separate sheet of paper, if necessary.

Name: _____

Address: _____

Type of Account: _____ Account Number (last 4-digits): _____

Name: _____

Address: _____

Type of Account: _____ Account Number (last 4-digits): _____

17. If the business owns or owned during the last four years, or regularly uses, any personal property for which it paid $500.00 or more, describe each item by make, model, date of purchase, purchase price, name of owner if only used by you. If the business no longer owns the item, identify date of sale, sale price, and name and address of purchaser. Provide additional information on a separate sheet of paper, if necessary.

Make: _____ Model: _____ Purchase Date: _____ Price: _____

Sale Date: _____ Price: _____ Purchaser: _____

Address of Purchaser: _____

Owner if not you: _____

Make: _____ Model: _____ Purchase Date: _____ Price: _____

Sale Date: _____ Price: _____ Purchaser: _____

Address of Purchaser: _____

Owner if not you: _____

Make: _____ Model: _____ Purchase Date: _____ Price: _____

Sale Date: _____ Price: _____ Purchaser: _____

Address of Purchaser: _____

Owner if not you: _____

18. Produce and attach to your answers, copies of the following documents for the business:

a. All bank records for the past three months.
b. All payroll records for the past three months.
c. Current list of the accounts receivable.
d. Profit and Loss Statements for the current and prior year.
e. Current asset list, including the inventory.

Failure to respond fully, accurately and timely to these interrogatories could result in a citation for contempt of court.

I do hereby affirm under penalty of perjury that I have read each of the above questions and answered them fully and truthfully.

Dated: _____ _____
Judgment Debtor

Subscribed and affirmed, or sworn to before me in the County of _____, State of _____, this _____ day of _____, 20_____.

My Commission Expires: _____ _____
Notary Public /Deputy Clerk

CERTIFICATE OF SERVICE BY MAILING
(To be performed by Clerk within three days of filing)

I hereby certify that on _____(date), I mailed a true and complete copy of the *PATTERN INTERROGATORIES UNDER C.R.C.P. 369(g) - INDIVIDUAL* I by placing them in the United States Mail, postage pre-paid to the Defendant at the address listed below.

To: _____
_____
_____ _____
Clerk of Court/Deputy Clerk

☐ (If applicable) Plaintiff notified of non-service on _____ (date). Clerk's Initials _____

Form 7A.
PATTERN INTERROGATORIES UNDER C.R.C.P. 369(g) - BUSINESS

County Court _____ County, Colorado Court Address: _____ Plaintiff(s)/Petitioner(s): v. Defendant(s)/Respondent(s):	▲ COURT USE ONLY ▲
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom
PATTERN INTERROGATORIES UNDER C.R.C.P. 369(g) - BUSINESS	

The following Pattern Interrogatories are propounded to _____ (name of Judgment Debtor) pursuant to C.R.C.P. 369(g).

Answer all of the questions and each and every part thereof fully and completely. Your answers must be filed with the Court and a copy mailed to the sender no later than 10 days after you receive them. Use a separate sheet of paper, if necessary. Do not use Post Office boxes for any address provided in your answers unless you request and receive permission from the Court.

1. **State the name, business address , home address, business phone, home phone, and date of birth of the person answering these questions, and the relationship to the Business:**

   Home address: _____

   Business address: _____

   Home phone: _____ Business phone: _____

   Date of Birth: _____

2. **If the Business is a corporation, list the name, home address, business address, home phone, business phone, and date of birth and the title of each officer, direction and shareholder owning 5% or more of the outstanding shares.**

   Name: _____ Title: _____ Date of Birth: _____

   Home address: _____

   Business address: _____

   Home phone: _____ Business phone: _____

   Name: _____ Title: _____ Date of Birth: _____

   Home address: _____

   Business address: _____

   Home phone: _____ Business phone: _____

3. **If the Business is not a corporation, state the form of entity (sole proprietorship, partnership, limited liability company, or otherwise) and list the name, homes address, business address, home phone, business phone, and date of birth and the title of each owner, general or limited partner, or member owning 5% or more of the Business.**

Name: _____ Title: _____ Date of Birth: _____

Home address: _____

Business address: _____

Home phone: _____ Business phone: _____

Name: _____ Title: _____ Date of Birth: _____

Home address: _____

Business address: _____

Home phone: _____ Business phone: _____

Name: _____ Title: _____ Date of Birth: _____

Home address: _____

Business address: _____

Home phone: _____ Business phone: _____

4. **Provide the EIN and/or Federal Tax Id Number of the Business.**

EIN: _____ Federal Tax Id: _____

5. **List by year, make, model, purchase price, VIN, loan balance, if any, and current location of any and all cars, trucks, motorcycles, boats, trailers, and other motor vehicles owned, used by or titled in the Business during the last four years. If the property is not owned by the Business, list the name and address of the owner. If the property has been transferred to another person or entity, list the name, address and telephone number of the transferee, the date of transfer, and the amount paid by transferee.**

Make: _____ Model: _____ Year: _____ VIN: _____

Purchase Date: _____ Price: _____ Loan Balance, if any: _____

Current Location: _____

Name of Owner if not you: _____

Address of Owner: _____

Name of Person Property Transferred to: _____

Address: _____ Phone Number: _____

Make: _____ Model: _____ Year: _____ VIN: _____

Purchase Date: _____ Price: _____ Loan Balance, if any: _____

Current Location: _____

Name of Owner if not you: _____

Address of Owner: _____

Name of Person Property Transferred to: _____

Address: _____ Phone Number: _____

6. **List each and every financial institution, including banks, savings and loan associations, credit unions, brokerage houses, or otherwise, where the Business is named on an account or has signature authority, including the name, address and telephone number of the institution, the account number, and the current balance of each account.**

Name: _____ Telephone Number: _____

Address: _____

Type of Account: _____ Current Balance: _____ Account Number (last 4-digits): _____

Name: _____ Telephone Number: _____

Address: _____

Type of Account: _____ Current Balance: _____ Account Number (last 4-digits): _____

Name: _____ Telephone Number: _____

Address: _____

Type of Account: _____ Current Balance: _____ Account Number (last 4-digits): _____

7. **List any and all real or personal property owned by the Business during the last four years, or in which the Business has an interest, where the purchase price or present value exceeds $500.00, including a detailed description, purchase price, current value, amount of any loan balance against the property, and the location including the county. If the property has been transferred to another person or entity, list the name, address and telephone number of the transferee, the date of transfer, and the amount paid by transferee.**

Description of Property: _____

Purchase Date: _____ Price: _____ Current Value: _____

Loan Balance: _____ Location (including the County: _____

Transfer Date: _____ Price Paid: _____ Name: _____

Address of Purchaser: _____

Telephone Number: _____

Description of Property: _____

Purchase Date: _____ Price: _____ Current Value: _____

Loan Balance: _____ Location (including the County: _____

Transfer Date: _____ Price Paid: _____ Name: _____

Address of Purchaser: _____

Telephone Number: _____

Description of Property: _____

Purchase Date: _____ Price: _____ Current Value: _____

Loan Balance: _____ Location (including the County: _____

Transfer Date: _____ Price Paid: _____ Name: _____

Address of Purchaser: _____

Telephone Number: _____

8. **If the Business owns any property which is leased to another person or entity, identify the property and provide the lessee's name, address, and phone number, the term of the lease, the amount of lease payments, and the dates that the payments are due.**

Type of Property: _____ Lessee's Name: _____

Address: _____

Telephone Number: _____ Term of Lease: _____

Lease Payment Amount: _____ Payment Due Dates: _____

Type of Property: _____ Lessee's Name: _____

Address: _____

Telephone Number: _____ Term of Lease: _____

Lease Payment Amount: _____ Payment Due Dates: _____

9. **List every person or entity which owes money to the Business in excess of $500.00, including the name, address and phone number, the amount owed, if payments are due, the amount and dates they are due, and the reason the moneys are owed.**

Name: _____ Telephone Number: _____ Amount Owed: _____

Address: _____

Payment Amount: _____ Payment Due Dates: _____

Reason(s) the moneys are owed: _____

Name: _____ Telephone Number: _____ Amount Owed: _____

Address: _____

Payment Amount: _____ Payment Due Dates: _____

Reason(s) the moneys are owed: _____

Name: _____ Telephone Number: _____ Amount Owed: _____

Address: _____

Payment Amount: _____ Payment Due Dates: _____

Reason(s) the moneys are owed: _____

10. **List every person or entity currently using the services or products of the Business averaging more than $100.00 per month, including the address and phone number, the amount billed or purchased each month, and the billing dates.**

Name: _____ Telephone Number: _____

Address: _____

Amount Billed or Purchased each Month: _____ Billing Dates: _____

Name: _____ Telephone Number: _____

Address: _____

Amount Billed or Purchased each Month: _____ Billing Dates: _____

Name: _____ Telephone Number: _____

Address: _____

Amount Billed or Purchased each Month: _____ Billing Dates: _____

11. Produce and attach to your answers, copies of the following documents for the last four years:

a. For corporations, the articles of incorporation, bylaws, and corporate minutes.
b. For partnerships, the partnership agreement.
c. For limited liability companies, the articles of organization and operating agreement.
d. For all entities, annual:
  i. Federal and state tax returns.
  ii. Profit and loss statements.
  iii. Balance sheets.
  iv. Inventory lists.

12. If the Business wishes to propose an arrangement to pay the judgment, state the proposed terms.

_____

_____

_____

If the Business is not longer in business, answer the following questions:

13. State the date and exact reasons the Business went out of business.

Date: _____

Reason(s): _____

_____

_____

14. If the Business disposed of any of its assets when it went out of business, describe each item which was disposed of, the name, address and telephone number of the person or entity which took possession of the item, any amounts paid for the item, and the reason for the disposition.

Description: _____ Amount Paid: _____

Name: _____ Telephone Number: _____

Address: _____

Reason for Disposition: _____

Description: _____ Amount Paid: _____

Name: _____ Telephone Number: _____

Address: _____

Reason for Disposition: _____

15. If the Business has any remaining assets, describe each item, including the current value, location and amount of the loan against that item, if any.

Description: _____

Location: _____ Current Value: _____ Loan Balance: _____

Description: _____

Location: _____ Current Value: _____ Loan Balance: _____

Description: _____

Location: _____ Current Value: _____ Loan Balance: _____

16. If the Business is in receivership or a trustee has been appointed, provide the name, address and phone number of the receiver or trustee.

Name: _____ Telephone Number: _____

Address: _____

17. If there are any documents associated with the Business going out of business (e.g., bill of sale, deed in lieu of foreclosure, articles of dissolution), produce and attach them to your answers.

Failure to respond fully, accurately and timely to these interrogatories could result in a citation for contempt of court.

I do hereby affirm under penalty of perjury that I have read each of the above questions and answered them fully and truthfully.

Dated: _____ _____
Judgment Debtor

Subscribed and affirmed, or sworn to before me in the County of _____, State of _____, this _____ day of _____, 20_____.

My Commission Expires: _____ _____
Notary Public /Deputy Clerk

CERTIFICATE OF SERVICE BY MAILING
(To be performed by Clerk within three days of filing)

I hereby certify that on _____(date), I mailed a true and complete copy of the *PATTERN INTERROGATORIES UNDER C.R.C.P. 369(g) - BUSINESS* by placing them in the United States Mail, postage pre-paid to the Defendant at the address listed below.

To: _____
_____
_____

_____
Clerk of Court/Deputy Clerk

Form 8. (Reserved)

Form 9.
DISCLOSURE STATEMENT

☐ County Court _____ County, Colorado Court Address: Plaintiff(s): v. Defendant(s):	▲ COURT USE ONLY ▲
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom
DISCLOSURE STATEMENT	

IF YOU ARE SENDING THIS FORM TO AN OPPOSING PARTY, IT MUST BE ACCOMPANIED BY YOUR OWN COMPLETED FORM LISTING YOUR WITNESSES AND EXHIBITS AND ATTACHING COPIES OF YOUR DOCUMENTS AND PICTURES

DO NOT FILE YOUR DISCLOSURE STATEMENT WITH THE COURT UNLESS TOLD BY THE COURT TO DO SO.

PART 1. THIS PART TO BE COMPLETED BY THE PARTY WHO SENDS THIS FORM. PRINT OR TYPE THIS INFORMATION:

This form is sent to you by:

Name: _____

Address: _____

City/State/Zip: _____

Address of Clerk of the Court:

_____

_____

PART 2. THIS PART TO BE COMPLETED BY THE PARTY WHO RECEIVES THIS FORM. PRINT OR TYPE YOUR ANSWERS.

WARNING: YOU MUST COMPLETE THIS PART, SIGN IT AND SEND A COPY WITH COPIES OF THE DOCUMENTS AND PICTURES TO THE PERSON SHOWN IN PART 1 WITHIN TWENTY DAYS BUT NO LESS THAN TEN DAYS BEFORE THE TRIAL DATE. IF YOU DO NOT SEND IT, YOU MAY NOT BE ALLOWED TO CALL WITNESSES OR USE EXHIBITS AT TRIAL.

A. Give the name, address and telephone number and a brief description of the testimony of each witness you intend to call at the trial. (Use the back of this form if necessary):

1. _____

Brief Description of Testimony: _____

_____

_____

_____

2. _____

Brief Description of Testimony: _____

_____

_____

_____

3. _____

Brief Description of Testimony: _____

_____

_____

_____

B. List every document, picture or item you may use at the trial. Describe and attach a photocopy of each document or picture listed to the copy sent to the person shown in Part 1. (Use the back of this form if necessary):

1. _____

2. _____

3. _____

I certify I served (mailed or delivered) a copy of this Statement with attached photocopies of documents/pictures on _____ (date) to:

Name of opposing party or attorney: _____

Address: _____

Signature: _____

Printed Name: _____

Title (if applicable): _____

Address: _____

Telephone: _____

***KEEP A COPY OF YOUR COMPLETED DISCLOSURE STATEMENT AND ITS ATTACHMENTS FOR YOURSELF.**

***DO NOT FILE YOUR DISCLOSURE STATEMENT WITH THE COURT UNLESS TOLD BY THE COURT TO DO SO.**

INDEX TO
COLORADO RULES OF
COUNTY COURT CIVIL PROCEDURE

A

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P

CHAPTER 26

The Colorado Rules of Procedure for Small Claims Courts

Repealed and Readopted by the

SUPREME COURT OF COLORADO

February 24, 1994,

Effective July 1, 1994

ANALYSIS BY RULE

CHAPTER 26

COLORADO RULES OF PROCEDURE FOR SMALL CLAIMS COURTS

Rule 501. Scope and Purpose

(a) How Known and Cited. These rules for the small claims division for the county court are additions to C.R.C.P. and shall be known and cited as the Colorado Rules of Civil Procedure, or C.R.C.P. These rules are promulgated pursuant to section 13-6-413, C.R.S.

(b) Procedure Governed. These rules govern the procedure in all small claims courts. They shall be liberally construed to secure the just, speedy, informal, and inexpensive determination of every small claims action.

(c) Purpose. Each small claims court shall provide for the expeditious resolution of all cases before it. Where practicable, at least one weekend session and at least one evening session shall be scheduled or available to be scheduled for trial in each small claims court each month.

(d) Record of Proceedings. A record shall be made of all small claims court proceedings.

Source: Entire chapter repealed and readopted February 24, 1994, effective July 1, 1994; entire rule amended and effective September 6, 2001.

ANNOTATION

Law reviews. For article, "Changes to the Statutes and Rules Governing Procedures in Colorado Small Claims Courts", see 31 Colo. Law. 29 (February 2002).

The strict technical application of procedural filing deadlines is to be avoided in cases where it would result in a punitive disposition of litigation and an arbitrary denial of substantial justice contrary to the spirit of the rules of civil procedure. The district court's order emphasized the importance of the timely and inexpensive resolution of small claims at the expense of an equally important concern: The tenet that requires courts to construe procedural rules in a manner that ensures the just determination of every action. Semental v. Denver County Court, 978 P.2d 668 (Colo. 1999).

Rule 502. Commencement of Action

(a) How Commenced. A small claims action is commenced by filing with the court a short statement of the plaintiff's claim setting forth the facts giving rise to the action in the manner and form provided in C.R.C.P. 506 and by paying the appropriate docket fee.

(b) Jurisdiction. The court shall have jurisdiction from the time the claim is filed.

(c) Setting of the Trial Date. At the time the small claims action is filed, the clerk shall set the trial on a date, time and place certain. The first scheduled trial date shall not be less than thirty days from the date of issuance of the notice of claim by the clerk.

Source: Entire chapter repealed and readopted February 24, 1994, effective July 1, 1994; entire rule amended and effective September 6, 2001.

Rule 503. Place of Action

(a) Where Brought, Generally. All actions in the small claims court shall be brought in the county in which at the time of filing of the claim any of the defendants resides, or is regularly employed, or has an office for the transaction of business, or is a student at an institution of higher education. In an action to enforce restrictive covenants or arising from

a security deposit dispute, the action may be brought in the county in which the subject real property is located.

(b) Consent to venue. If a defendant appears and defends a small claims action on the merits at trial, the defendant agrees to the place of trial.

Source: Entire chapter repealed and readopted February 24, 1994, effective July 1, 1994; entire rule amended and effective September 6, 2001; (a) amended and effective November 13, 2008.

ANNOTATION

Law reviews. For article, "What Is a Lawyer Doing in Small Claims Court"? see 13 Colo. Law. 430 (1984).

Applied in Yard v. Ambassador Bldr. Corp., 669 P.2d 1040 (Colo. App. 1983).

Rule 504. Service of the Notice, Claim and Summons to Appear for Trial

(a) Time for Serving the Notice, Claim and Summons to Appear for Trial. A copy of the notice, claim and summons to appear for trial shall be served at least fifteen days prior to the trial date.

(b) Personal Service of the Notice, Claim and Summons to Appear for Trial. Personal service of the notice, claim and summons to appear for trial shall be in accordance with C.R.C.P. 304(c), (d) and (e), with proof of service filed in accordance with C.R.C.P. 304(g), and refusal of service dealt with as described in C.R.C.P. 304(j).

(c) Clerk's Service of the Notice, Claim and Summons to Appear for Trial by Certified Mail.

(1) Within three days after the action is filed, the clerk shall send a signed and sealed notice, pursuant to Forms appended to these rules, to the defendant(s), by certified mail, return receipt requested to be signed by addressee only, at the address supplied or designated by the plaintiff. If the notice is delivered, the clerk shall note on the register of actions the mailing date and address, the date of delivery shown on the receipt, and the name of the person who signed the receipt. If the notice was refused, the clerk shall note the date of refusal.

(2) When Service is Complete. Notice shall be sufficient even if refused by the defendant and returned. Service shall be complete upon the date of delivery or refusal.

(3) Notification by Clerk and Fees and Expenses for Service. If the notice is returned for any reason other than refusal to accept it, or if the receipt is signed by any person other than the addressee, the clerk shall so notify the plaintiff. The clerk may then issue additional notices, at the request of the plaintiff. All fees and expenses for the certified mailing by the clerk shall be paid by the plaintiff and treated as costs of the action. Issuance of each notice shall be noted upon the register of actions or in the file.

Source: Entire chapter repealed and readopted February 24, 1994, effective July 1, 1994; entire rule amended and effective September 6, 2001; (b)(2)(H) corrected and effective December 5, 2001; (b) and (c)(3) amended and effective March 23, 2006.

Rule 505. Pleadings and Motions

(a) Pleadings. There shall be a claim and a response which may or may not include a counterclaim. No other pleadings shall be allowed.

(b) No Motions. There shall be no motions allowed except as contemplated by these rules.

Source: Entire chapter repealed and readopted February 24, 1994, effective July 1, 1994.

Rule 506. General Rules of Pleading

(a) Claims for Relief and Responses. Except as provided in subsection (b), claims and responses, with or without a counterclaim, in the small claims court shall be filed in the

manner and form prescribed by Forms appended to these rules, and shall be signed by the party under penalty of perjury. Claims and responses, with or without a counterclaim, for an action to enforce restrictive covenants on residential property shall be filed pursuant to Forms appended to these rules, and shall be signed by the party under penalty of perjury.

(b) Availability of Forms; Assistance by Court Personnel. The clerk of the court shall provide such assistance as may be requested by a plaintiff or defendant regarding the forms, operations, procedures, jurisdictional limits, and functions of the small claims court; however, court personnel shall not engage in the practice of law. The clerk shall also advise parties of the availability of subpoenas to obtain witnesses and documents. All necessary and appropriate forms shall be available in the office of the clerk.

Source: Entire chapter repealed and readopted February 24, 1994, effective July 1, 1994; (a) amended June 7, 1994, effective July 1, 1994; (a) amended June 1, 2000, effective July 1, 2000; entire rule amended and effective September 6, 2001.

Rule 507. Responses and Defenses

Each defendant shall file a written and signed response on or before the trial date. At the time of filing the response or appearing, whichever occurs first, each defendant shall pay the docket fee prescribed by law.

Source: Entire chapter repealed and readopted February 24, 1994, effective July 1, 1994; entire rule amended and effective September 6, 2001.

Rule 508. Counterclaim

(a) When Counterclaim to be Filed; Effect on Hearing Date. If at the time of the trial date it appears that a defendant has a counterclaim within the jurisdiction of the small claims court, the court may either proceed to hear the entire case or may continue the hearing for a reasonable time, at which continued hearing the entire case shall be heard.

(b) Counterclaim Within the Jurisdiction of the Small Claims Court. If at the time the action is commenced a defendant possesses a claim against the plaintiff that: (1) is within the jurisdiction of the small claims court, exclusive of interest and costs; (2) arises out of the same transaction or event that is the subject matter of the plaintiff's claim; (3) does not require for its adjudication the joinder of third parties; and (4) is not the subject of another pending action, the defendant shall file such claim as a counterclaim in the answer or thereafter be barred from suit on the counterclaim. The defendant may also elect to file a counterclaim against the plaintiff that does not arise out of the transaction or occurrence.

(c) Counterclaim Exceeding the Jurisdiction of the Small Claims Court. If at the time the action is commenced the defendant possesses a counterclaim against the plaintiff that is not within the jurisdictional limit of the small claims court, exclusive of interest and costs, and the defendant wishes to assert the counterclaim, the defendant may:

(1) file the counterclaim in the pending small claims court action, but unless the defendant follows the procedure set forth in subsection (2) below, any judgment in the defendant's favor shall be limited to the jurisdictional limit of the small claims court, exclusive of interest and costs, and suit for the excess due the defendant over that sum will be barred thereafter; or

(2) file the counterclaim together with the answer in the pending small claims court action at least seven days before the first scheduled trial date and request in the answer that the action be removed to county court or district court, whichever has appropriate jurisdiction, as selected by the defendant, to be tried pursuant to the rules of civil procedure applicable to the court to which the case has been removed. Upon filing the answer and counterclaim, the defendant shall tender the filing fee for a complaint in the court to which the case has been removed. Upon compliance by the defendant with the requirements of this subsection (2), all small claims court proceedings shall be discontinued and the clerk of the small claims court shall deliver the case and fee to the appropriate court.

(d) Defendant Notified if Counterclaim Exceeds Court's Jurisdiction. All counterclaims asserted over the jurisdictional limit of the small claims court shall be subject to the provisions of Section 13-6-408, C.R.S., and all defendants shall be advised of those provisions on Forms appended to these rules.

Source: Entire chapter repealed and readopted February 24, 1994, effective July 1, 1994; entire rule amended and effective September 6, 2001.

Rule 509. Parties, Representation and Intervention

(a) Parties. Any natural person, corporation, partnership, association, or other organization may commence or defend an action in the small claims court, but no assignee or other person not a real party to the transaction which is the subject of the action may commence an action therein, except as a court-appointed personal representative, conservator, or guardian of the real party in interest.

(b) Representation.

(1) **Partnerships and Associations.** Notwithstanding the provisions of article 5 of title 12, C.R.S., in the small claims court, an individual shall represent himself or herself; a partnership shall be represented by an active general partner or an authorized full-time employee; a union shall be represented by an authorized active union member or full-time employee; a for-profit corporation shall be represented by one of its full-time officers or full-time employees; an association shall be represented by one of its active members or by a full-time employee of the association; and any other kind of organization or entity shall be represented by one of its active members or full-time employees or, in the case of a nonprofit corporation, a duly elected nonattorney officer or an employee.

(2) **Attorney Representatives of Entities.** No attorney, except pro se or as an authorized full-time employee or active general partner of a partnership, an authorized active member or full-time employee of a union, a full-time officer or full-time employee of a for-profit corporation, or a full-time employee or active member of an association, which partnership, union, corporation, or association is a party, shall appear or take any part in the filing or prosecution or defense of any matter in the small claims court, except as permitted by rule 520(b).

(3) **Property Managers.** In actions arising from a landlord-tenant relationship, a property manager who has received security deposits, rents, or both, or who has signed a lease agreement on behalf of the owner of the real property that is the subject of the small claims action, shall be permitted to represent the owner of the property in such action.

(4) **Defendants in the Military.** In any action to which the federal "Soldiers' and Sailors' Civil Relief Act of 1940", 50 U.S.C. App. §§ 501 et seq., is applicable, the court may enter a default against a defendant who is in the military without entering judgment, and the court shall appoint an attorney to represent the interests of the defendant prior to the entry of judgment against the defendant.

(c) Intervention. There shall be no intervention, addition, or substitution of parties, unless otherwise ordered by the court in the interest of justice.

Source: Entire chapter repealed and readopted February 24, 1994, effective July 1, 1994; entire rule amended and effective September 6, 2001.

Rule 510. Discovery and Subpoenas

(a) Depositions, discovery, disclosure statements, and pre-trial conferences shall not be permitted in small claims court proceedings.

(b) Subpoenas for the attendance of witnesses or the production of evidence at trial shall be issued and served pursuant to C.R.C.P. 345.

Source: Entire chapter repealed and readopted February 24, 1994, effective July 1, 1994; entire rule amended and effective September 6, 2001.

Rule 511. Magistrates - No Jury Trial

(a) No Jury Trial. There is no right to a trial by jury in small claims court proceedings.

(b) Magistrates. Magistrates may hear and decide claims and shall have the same powers as a judge, except as provided by C.R.M. 5. A party objecting to a magistrate pursuant to Section 13-6-405 (4), C.R.S., shall file the objection seven days prior to the first scheduled trial date. Cases in which an objection to a magistrate has been timely filed shall be heard and decided by a judge pursuant to the rules and procedures of the small claims court.

Source: Entire chapter repealed and readopted February 24, 1994, effective July 1, 1994; entire rule amended and effective September 6, 2001.

Rule 512. Trial

(a) Date of Trial. The trial shall be held on the date set forth in the notice, claim, and summons to appear for trial unless the court grants a continuance for good cause shown. Good cause for a continuance may include a defense made in good faith raising jurisdictional grounds or defects in service of process. A plaintiff may request one continuance if a defendant files a counterclaim.

(b) Settlement Discussions. On the trial date, but before trial, the court may require settlement discussions between the parties, but the court shall not participate in such discussions. If a settlement is achieved, the terms of such settlement shall be presented to the court for approval. If an approved settlement is not achieved, the trial shall be held pursuant to subsection (a) of this rule.

Source: Entire chapter repealed and readopted February 24, 1994, effective July 1, 1994; entire rule amended and effective September 6, 2001.

Rule 513. Evidence

The hearing of all cases shall be informal, the object being to dispense justice promptly and economically between the parties. Rules of evidence shall not be strictly applied; however, all constitutional and statutory privileges shall be recognized. The parties may testify and offer evidence and testimony of witnesses at the hearing.

Source: Entire chapter repealed and readopted February 24, 1994, effective July 1, 1994.

Rule 514. Judgment

At the end of the trial, the court shall immediately state its findings and decision and direct the entry of judgment. Judgment shall be entered immediately pursuant to the provisions of C.R.C.P. 358. No written findings shall be required.

Source: Entire chapter repealed and readopted February 24, 1994, effective July 1, 1994.

Rule 515. Default and Judgment

(a) Entry at the Time of Trial. Upon the date and at the time set for trial, if the defendant has filed no response or fails to appear and if the plaintiff proves by appropriate return that proper service was made upon the defendant as provided herein at least fifteen days prior to the trial date, the court may enter judgment for the plaintiff for the amount due, as stated in the complaint, but in no event more than the amount requested in the plaintiff's claim, plus interest, costs, and other items provided by statute or agreement. However, before any judgment is entered pursuant to this rule, the court shall be satisfied that venue of the action is proper pursuant to C.R.C.P. 503 and may require the plaintiff to present sufficient evidence to support the plaintiff's claim.

(b) Entry at the Time of Continued Trial. Failure to appear at any other date set for trial shall be grounds for entering a default and judgment against the non-appearing party, whether on a plaintiff's claim or a defendant's counterclaim.

(c) Default and Judgment - Soldiers' and Sailors' Civil Relief. If a defendant is a member on active duty in the United States military services, and if the defendant fails to appear on the trial date without having requested a stay of proceedings, the court shall enter the defendant's default and it shall appoint an attorney to represent the defendant's interests in accordance with the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. §§ 501, et seq. Judgment shall enter three business days after the appointment of the attorney unless the attorney shall have filed a written objection to the entry of judgment, stating the legal and factual bases for such objection. The fees of the attorney shall be paid by the plaintiff and shall be assessed as costs in accordance with C.R.C.P. 516.

(d) Setting Aside a Default. For good cause shown, within a reasonable period and in any event not more than thirty days after the entry of judgment, the court may set aside an entry of default and the judgment entered thereon.

Source: Entire chapter repealed and readopted February 24, 1994, effective July 1, 1994; entire rule amended and effective September 6, 2001.

Rule 516. Costs

The prevailing party in the action in a small claims court shall have judgment to recover costs of the action and also the costs to enforce the judgment as provided by law.

Source: Entire chapter repealed and readopted February 24, 1994, effective July 1, 1994; entire rule amended and effective June 16, 2011.

Rule 517. Stay of Proceedings to Enforce Judgment

(a) No Automatic Stay. If upon rendition of a judgment payment is not made forthwith, an execution may issue immediately and proceedings may be taken for its enforcement unless the party against whom the judgment was entered requests a stay of execution and the court grants such request. Proceedings to enforce execution and other process after judgment and any fees shall be as provided by law or the Colorado Rules of Civil Procedure applicable in county court.

(b) Stay on Motion for Relief From Judgment or Appeal. In its discretion the court may stay the commencement of any proceeding to enforce a judgment pending the disposition of a motion for relief from a judgment or order made pursuant to C.R.C.P. 515(d), or pending the filing and determination of an appeal.

Source: Entire chapter repealed and readopted February 24, 1994, effective July 1, 1994; entire rule amended and effective September 6, 2001.

Rule 518. Execution and Proceedings Subsequent to Judgment

(a) Judgment Debtor to File List of Assets and Property. Immediately following the entry of judgment, the party against whom the judgment was entered, if present in court, shall complete and file the information of judgment debtor's assets and property, pursuant to forms appended to these rules, where appropriate and as ordered by the court, unless the judgment debtor tenders immediate payment of the judgment or the court orders otherwise.

(b) Enforcement Procedures. (1) Execution and the proceedings subsequent to judgment shall be the same as in a civil action in the county court. (2) In addition, at any time when execution may issue on a small claims court judgment, the judgment creditor shall be entitled to an order requiring the judgment debtor to appear before the court at a specified time and place to answer concerning assets and property.

(c) Enforcement of Nonmonetary Judgments. The judgment may compel delivery, compliance, or performance or the value thereof, and damages or other remedies for the failure to comply with the judgment, including contempt of court.

Source: Entire chapter repealed and readopted February 24, 1994, effective July 1, 1994; (a) amended June 7, 1994, effective July 1, 1994; entire rule amended and effective September 6, 2001.

Rule 519. Post Trial Relief and Appeals

No motion for new trial shall be filed in the small claims court, whether or not an appeal is taken. Appeal procedures shall be as provided by Section 13-6-410, C.R.S., and C.R.C.P. 411.

Source: Entire chapter repealed and readopted February 24, 1994, effective July 1, 1994.

Rule 520. Attorneys

(a) No Attorneys. Except as authorized by Section 13-6-407, C.R.S., rule 509(b)(2) and this rule, no attorney shall appear on behalf of any party in the small claims court.

(b) When Attorneys are Permitted in Small Claims Court. On the written notice of the defendant, that the defendant will be represented by an attorney, pursuant to forms appended to these rules filed not less than seven days before the first scheduled trial date, the defendant may be represented by an attorney. The notice of Representation shall advise the plaintiff of the plaintiff's right to counsel. Thereupon, plaintiff may also be represented by an attorney. If the notice is not filed at least seven days before the date set for the first scheduled trial date in the small claims court, no attorney shall appear for either party.

(c) Cases Heard by County Court Judge. Cases in which attorneys will appear may be heard by a county court judge pursuant to a standing order of the chief judge of any judicial district or of the presiding judge of the Denver county court.

(d) Sanctions. If the defendant appears at the trial without an attorney or fails to appear at the trial, and the court finds that the defendant's notice of representation by an attorney was made in bad faith, the court may award the plaintiff any costs, including reasonable attorney fees, occasioned thereby.

(e) Small Claims Court Rules to Apply. Any small claims court action in which an attorney appears shall be processed and tried pursuant to the statutes and court rules governing small claims court actions.

Source: Entire chapter repealed and readopted February 24, 1994, effective July 1, 1994; entire rule amended and effective September 6, 2001; (b) and (e) amended and effective and (f) deleted and effective January 11, 2007.

ANNOTATION

It is within the discretion of the small claims court to continue an appearance date, the trial, or both, for good cause. When the court continues the appearance date, the court must also recognize a defendant's right to file a motion to transfer pursuant to section (b) so long as said motion is filed at least seven days prior to the continued appearance date. This interpretation of rule is particularly reasonable where small claims court continues a trial on its own motion to give the petitioner time to file a responsive pleading, pay the filing fee, and secure the assistance of a translator. Semental v. Denver County Court, 978 P.2d 668 (Colo. 1999).

Given the liberal interpretation afforded to procedural rules, district court abused its discretion by dismissing petitioner's motion for transfer as untimely filed under section (b) and appellate remedy would be inadequate. Accordingly, court makes the rule to show cause absolute and directs district court to grant petitioner's motion for transfer to county court. Semental v. Denver County Court, 978 P.2d 668 (Colo. 1999).

Rule 521. Special Procedures to Enforce Restrictive Covenants on Residential Property

(a) The small claims division shall dismiss without prejudice any claim to enforce a restrictive covenant if it affects the title to the real property.

(b) The owners of the residential property, subject of the action, shall be joined as codefendants to the action.

(c) Upon the filing of a claim under oath (see Forms appended to these rules) alleging

that the defendant has violated any restrictive covenant regarding residential property, where the cost to comply with such restrictive covenant is not more than $7,500.00, the clerk shall issue the notice and summons to appear. The notice shall be served pursuant to C.R.C.P. 504.

(d) The general procedures applicable to the small claims court, C.R.C.P. 501 through 520, shall apply to actions to enforce a restrictive covenant on residential property, except as they are modified by this Rule.

(e) On the date set for appearance and trial pursuant to C.R.C.P. 512, the court shall proceed to determine the issues and render judgment and enter appropriate orders according to the law and the facts operative in the case.

(f) If the defendant fails to appear at the trial, the court may proceed pursuant to C.R.C.P. 514 and the provisions of this Rule, except that the court shall require the plaintiff to present sufficient evidence to support the plaintiff's claim.

(g) An order enforcing a restrictive covenant on residential property shall be reduced to writing by the magistrate and shall be personally served upon every party subject to the order (see Forms appended to these rules). If any party subject to the order is present in the courtroom at the time the order is made, the magistrate or judge shall at that time serve a copy of the order on such party and shall note such service on the order or file. Any party subject to the order who is not present shall be served as provided by C.R.C.P. 345, except that no fees or mileage need be tendered.

(h) If the plaintiff requests a temporary order directing the defendant to immediately comply with the restrictive covenant before the defendant has had an opportunity to be heard, the plaintiff shall attach to plaintiff's complaint a certified copy of the current deed showing ownership of the residential property, and a certified copy of the restrictive covenant. The request for temporary order shall be heard by the court, ex parte, at the earliest time the court is available. If the court is satisfied from the claim filed and the testimony of the plaintiff, that there is a substantial likelihood that the plaintiff will prevail at a trial on the merits of the claim and that irreparable damage will accrue to the plaintiff unless a temporary order is issued without notice, the court may issue a temporary order and citation to the defendant to appear and show cause, at a date and time certain, why the temporary order should not be made permanent, see Forms appended to these rules.

(1) A copy of the claim and notice with the attachments and with a copy of the temporary order and citation shall be served on the defendant as provided by C.R.C.P. 504, and the citation shall inform the defendant that if the defendant fails to appear in court in accordance with the terms of the citation, the restraining order may be made permanent.

(2) On the trial date or any date to which the matter has been continued, the court shall proceed as provided in subsections (e) and (g) of this Rule.

(i) A temporary order shall not be an appealable order. A permanent order shall be an appealable order.

(j) When it appears to the court by motion supported by affidavit that a violation of the temporary or permanent order issued pursuant to this Rule has occurred, the court shall immediately order the clerk to issue a citation to the defendant so charged to appear and show cause before a county judge at a time designated why the defendant should not be held in contempt for violation of the court's order. The citation shall direct the defendant to appear in the county court. Such contempt proceedings shall be governed by C.R.C.P. 407. The citation and a copy of the motion and affidavit shall be served upon the defendant in the manner required by C.R.C.P. 345. If such defendant fails to appear at the time designated in the citation, a warrant for the defendant's arrest may issue to the sheriff. The warrant shall fix the time for the production of the defendant in court. A bond set in a reasonable amount not to exceed $7,500.00 shall be stated on the face of the warrant.

Source: Added May 12, 1994, effective July 1, 1994; (h) amended June 7, 1994, effective July 1, 1994; entire rule amended and effective September 6, 2001.

APPENDIX TO CHAPTER 26

The Colorado Rules of Procedure for Small Claims Courts

APPENDIX TO CHAPTER 26

SMALL CLAIMS COURTS FORMS

(Forms in this Appendix are available online at
http://www.courts.state.co.us/Forms/Index.cfm).

Introductory Statement.

Forms of captions are to be consistent with Rule 10, C.R.C.P.

An addendum should be used for identifying additional parties or attorneys when the space provided on a pre-printed or computer-generated form is not adequate.

SPECIAL FORM INDEX

JDF-249	Notice of Non-compliance and Order
JDF-250	Notice, Claim and Summons to Appear for Trial (four parts)
JDF-251	Notice of Removal
JDF-252A	Motion and Order for Interrogatories — Short Form
JDF-252B	Motion and Order for Interrogatories — Long Form (Replaces JDF-252)
JDF-253	Request to Set Aside Dismissal/Default Judgment (Replaces JDF-253A and JDF-253B)
JDF-254	Subpoena or Subpoena to Produce
JDF-255	Notice of No Service
JDF-256	Notice of Representation by Attorney
JDF-257	Notice, Claim and Summons to Appear (four parts) Enforcement of Restrictive Covenant (Deleted 9-01)
JDF-258	Temporary Order and Citation for Enforcement of Restrictive Covenant (Replaces JDF-258A)
JDF-258B	Permanent Order for Enforcement of Restrictive Covenant (Deleted 9-01)
JDF-259	Objection to Magistrate Hearing Case
JDF-260	Permanent Order

Small Claims Court _____ County, Colorado Court Address: _____ **PLAINTIFF(S):** _____ Address: _____ City/State/Zip: _____ Phone: Home _____ Work _____ v. **DEFENDANT(S):** _____ Address: _____ City/State/Zip: _____ Phone: Home _____ Work _____	▲ **COURT USE ONLY** ▲ Case Number: Division Courtroom

NOTICE OF NON-COMPLIANCE AND ORDER

Please take notice that _____ (name of party) has failed to comply with the terms of the order to compel delivery, compliance or performance that was entered by the Court on _____ (date) in the following manner:

_____

_____

_____

_____

I request that the Court schedule a hearing to determine the amount of damages or other remedies to be imposed for the failure to comply with the judgment.

Date: _____ _____
Signature

CERTIFICATE OF MAILING

I hereby certify that on _____ (date), I mailed a true and correct copy of the NOTICE OF NON-COMPLIANCE AND ORDER, by placing it in the United States Mail, postage pre-paid to the parties at the addresses listed above.

_____
Clerk of the Court/Deputy

ORDER

A hearing is set for _____ (date) to determine the amount of damages or other remedies to be imposed by the Court for the failure to comply with the judgment. Failure to appear may result in an imposition of damages or other remedies allowed by law.

Dated: _____ _____
❑Judge ❑Magistrate

Small Claims Court _____ County, Colorado Court Address:	
PLAINTIFF(S): _____ Address: _____ City/State/Zip: _____ Phone: Home _____ Work _____ Cell _____ v. **DEFENDANT(1):** _____ Address: _____ City/State/Zip: _____ Phone: Home _____ Work _____ Cell _____ **DEFENDANT(2):** _____ Address: _____ City/State/Zip: _____ Phone: Home _____ Work _____ Cell _____	▲ COURT USE ONLY ▲ Case Number: **S** Division Courtroom

NOTICE, CLAIM AND SUMMONS TO APPEAR FOR TRIAL (Part 1)

If Defendant(s) is/are other than a person, go on-line at www.sos.state.co.us to determine the registered agent for service of this notice. Please enter name and address of the agent. Name: _____
Address: _____

1. The Defendant(s) is/are in the military service: ❑**Yes** ❑**No** ❑**Unknown**
2. The Defendant(s) reside(s), is/are regularly employed, has/have an office for the transaction of business, or is/are a student in this county, or the Defendant(s) own(s) the real property in this county that is the subject of this claim arising from a restrictive covenant or security deposit dispute. ❑**Yes** ❑**No**
3. I/We understand that it is my/our responsibility to have each Defendant served with the "Defendant's Copy" of this Notice by a person whose age is 18 years or older and who is not a party to this action 15 days prior to the trial and to provide the Court with written proof of service. ❑**Yes** ❑**No**
4. I am an attorney: ❑**Yes** ❑**No**

Notice and Summons to Appear for Trial

To the Defendant(s):
You are scheduled to have your trial in this case on _____ (date) at _____(time) at the Court address stated in the above caption. Bring with you all books, papers and witnesses you need to establish your defense. **If you do not appear, judgment may be entered against you.** If you wish to defend the claim or present a counterclaim, you must provide a written response or written counterclaim on or before the scheduled trial date and pay a **nonrefundable** filing fee.

Dated: _____ _____
Clerk of Court/Deputy Clerk

Plaintiff(s)'s Claim (Please summarize reasons to support your claim below.)
The Defendant(s) owe(s) me $_____, which includes penalties, plus interest and costs allowed by law, and/or should be ordered to return property, perform a contract or set aside a contract or comply with a restrictive covenant for the following reasons. (If seeking return of property, please describe the property being requested).

_____
_____
_____
_____
_____

Note: The combined value of money, property, specific performance or cost to remedy a covenant violation cannot exceed $7,500.00.
Plaintiff(s) declare under penalty of perjury that the above statements are true and correct, and that I/we have not filed in any Small Claims Court in this County more than 2 claims during this calendar month, nor more than 18 claims in this County this calendar year.

Dated: _____

_____
Plaintiff's Signature

_____
Plaintiff's Signature

Small Claims Court _____ County, Colorado
Court Address:

PLAINTIFF(S): _____
Address: _____
City/State/Zip: _____
Phone: Home _____ Work _____ Cell _____

v.

DEFENDANT(1): _____
Address: _____
City/State/Zip: _____
Phone: Home _____ Work _____ Cell _____

DEFENDANT(2): _____
Address: _____
City/State/Zip: _____
Phone: Home _____ Work _____ Cell _____

▲ **COURT USE ONLY** ▲
Case Number:

S

Division Courtroom

NOTICE, CLAIM AND SUMMONS TO APPEAR FOR TRIAL (Part 2)

If Defendant(s) is/are other than a person, go on-line at www.sos.state.co.us to determine the registered agent for service of this notice. Please enter name and address of the agent. Name: _____
Address: _____

1. The Defendant(s) is/are in the military service: ❑**Yes** ❑**No** ❑**Unknown**
2. The Defendant(s) reside(s), is/are regularly employed, has/have an office for the transaction of business, or is/are a student in this county, or the Defendant(s) own(s) the real property in this county that is the subject of this claim arising from a restrictive covenant or security deposit dispute. ❑**Yes** ❑**No**
3. I/We understand that it is my/our responsibility to have each Defendant served with the "Defendant's Copy" of this Notice by a person whose age is 18 years or older and who is not a party to this action 15 days prior to the trial and to provide the Court with written proof of service. ❑**Yes** ❑**No**
4. I am an attorney: ❑**Yes** ❑**No**

Notice and Summons to Appear for Trial

To the Defendant(s):
You are scheduled to have your trial in this case on _____ (date) at_____ (time) at the Court address stated in the above caption. Bring with you all books, papers and witnesses you need to establish your defense. **If you do not appear, judgment may be entered against you.** If you wish to defend the claim or present a counterclaim, you must provide a written response or written counterclaim on or before the scheduled trial date and pay a **nonrefundable** filing fee.

Dated: _____ _____
Clerk of Court/Deputy Clerk

Plaintiff(s)'s Claim (Please summarize reasons to support your claim below.)
The Defendant(s) owe(s) me $_____, which includes penalties, plus interest and costs allowed by law, and/or should be ordered to return property, perform a contract or set aside a contract or comply with a restrictive covenant for the following reasons. (If seeking return of property, please describe the property being requested).

_____
_____
_____
_____
_____

Note: The combined value of money, property, specific performance or cost to remedy a covenant violation cannot exceed $7,500.00.
Plaintiff(s) declare under penalty of perjury that the above statements are true and correct, and that I/we have not filed in any Small Claims Court in this County more than 2 claims during this calendar month, nor more than 18 claims in this County in this calendar year.

Dated: _____ _____
Plaintiff's Signature

_____
Plaintiff's Signature

You must complete and fill out a response and or counterclaim on reverse side of Defendant's copy and bring to Court.

Defendant's Response (If responding, pay the appropriate filing fee). I do not owe the Plaintiff(s) or am not responsible to the Plaintiff(s) because:

_____

_____

_____

Defendant's Counterclaim (If submitting a counterclaim, pay the appropriate filing fee).
The Plaintiff(s) owe(s) me $_____, which includes penalties, plus interest and costs allowed by law and/or should be ordered to return property, perform a contract or set aside a contract or comply with a restrictive covenant for the following reasons. (If seeking return of property, please describe the property being requested).

_____

_____

☐ The amount of my/our counterclaim does not exceed the jurisdictional amount of the Small Claims Court of $7,500.00.

☐ The amount of my/our counterclaim exceeds the jurisdictional amount of the Small Claims Court, but I/we wish to limit the amount that I/we wish to recover from the Plaintiff to $7,500.00.

☐ The amount of my/our counterclaim exceeds the jurisdictional amount of the Small Claims Court, and I/we wish to have the case sent to ☐County Court (only if I/we wish to limit the amount I/we can recover from the plaintiff to $15,000.00) ☐District Court (I /we do not wish to limit the amount I/we can recover from the Plaintiff(s)) and will pay the appropriate filing fee. I/we am/are filing a Notice of Removal and paying the appropriate filing fee to the Court at this time.

I am an attorney. ☐**Yes** ☐**No**

I declare under penalty of perjury that this information is true and correct and that I mailed a copy of the Response/Counterclaim to the Plaintiff(s) at the address(es) stated on this form on _____ (date).

_____
Defendant's Address

_____ _____ _____
Defendant's Signature Date Telephone #: Home Work Cell

Information for Defendants in Small Claims Cases

A. Filing Fees.
Response without a counterclaim:
- **Claim $500.00 or less: $23.00**
- **Claim over $500.00 but less than $7,500.00: $34.00**

Response with a counterclaim:
- **If Plaintiff's claim is $500.00 or less and counterclaim is $500.00 or less: $28.00**
- **If Plaintiff's claim is more than $500.00 or counterclaim is more than $500.00: $39.00**

B. Response. You have been served with a Summons. If you fail to appear on the trial date shown on this notice, judgment may be entered against you. If you wish to defend the claim or present a counterclaim, you must **file with the Court Clerk a written response or counterclaim** on or before the scheduled trial date, provide a copy to the Plaintiff(s), pay the appropriate **nonrefundable** filing fee, and appear on the date set for trial in this notice with all evidence and witnesses needed to establish your defense.

C. Subpoenas. Upon your request, the clerk will issue a subpoena to require witnesses to appear or bring documents for your trial. It is your responsibility to complete the information needed on the subpoena and to have the subpoena served. Subpoenas must be served personally and may be served by a person over the age of 18 that is not a party to the case. Subpoenas must be accompanied by a check for payment of witness fees and mileage for any witnesses served.

D. Counterclaim. If you have a claim against the Plaintiff(s), you must **file with the Court clerk** the Defendant's counterclaim at the top of this form, provide a copy of the counterclaim to the Plaintiff(s) prior to the trial, and pay the appropriate **nonrefundable filing** fee. If you settle your counterclaim before trial, notify the Small Claims Court and the Plaintiff(s) in writing. **If you want your case heard by a Court of greater jurisdiction, you must complete and file this form, pay the appropriate filing fee (County = $80.00, District = 182.00) and file a Notice of Removal (JDF 251) at least 7days before the trial date shown on this Notice.**

E. Trial Responsibility. You have a right to a trial. Bring all evidence necessary to establish your defense and/or counterclaim: books, papers, repair bills, photographs or other exhibits. If the suit involves the delivery of personal property, be prepared to deliver the property immediately after trial. Be on time. If you are late, the Court may enter judgment against you.

F. Appeal. If you wish to appeal, you must file your appeal within 21 days of the judgment and proceed according to C.R.C.P 411.

G. Judgment. The Court does not collect any judgment, but will help with the necessary forms.
Money Judgment. If judgment is entered against you, you are expected to immediately pay the judgment, including filing fees and court costs. If the judgment is not paid immediately, you must answer questions about your assets and income and the other party can obtain a writ of garnishment or execution against your wages or property. Once the judgment is paid, you are entitled to have the judgment satisfied.
Non-monetary Judgment. If the Court orders immediate possession of the property, performance of a contract, setting aside of a contract or compliance with a restrictive covenant, your failure to comply with the Court order may result in an award of damages and/or being held in contempt.

H. Case Inquiries. When inquiring about this case, refer to the case number on this notice. Direct all inquiries to the clerk, not the judge or magistrate.

I. Attorney. If you want to be represented by an attorney, you or your attorney must file a Notice of Representation of Attorney (JDF 256) at least 7 days before the trial date on this notice. Then the Plaintiff(s) may have representation by an attorney. If the Plaintiff(s) is/are an attorney, you also may be represented by an attorney without filing a notice of representation. Even if there are attorneys in the case, the rules and procedures of the Small Claims Court will still apply.

J. Judicial Officer. A magistrate or a judge may hear your case. If you want a judge to hear your case, you must file an Objection to a Magistrate Hearing Case (JDF 259) at least seven days before the trial date set in this notice. The rules and procedures of the Small Claims Court will still apply.

K. Language Interpreter. If you or a witness requires a language interpreter to be present for hearings, you must contact the Managing Interpreter corresponding to the district in which the case will be heard at least seven days before the trial date is set on this notice. A language interpreter may only interpret what is said between parties during a hearing and immediately prior to or after the hearing. A language interpreter may not provide legal advice or any other service that is not related to interpreting. Interpreters may not provide any services that may constitute a violation of the language interpreter's Code of Professional Responsibility. A current list of Managing Interpreters can be viewed at http://www.courts.state.co.us/Administration/Custom.cfm?Unit=interp&Page_ID=117.

Small Claims Court _____ County, Colorado
Court Address:

PLAINTIFF(S): _____
Address: _____
City/State/Zip: _____
Phone: Home _____ Work _____ Cell _____

v.

DEFENDANT(1): _____
Address: _____
City/State/Zip: _____
Phone: Home _____ Work _____ Cell _____

DEFENDANT(2): _____
Address: _____
City/State/Zip: _____
Phone: Home _____ Work _____ Cell _____

▲ COURT USE ONLY ▲
Case Number:

S

Division Courtroom

NOTICE, CLAIM AND SUMMONS TO APPEAR FOR TRIAL (Part 3)

If Defendant(s) is/are other than a person, go on-line at www.sos.state.co.us to determine the registered agent for service of this notice. Please enter name and address of the agent. Name: _____
Address: _____

1. The Defendant(s) is/are in the military service: ❑**Yes** ❑**No** ❑**Unknown**
2. The Defendant(s) reside(s), is/are regularly employed, has/have an office for the transaction of business, or is/are a student in this county, or the Defendant(s) own(s) the real property in this county that is the subject of this claim arising from a restrictive covenant or security deposit dispute. ❑**Yes** ❑**No**
3. I/We understand that it is my/our responsibility to have each Defendant served with the "Defendant's Copy" of this Notice by a person whose age is 18 years or older and who is not a party to this action 15 days prior to the trial and to provide the Court with written proof of service. ❑**Yes** ❑**No**
4. I am an attorney: ❑**Yes** ❑**No**

Notice and Summons to Appear for Trial

To the Defendant(s):
You are scheduled to have your trial in this case on (date) _____ (time) _____ at the Court address stated in the above caption. Bring with you all books, papers and witnesses you need to establish your defense. **If you do not appear, judgment may be entered against you.** If you wish to defend the claim or present a counterclaim, you must provide a written response or written counterclaim on or before the scheduled trial date and pay a **nonrefundable** filing fee.

Dated: _____ _____
Clerk of Court/Deputy Clerk

Plaintiff(s)'s Claim (Please summarize reasons to support your claim below.)
The Defendant(s) owe(s) me $_____, which includes penalties, plus interest and costs allowed by law, and/or should be ordered to return property, perform a contract or set aside a contract or comply with a restrictive covenant for the following reasons. (If seeking return of property, please describe the property being requested).

_____
_____
_____
_____

Note: The combined value of money, property, specific performance or cost to remedy a covenant violation cannot exceed $7,500.00.

Plaintiff(s) declare under penalty of perjury that the above statements are true and correct, and that I/we have not filed in any Small Claims Court in this County more than 2 claims during this calendar month, nor more than 18 claims in this County in this calendar year.

Dated: _____ _____
Plaintiff's Signature

_____
Plaintiff's Signature

INFORMATION FOR PLAINTIFFS IN SMALL CLAIMS CASES

A. FILING. You may file your claim in this Court if:

1. Your claim is for money, property, specific performance or rescission of a contract, or enforcement of a restrictive covenant that does not exceed $7,500.00. You may reduce a larger claim and waive the balance. You cannot divide a claim and file two separate cases.
2. At least one of the parties you sue resides, is regularly employed, has an office for the transaction of business, or is a student in this county, or they own rental property in the county that is the subject of this claim.
3. You pay the clerk one of the following **NONREFUNDABLE** filing fees.
   - **Claim $500.00 or less: $28.00**
   - **Claim over $500.00 but less than $7,500.00: $45.00**

B. SERVICE. This notice to appear must be served at least 15 days prior to the trial on each Defendant. It may be served by:

1. Any person whose age is 18 years or older and who is not a party to this action.
2. Sheriff or process server.
3. Certified Mail that is mailed by the clerk. You must deposit the cost for certified mail in advance.

C. SETTLEMENT. If you settle your claim before trial, you must notify the Small Claims Court and Defendant in writing.

D. SUBPOENAS. Upon your request, the clerk will issue a subpoena to require witnesses to appear or bring documents for your trial. It is your responsibility to complete the information needed on the subpoena and to have the subpoena served. Subpoenas must be served personally and may be served by a person over the age of 18 that is not a party to the case. Subpoenas must be accompanied by a check for payment of witness fees and mileage for any witnesses served.

E. TRIAL RESPONSIBILITY. You have a right to a trial. Bring all evidence necessary to prove your case: books, papers, repair bills, photographs or other exhibits. Be on time. If you are late or do not appear, the Court may enter judgment in favor of the Defendant and against you if the Defendant filed a counterclaim.

F. APPEAL. If you wish to appeal, you must file your appeal within21 days of the judgment and proceed according to C.R.C.P. 411.

G. JUDGMENT. THE COURT DOES NOT COLLECT ANY JUDGMENT, but will help with the necessary forms.
Money Judgment. If judgment is entered in favor of the Defendant and against you, you are expected to immediately pay the judgment, including filing fees and court costs. If the judgment is not paid immediately, you must answer questions about your assets and income and the other party can obtain a writ of garnishment or execution against your wages or property. Once the judgment is paid, you are entitled to have the judgment satisfied.
Non-monetary Judgment. If the Court orders immediate possession of the property, performance of a contract, setting aside of a contract or compliance with a restrictive covenant, failure to comply with the Court order may result in an award of damages and or being held in contempt.

H. CASE INQUIRIES. When inquiring about this case, refer to the case number on the other side of this document. Direct all inquiries to the clerk, not the judge or magistrate.

I. ATTORNEY. If the Defendant(s) want(s) to be represented by an attorney, the Defendant(s) or attorney must file a Notice of Representation of Attorney (JDF 256) at least seven days before the trial date on this notice. Then, you may have representation by an attorney. If either party is an attorney, the other party may be represented by an attorney without filing a notice of representation. Even if there are attorneys in the case, the rules and procedures of the Small Claims Court will still apply.

J. JUDICIAL OFFICER. A magistrate or judge may hear your case. If you want a judge to hear your case, you must file an Objection to a Magistrate Hearing Case (JDF 259) at least seven days before the trial date set in this notice. The rules and procedures of the Small Claims Court will still apply.

K. Language Interpreter. If you or a witness requires a language interpreter to be present for hearings, you must contact the Managing Interpreter corresponding to the district in which the case will be heard at least seven days before the trial date is set on this notice. A language interpreter may only interpret what is said between parties during a hearing and immediately prior to or after the hearing. A language interpreter may not provide legal advice or any other service that is not related to interpreting. Interpreters may not provide any services that may constitute a violation of the language interpreter's Code of Professional Responsibility. A current list of Managing Interpreters can be viewed at: http://www.courts.state.co.us/Administration/Custom.cfm?Unit=interp&Page_ID=117.

Small Claims Court _____ County, Colorado
Court Address:

PLAINTIFF(S): _____
Address: _____
City/State/Zip: _____
Phone: Home _____ Work _____ Cell _____

v.

DEFENDANT(1): _____
Address: _____
City/State/Zip: _____
Phone: Home _____ Work _____ Cell _____

DEFENDANT(2): _____
Address: _____
City/State/Zip: _____
Phone: Home _____ Work _____ Cell _____

▲ **COURT USE ONLY** ▲
Case Number:

S

Division Courtroom

NOTICE, CLAIM AND SUMMONS TO APPEAR FOR TRIAL (Part 4)

If Defendant(s) is/are other than a person, go on-line at www.sos.state.co.us to determine the registered agent for service of this notice. Please enter name and address of the agent. Name: _____
Address: _____

1. The Defendant(s) is/are in the military service: ❑**Yes** ❑**No** ❑**Unknown**
2. The Defendant(s) reside(s), is/are regularly employed, has/have an office for the transaction of business, or is/are a student in this county, or the Defendant(s) own(s) the real property in this county that is the subject of this claim arising from a restrictive covenant or security deposit dispute. ❑**Yes** ❑**No**
3. I/We understand that it is my/our responsibility to have each Defendant served with the "Defendant's Copy" of this Notice by a person whose age is 18 years or older and who is not a party to this action 15 days prior to the trial and to provide the Court with written proof of service. ❑**Yes** ❑**No**
4. I am an attorney: ❑**Yes** ❑**No**

Notice and Summons to Appear for Trial

To the Defendant(s):
You are scheduled to have your trial in this case on (date) _____ (time) _____ at the Court address stated in the above caption. Bring with you all books, papers and witnesses you need to establish your defense. **If you do not appear, judgment may be entered against you.** If you wish to defend the claim or present a counterclaim, you must provide a written response or written counterclaim on ore before the scheduled trial date and pay a **nonrefundable** filing fee.

Dated: _____ _____
Clerk of Court/Deputy Clerk

Plaintiff(s)'s Claim (Please summarize reasons to support your claim below.)
The Defendant(s) owe(s) me $_____, which includes penalties, plus interest and costs allowed by law, and/or should be ordered to return property, perform a contract or set aside a contract or comply with a restrictive covenant for the following reasons. (If seeking return of property, please describe the property being requested).

_____
_____
_____
_____

Note: The combined value of money, property, specific performance or cost to remedy a covenant violation cannot exceed $7,500.00

Plaintiff(s) declare under penalty of perjury that the above statements are true and correct, and that I/we have not filed in any Small Claims Court in this County more than 2 claims during this calendar month, nor more than 18 claims in this County in this calendar year.
Dated: _____

_____
Plaintiff's Signature

_____
Plaintiff's Signature

Case Name _____ v. _____ **Case Number:** _____

AFFIDAVIT OF SERVICE

(Must be returned to Court)

I declare under oath that I am 18 years or older and not a party to the action, and that I served the ***Notice, Claim, and Summons to Appear for Trial (JDF 250)*** on the following:

Name of Person Served	**Date and Time of Service**	**Address of Service** (Street, County, City, State)

Check type of Service:

- ☐ By handing the documents to a person identified to me as the Defendant.
- ☐ By identifying the documents, offering to deliver them to a person identified to me as the Defendant who refused service, and then leaving the documents in a conspicuous place.
- ☐ By leaving the documents at the Defendant's usual place of abode with _____ (Name of Person) who is a member of the Defendant's family and whose age is 18 years or older. (Identify family relationship) _____.)
- ☐ By leaving the documents at the Defendant's usual workplace with _____ (Name of Person) who is the Defendant's secretary, administrative assistant, bookkeeper, or managing agent. (Circle title of person served.)
- ☐ By leaving the documents with _____ (Name of Person), who as _____ (title) is authorized by appointment or by law to receive service of process for the Defendant.
- ☐ By leaving the documents with an officer, partner, manager, stockholder, elected official or functional equivalent pursuant to C.R.C.P. 304 _____ (please identify) of the corporation or non-corporate entity which was to be served. (Circle title of person who was served.)
- ☐ By serving the documents as follows (other service under C.R.C.P. 304:_____ _____.

I have charged the following fees for my services in this matter:

☐ Private process server
☐ Sheriff, _____County
Fee $ _____ Mileage $ _____

_____
Signature of Process Server

_____
Name (Print or type)

Subscribed and affirmed, or sworn to before me in the County of _____, State of _____, this _____ day of _____, 20 _____.

My Commission Expires: _____

_____
Notary Public

CERTIFICATE OF SERVICE BY MAILING

(To be performed by Clerk within three days of filing)

I hereby certify that on _____(date), I mailed a true and correct copy of the ***NOTICE, CLAIM, AND SUMMONS TO APPEAR FOR TRIAL***, by placing it in the United States Mail, postage pre-paid to the Defendant(s) at the address(es) listed above.

_____
Clerk of Court/Deputy Clerk

☐ (If applicable) Plaintiff(s) notified of non-service on (date) _____. Clerk's Initials _____

Small Claims Court, _____ County, Colorado Court Address:	
PLAINTIFF(S): _____ Address: _____ City/State/Zip: _____ Phone: Home _____ Work _____ v **DEFENDANT(S):** _____ Address: _____ City/State/Zip: _____ Phone: Home _____ Work _____	▲ COURT USE ONLY ▲ Case Number:
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Division: Courtroom:

NOTICE OF REMOVAL

I, _____, Defendant(s) have/has requested that this case be removed to ☐ County Court or ☐ District Court pursuant to C.R.C.P. 508(c)(2), on the grounds that the counterclaim in this action exceeds the jurisdictional limits of the Small Claims Court.

Dated: _____

_____
Signature of Defendant or Defendant's Attorney

NOTICE TO PLAINTIFF(S)/DEFENDANT(S):

This Small Claims case is removed to ☐ County Court or ☐ District Court. Do not appear in Small Claims Court on the date shown on the Notice, Claim and Summons to Appeâr for Trial.

- ☐ Your new case number is _____.
- ☐ The new Court date is _____ at (time) _____.
- ☐ See attached Court notice.

Dated: _____

_____
Clerk of Court/Deputy Clerk

CERTIFICATE OF MAILING

I hereby certify that on (date) _____, I mailed a true and correct copy of the NOTICE OF REMOVAL, by placing it in the United States Mail, postage pre-paid to the parties at the addresses listed above.

_____
Clerk of Court/Deputy Clerk

Small Claims Court _____ County, Colorado Court Address: PLAINTIFF(S): _____ Address: _____ City/State/Zip: _____ Phone: Home _____ Work _____ v. DEFENDANT(S): _____ Address: _____ City/State/Zip: _____ Phone: Home _____ Work _____	▲ ▲ **COURT USE ONLY** Case Number: Division Courtroom

MOTION AND ORDER FOR INTERROGATORIES – SHORT FORM

MOTION

Judgment was entered on: (date) _____.
Against the: ❑ Plaintiff ❑ Defendant By: ❑ Default ❑ After trial
The judgment remains unsatisfied. Pursuant to Rule 518(a), C.R.C.P., the ❑ judgment creditor requests or the ❑ Court finds that the judgment debtor should be required to answer the following interrogatories.

Dated: _____ _____
Judgment Creditor's Signature

ORDER

❑ Pursuant to Rule 518(a), at the request of the judgment creditor **or** on the Court's review of the above Motion **IT IS ORDERED:**

❑ That the judgment debtor shall answer the following questions and file the answers with the Court ❑ immediately ❑ within ten days after service of these interrogatories upon the judgment debtor, or in lieu there of, pay the judgment in full. **or**

❑ That the judgment debtor answer the questions and appear in Court at (date)_____ at (time)_____.

FAILURE TO TRUTHFULLY AND COMPLETELY ANSWER ALL OF THESE QUESTIONS AND RETURN THEM WITHIN TEN DAYS TO THE CLERK OF THE COURT, SMALL CLAIMS COURT, SHALL CAUSE A CITATION TO BE ISSUED FOR CONTEMPT OF COURT. A FINDING OF CONTEMPT BY THE COURT MAY RESULT IN A FINE OR JAIL SENTENCE.

Dated: _____ _____
❑ Judge ❑ Magistrate

INTERROGATORIES

1. What is your full legal name: _____
   List any other names you have been known by: _____
   Home address: _____
   Home phone number: _____ Work phone number: _____
   Date of birth: _____ Social Security Number: _____
   Drivers license number: _____ State: _____

2. As to your employment, complete the following:
   The employer's/company's name: _____
   Address of employer: _____
   Phone number: _____ Supervisor's name: _____

You are paid: ☐ hourly $ _____ ☐ monthly $ _____ ☐ or your annual rate of pay you earn $ _____ ☐ you are paid commissions, the manner in which commissions are calculated are: _____
The days or days of the month on which you are paid: _____

3. As to your bank accounts, complete the following: List the name and address and account number of every bank, saving and loan, credit union or other financial institution holding any funds which you have deposited or which you are allowed to withdraw without obtaining another person's signature.

Name of Bank Saving & Loan/Credit Union	Address/Location City/State	Account Number
Name of Bank Saving & Loan/Credit Union	Address/Location City/State	Account Number
Name of Bank Saving & Loan/Credit Union	Address/Location City/State	Account Number
Name of Bank Saving & Loan/Credit Union	Address/Location City/State	Account Number
Name of Bank Saving & Loan/Credit Union	Address/Location City/State	Account Number

4. State the full and correct address of all real estate you own or have an interest in:

Address	City/County State
Address	City/County State
Address	City/County State
Address	City/County State

5. As to debts owed to you, complete the following. List the name and address of every person who owes you money and the amount owed to you:

Name	Address City/State	$ Amount owed
Name	Address City/State	$ Amount owed
Name	Address City/State	$ Amount owed
Name	Address City/State	$ Amount owed

6. As to insurance coverage, complete the following: List the name and address of any insurance company, including policy numbers with agent's name providing liability coverage.

Name of Insurance Company – Name of Agent	Address/Location City/State	Policy Number
Name of Insurance Company – Name of Agent	Address/Location City/State	Policy Number
Name of Insurance Company – Name of Agent	Address/Location City/State	Policy Number

UNDER PENALTIES OF PERJURY, I DECLARE THAT THESE STATEMENTS ARE TRUE AND CORRECT.

Dated: _____

_____
Judgment debtor's signature

Subscribed and affirmed, or sworn to before me in the County of _____, State of _____, this _____ day of _____, 20 _____.

My commission expires: _____

_____
Notary Public/Clerk of the Court/Deputy Clerk

Case Name _____ v. _____ **Case Number:** _____

AFFIDAVIT OF SERVICE
(Must be returned to Court)

I served a copy of the foregoing Interrogatories, on the following:

Name	Date	Place

If the person on whom service was made is not the named party to be served, I served the Interrogatories:

☐ At the regular place of abode of the person to be served, by leaving the Notice with a person over the age of 18 years who regularly resides at the place of abode. (Identify relationship to defendant _____)

☐ At the regular place of business of the person to be served, by leaving the Notice with that person's secretary, bookkeeper, chief clerk, office receptionist/assistant or partner. (Circle title of person that was served).

☐ By leaving the Notice with a partner, limited partner, associate, manager, elected office, receptionist/assistant, bookkeeper or general agent of the partnership. Limited Liability Company, or other non-corporate entity, which was to be served. (Circle title of person that was served).

☐ By leaving the Notice with an officer, manager, receptionist/assistant, legal assistant, paid legal advisor or general agent, registered agent for service of process, stockholder or principal employee of the corporation, which was to be served. (Circle title of person that was served).

I am over the age of 18 years, and I am not an interested party in this matter.

I have charged the following fees for my services in this matter:

☐ Private process server

☐ Sheriff, _____County

Fee $ _____ Mileage $ _____

_____
Signature of Process Server

_____
Name (Print or type)

Subscribed and affirmed, or sworn to before me in the County of _____, State of _____, this _____ day of _____, 20 _____.

My commission expires: _____

_____
Notary Public

CERTIFICATE OF SERVICE BY MAILING
(To be performed by Clerk within three days of filing)

I hereby certify that on (date)_____, I mailed a true and correct copy of the MOTION AND ORDER FOR INTERROGATORIES – SHORT FORM, by placing it in the United States Mail, postage pre-paid to the Defendant(s) at the address(es) listed above.

Dated: _____

_____
Clerk of Court/Deputy Clerk

☐ (If applicable) Plaintiff notified of non-service on (date)_____. Clerk's Initials _____

Small Claims Court, _____ County, Colorado Court Address:	
PLAINTIFF(S): _____ Address: _____ City/State/Zip: _____ Phone: Home _____ Work _____ v **DEFENDANT(S):** _____ Address: _____ City/State/Zip: _____ Phone: Home _____ Work _____	▲ COURT USE ONLY ▲ Case Number: Division: Courtroom:

MOTION AND ORDER FOR INTERROGATORIES – LONG FORM

The judgment creditor, _____, requests this Court to issue an order requiring the judgment debtor, _____, to appear and answer completely all of the INTERROGATORIES attached within ten days after receipt, because:

1. On (date) _____, judgment was entered in favor of the _____ and against the _____ in the amount of $ _____, with court costs in the amount of $ _____, for a total award of $ _____;
2. There remains due on this judgment the amount of $ _____, interest to date of $ _____, additional costs of $ _____, for a balance of $ _____;
3. Execution may presently issue on this judgment; and
4. Pursuant to C.R.C.P. 517 and 518, the judgment creditor is entitled to an order requiring the judgment debtor to appear and answer these interrogatories concerning the debtor's financial condition.

Dated: _____ _____
Judgment Creditor

Subscribed under oath before me on:

Dated: _____ _____
Clerk/Deputy

IT IS ORDERED:

1. That the judgment debtor, _____, APPEAR and ANSWER completely all of the INTERROGATORIES attached, pursuant to C.R.C.P. 517 and 518.
2. That these INTERROGATORIES be signed by the judgment debtor in full legal name, under penalty of perjury, in the presence of a notary public or clerk of court.
3. That these INTERROGATORIES be filed with the Clerk, and that the judgment debtor appear on (date) _____ (time) _____ at (location) _____ _____.
4. That service of these INTERROGATORIES and this order be made by mailing copies to the judgment debtor, by certified mail, or as provided by C.R.C.P. 304.

Dated: _____ _____
☐ Judge ☐ Magistrate

I certify that a copy of this form and interrogatories were mailed to the judgment debtor on:

Dated: _____ _____
Clerk of Court/Deputy Clerk

INTERROGATORIES TO JUDGMENT DEBTOR

Name of Judgment Debtor: _____. THESE INTERROGATORIES MUST BE COMPLETELY ANSWERED AND FILED WITH THE CLERK OF THE _____ COUNTY COURT AT THE ADDRESS STATED ON PAGE 1 OF THIS FORM ON (date) _____ (time) _____. YOU MUST APPEAR ON THIS DATE.

WARNING: FAILURE TO TRUTHFULLY AND COMPLETELY ANSWER ALL OF THESE QUESTIONS AND RETURN THEM WITHIN TEN DAYS TO THE CLERK OF COUNTY COURT, SMALL CLAIMS DIVISION, SHALL CAUSE A CITATION TO BE ISSUED FOR CONTEMPT OF COURT. A FINDING OF CONTEMPT MAY BE CAUSE FOR A FINE OR JAIL SENTENCE.

NOTE: YOU MAY PAY $ _____ (THE AMOUNT OF THE JUDGMENT TOGETHER WITH ANY INTEREST AND COSTS) TO THE CLERK OF THE COURT WITHIN TEN DAYS INSTEAD OF ANSWERING THESE QUESTIONS. IF YOU MAKE THE PAYMENT, THIS CASE WILL BE CLOSED.

1. What is your full legal name: _____
   List any other names you have been known by: _____
   Home address: _____
   Home phone number: _____ Work phone number: _____
   Date of birth: _____ Social Security Number: _____
   Drivers license number: _____ State: _____

2. State your full and correct business address: _____
   _____
   a. Do you rent or own the premises? _____
   b. State the full and correct name and address of your landlord. _____
      _____
   c. On what day of the month do you pay your rent? _____
   d. What is the amount of the deposit with your landlord? $_____

3. State your full and correct home address: _____
   _____
   a. Do you own or rent the premises? _____
   b. State the full and correct name and address of your landlord. _____
      _____
   c. On what day of the month do you pay your rent? _____
   d. What is the amount of the deposit with your landlord? _____

4. State the full and correct address of all real estate you own or have an interest in.

Address	City/County State
Address	City/County State
Address	City/County State
Address	City/County State

5. State the book and page number and other recording numbers of the deed or other instruments of such property.

Book/page number of deed	Book/page number of deed
Book/page number of deed	Book/page number of deed

6. Are there any liens, mortgages, or encumbrances against any of the property referred to in No. 4? If so, give the full and correct name and address of the creditor of, and balance due on each.

Name	Address City/State	Amount owed
		$
		$
		$
		$

7. Employment information:
The employer's/company's name: _____
Address of employer: _____
Phone number: _____ Supervisor's name: _____
You are paid: ☐ hourly $ _____ ☐ monthly $ _____ ☐ or your annual rate of pay you earn $ _____ ☐ you are paid commissions, the manner in which commissions are calculated are:
_____
The days or days of the month on which you are paid: _____

8. If self-employed, do you own or have any interest in any inventory, supplies, machinery, equipment, or tools? If so, list each of them and whether they are paid for. If you owe money for any item, indicate how much for each item.

Type of Item	Paid YES or NO	If No, Amount owed

9. List the full and correct name and address of all banks and savings institutions you have:

Name of Bank Savings & Loan/Credit Union	Address/Location City/State	Account Number

10. Do you have any life, health, or other insurance with a cash surrender value or from which money is or will be due to you? If so, state the name and number of the policy and full and correct name and address of the insuring company.

Name of Insurance Company – Name of Agent	Address/Location City/State	Policy Number

11. Have you received any money judgments from any court within the past 12 months? If so, state the nature of the action, court location, case number, amount received and date judgment entered.

Nature of Action	Court Location	Case Number	Amount of Judgment	Date Ordered

12. Are you entitled to any refund on either or both of your last federal or state income tax returns?
    a. If so, what is the amount of the refund on each? _____
    b. Have you received any of this money as of this date? _____

13. State the description, amount, and location of any and all stocks, bonds, U.S. Savings Bonds, debentures, or other securities which you own or in which you have an interest.

_____ $_____
Type of Stock/Bond/US Savings Bond | Location | Amount

_____ $_____
Type of Stock/Bond/US Savings Bond | Location | Amount

_____ $_____
Type of Stock/Bond/US Savings Bond | Location | Amount

_____ $_____
Type of Stock/Bond/US Savings Bond | Location | Amount

14. State the amount and location of any cash you have on hand.

_____ $_____
Location of Cash | Amount

_____ $_____
Location of Cash | Amount

15. List and describe any and all automobiles, trucks or other motor vehicles owned by you, or vehicles in which you have an interest.

_____ $_____
Type of Vehicle | Estimated Value

    a. Are any of these vehicles used daily in your work? If so, identify _____
    b. Are any of these vehicles mortgaged? If so, state for what amount and the full and correct name and address of the mortgagee.

_____
Name of Bank Savings & Loan/Credit Union | Address/Location City/State | Account Number

_____
Name of Bank Savings & Loan/Credit Union | Address/Location City/State | Account Number

16. List and describe any and all livestock and crops you own or have an interest in, giving the location and present market value of each.

_____ $_____
Type of Livestock/Crops | Location | Estimated Value

_____ $_____
Type of Livestock/Crops | Location | Estimated Value

17. State the amount, description, and location of any and all other personal property you own or have an interest in including household furniture and fixtures, motorcycles, boats, photographic and electronic equipment, jewelry, and any other moveable property. If any of this property is mortgaged, state for what amount and the full and correct name and address of the mortgagee(s). (Use additional pages if necessary.)

_____ $_____
Description | Location | Estimated Value

_____ $_____
Description | Location | Estimated Value

_____ $_____
Description | Location | Estimated Value

18. State the full and correct name and address of any and all persons, firms, and/or corporations to whom you owe any money.

_____ $_____
Name and address | Amount

_____ $_____
Name and address Amount

_____ $_____
Name and address Amount

19. List and describe any and all rents, notes receivable, and accounts receivable, on an open account or otherwise, due or payable to you or in which you have an interest. State the full and correct name and address of the debtor and the amount due as of this date.

_____ $_____
List of Debtor Address Amount

_____ $_____
List of Debtor Address Amount

_____ $_____
List of Debtor Address Amount

_____ $_____
List of Debtor Address Amount

_____ $_____
List of Debtor Address Amount

20. State the full and correct address of the location of your financial books and records and, if you employ the services of a bookkeeper or accountant, the full correct name and address of such person. _____

_____

_____

21. What is the amount of your deposit with any utility company (gas, electric, water and sewer)?

_____ $_____
Description Location Estimated Value

_____ $_____
Description Location Estimated Value

22. What is the amount of your deposit with any telephone company? $ _____

23. For a period of one full year prior to the commencement of this legal action against you until the present, have you or your agents or employees, if any, closed out any savings, commercial, or other financial account which was in your name, individually or together with other people or business, in any bank or other financial institution? If so, for each of such closed accounts, state:
    a. The full and correct name and address of the bank or institution(s). _____
    _____
    b. The names on the account(s). _____
    c. The account number(s). _____
    d. The date on which the account(s) was/were opened. _____
    e. The date on which the account(s) was/were closed. _____

24. Supply a copy of your last federal income tax return.

I affirm/swear under the penalty of perjury that the above answers to these INTERROGATORIES are true, complete, and correct.

FALSE STATEMENT ARE PUNISHABLE AS PERJURY WHICH IS A FELONY.

Dated: _____ _____
Judgment Debtor

Subscribed and affirmed, or sworn to before me in the County of _____, State of _____, this _____ day of _____, 20 _____.

My commission expires: _____ _____
Notary Public/Deputy Clerk

Case Name _____ **v.** _____ **Case Number:** _____

AFFIDAVIT OF SERVICE
(Must be returned to Court)

I served a copy of the foregoing Interrogatories, on the following:

Name	Date	Place

If the person on whom service was made is not the named party to be served, I served the Interrogatories:

☐ At the regular place of abode of the person to be served, by leaving the Notice with a person over the age of 18 years who regularly resides at the place of abode. (Identify relationship to defendant _____.)

☐ At the regular place of business of the person to be served, by leaving the Notice with that person's secretary, bookkeeper, chief clerk, office receptionist/assistant or partner. (Circle title of person who was served.)

☐ By leaving the Notice with a partner, limited partner, associate, manager, elected official, receptionist/assistant, bookkeeper or general agent of the partnership, limited liability company, or other non-corporate entity, which was to be served. (Circle title of person who was served.)

☐ By leaving the Notice with an officer, manager, receptionist/assistant, legal assistant, paid legal advisor or general agent, registered agent for service of process, stockholder or principal employee of the corporation that was to be served. (Circle title of person who was served.)

I am over the age of 18 years, and I am not an interested party in this matter.

I have charged the following fees for my services in this matter:

☐ Private process server
☐ Sheriff, _____ County
Fee $ _____ Mileage $ _____

_____
Signature of Process Server

_____
Name (Print or type)

Subscribed and affirmed, or sworn to before me in the County of _____, State of _____, this _____ day of _____, 20 _____.

My commission expires: _____

_____
Notary Public

CERTIFICATE OF SERVICE BY MAILING
(To be performed by Clerk within three days of filing)

I hereby certify that on (date) _____, I mailed a true and correct copy of the MOTION AND ORDER FOR INTERROGATORIES – LONG FORM, by placing it in the United States Mail, postage pre-paid to the Defendant(s) at the address(es) listed above.

_____
Clerk of Court/Deputy Clerk

☐ (If applicable) Plaintiff(s) notified of non-service on (date) _____. Clerk's Initials _____

Small Claims Court, _____ County, Colorado Court Address:	
PLAINTIFF(S): _____ Address: _____ City/State/Zip: _____ Phone: Home _____ Work _____ v **DEFENDANT(S):** _____ Address: _____ City/State/Zip: _____ Phone: Home _____ Work _____	▲ **COURT USE ONLY** ▲ Case Number: Division: Courtroom:

REQUEST TO SET ASIDE ☐ DISMISSAL ☐ DEFAULT JUDGMENT

UNDER PENALTIES OF PERJURY, I DECLARE THAT THESE STATEMENTS ARE TRUE AND CORRECT.

1. I/We _____, am the ☐ Plaintiff(s) ☐ Defendant(s) in above captioned case
2. My claim against the Defendant(s) was/were dismissed on (date) _____.
   OR
   The Plaintiff(s) Judgment was/were entered against me on (date) _____.
3. I/We did not appear in Court on the ☐ date of the trial or the ☐ date of the entry of judgment because:
   _____
   _____
4. I/We believe I/we can provide the following facts to prove my/our case or to establish my/our defense:
   _____
   _____

Dated: _____ _____
Signature

_____
Signature

ORDER

The Court upon review of Request to Set Aside ☐ Dismissal ☐ Default Judgment, ORDERS the following:
☐ Request **DENIED** ☐ Request **GRANTED**
☐ Request to be heard by the Court on (date) _____.
If after the request is heard and the Court finds that the request for dismissal/default judgment should be set aside, the Court
☐ will proceed immediately to trial at the conclusion of the hearing.
☐ will re-schedule the trial for another date
THE PARTIES ARE ADVISED TO BRING WITH THEM ON THE SAID DATE ALL OF THE EVIDENCE AND WITNESSES NECESSARY FOR THE COURT TRIAL

Dated: _____ _____
☐ Judge ☐ Magistrate

CERTIFICATE OF MAILING

I hereby certify that on (date) _____, I mailed a true and correct copy of the REQUEST TO SET ASIDE DISMISSAL/DEFAULT JUDGMENT, by placing it in the United States Mail, postage pre-paid to the parties at the addresses listed above.

Dated: _____ _____
Clerk of Court/Deputy Clerk

Small Claims Court, _____ County, Colorado Court Address:	
PLAINTIFF(S): _____ Address: _____ City/State/Zip: _____ Phone: Home _____ Work _____ v **DEFENDANT(S):** _____ Address: _____ City/State/Zip: _____ Phone: Home _____ Work _____	▲ **COURT USE ONLY** ▲ Case Number: Division: Courtroom:

☐ **SUBPOENA OR** ☐ **SUBPOENA TO PRODUCE**

TO: _____

You are ordered to attend and give testimony in the Small Claims Division of _____ County Court at (location) _____ on (date) _____, at (time) _____, as a witness for _____ in an action between _____ Plaintiff(s), and _____ Defendant(s), and also to produce at this time and place (if applicable):

_____

_____

_____ now in your control.

Dated: _____

_____
Clerk of Court/Deputy Clerk

RETURN OF SERVICE

State of _____
County _____
I declare under oath that I served this Subpoena or Subpoena To Produce on _____ in _____ County on (date) _____, at (time) _____, at the following location: _____ and that I tendered witness(es) fees and mileage to _____
☐ by (state manner of service) _____

_____.

☐ I am over the age of 18 years and am not interested in nor a party to this case.

Subscribed and affirmed, or sworn to before me in the County of _____, State of _____, this _____ day of _____, 20 _____.

My commission expires: _____

_____
Notary Public

_____
Name Date

☐ Private process server
☐ Sheriff, _____ County
Fee $ _____ Mileage $ _____

Small Claims Court, _____ County, Colorado Court Address:	
PLAINTIFF(S): _____ Address: _____ City/State/Zip: _____ Phone: Home _____ Work _____ v **DEFENDANT(S):** _____	▲ **COURT USE ONLY** ▲
Address: _____ City/State/Zip: _____ Phone: Home _____ Work _____	Case Number: Division: Courtroom:

NOTICE OF NO SERVICE

TO THE PLAINTIFF(S):

PLEASE BE ADVISED that the attempted service by mail of the Notice, Claim and Summons to Appear for Trial upon the Defendant(s) was unsuccessful. If you desire to pursue this case, you are required to obtain an "Alias Notice, Claim and Summons to Appear for Trial" from the Clerk of the Court. You must have the Defendant personally served at least 15 days prior to the first scheduled trial date as set forth in the Alias Notice, Claim and Summons to Appear for Trial.

Dated: _____ _____
Clerk of Court/Deputy Clerk

CERTIFICATE OF MAILING

I hereby certify that on (date) _____, I mailed a true and correct copy of the NOTICE OF NO SERVICE, by placing it in the United States Mail, postage pre-paid to the parties at the addresses listed above.

Dated: _____ _____
Clerk of Court/Deputy Clerk

Small Claims Court, _____ County, Colorado Court Address:	
PLAINTIFF(S): _____ Address: _____ City/State/Zip: _____ Phone: Home _____ Work _____ v **DEFENDANT(S):** _____ Address: _____ City/State/Zip: _____ Phone: Home _____ Work _____	▲ COURT USE ONLY ▲ Case Number:
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Division: Courtroom:

NOTICE OF REPRESENTATION BY ATTORNEY

TO THE COURT AND TO THE PLAINTIFF(S) NAMED ABOVE:

Please take notice that Defendant(s) _____,
will be represented by: _____,
an attorney at the trial of the above-captioned matter.
Plaintiff(s) may now be represented by an attorney if Plaintiff(s) wishes. **However, it is not required that Plaintiff(s) be represented by an attorney.**

Please further take notice that this Notice of Representation by Attorney must be filed with the court at least seven days **prior** to the first scheduled trial date in this matter. If not filed at least seven days **prior** to the first scheduled trial date, the Court shall strike this notice and neither party may be represented by an attorney at the trial.

NOTE: Defendant(s) must make payment of the filing fee required for defendant's answer (and counterclaim, if any is anticipated) at the time of the filing of the Notice of Representation by Attorney.

_____ _____
Defendant's Signature Date Attorney's Signature Date

CERTIFICATE OF MAILING

I hereby certify on (date) _____ the original of this document was filed with the Court; and a true a accurate copy of the NOTICE OF REPRESENTATION BY ATTORNEY was served on the Plaintiff(s) by placing it in the United States Mail, postage pre-paid at the address(es) listed above.

Dated: _____

_____
Defendant/Attorney

Small Claims Court, _____ County, Colorado Court Address:	
PLAINTIFF(S): _____ Address: _____ City/State/Zip: _____ Phone: Home _____ Work _____ v **DEFENDANT(S):** _____ Address: _____ City/State/Zip: _____ Phone: Home _____ Work: _____	▲ COURT USE ONLY ▲ Case Number: Division: Courtroom:

TEMPORARY ORDER AND CITATION
ENFORCEMENT OF RESTRICTIVE COVENANT ON RESIDENTIAL PROPERTY

THIS MATTER is heard ex parte. _____ appears on behalf of the Plaintiff(s). The Court has examined the claim filed, and has heard the testimony of the Plaintiff(s), and:

THE COURT FINDS:

1. The Small Claims Court appears to have subject matter jurisdiction over this action.
2. The Plaintiff(s) is/are a proper party in interest.
3. Defendant(s) owns/possesses the residential property identified in the claim.
4. There is a restrictive covenant of record, which restricts the use of the property.
5. It appears that the Defendant(s) is/are in violation of such covenant by: _____
   _____
   _____
   It appears that there is a substantial likelihood Plaintiff(s) will prevail at trial on the merits of this case.
6. It appears that irreparable harm will accrue to the Plaintiff(s) unless a temporary order issues immediately, relating to initiating or continuing any violation of the covenant.

IT IS THEREFORE ORDERED that immediately upon service of a copy of this TEMPORARY ORDER AND CITATION, the Defendant(s) shall: _____
_____
_____

IT IS FURTHER ORDERED THAT THE DEFENDANT(S) IS/ARE CITED AND ORDERED TO APPEAR before this Court at the address stated above in the caption in Courtroom/Division _____ on (date) _____, at (time) _____, to show cause, if any, why this TEMPORARY ORDER should not be made permanent. If the Defendant(s) fails to appear in Court on the above date and time, the TEMPORARY ORDER shall be made permanent, if the Plaintiff(s) request(s), and a bench warrant may issue for the Defendant's arrest. A private process server may serve this order.

ANY VIOLATION OF THIS TEMPORARY ORDER MAY CONSTITUTE CONTEMPT OF COURT, WHICH MAY BE PUNISHED BY CONTEMPT, FINES, DAMAGES, ATTORNEY FEES, AND COSTS.

BY THE COURT

Dated: _____

_____
☐ Judge ☐ Magistrate

CERTIFICATE OF PERSONAL SERVICE

I served a copy of this form, the answer form, and any attachments by delivering them in _____ County, State of Colorado, as shown below:

_____

Name of Person Served | Address Where Served | Date of Service

_____

How Service Was Made and List of any Attachments Served

_____

Process Server

Subscribed and affirmed, or sworn to before me in the County of _____, State of _____, this _____ day of _____, 20 _____.

My commission expires: _____

_____

Notary Public

Small Claims Court, _____ County, Colorado Court Address:	
PLAINTIFF(S): _____ Address: _____ City/State/Zip: _____ Phone: Home _____ Work _____ v **DEFENDANT(S):** _____ Address: _____ City/State/Zip: _____ Phone: Home _____ Work _____	▲ **COURT USE ONLY** ▲ Case Number: Division: Courtroom:

OBJECTION TO MAGISTRATE HEARING CASE

I, _____, am the ☐ PLAINTIFF ☐ DEFENDANT in this case, and I object to a magistrate hearing the above captioned case, and pursuant to C.R.C.P. 511, I request that this case be heard by a judge.

I understand that this motion must be filed at least seven days before the trial date stated on the Notice, Claim, Summons to Appear for Trial.

Dated: _____

_____
Signature of ☐ PLAINTIFF ☐ DEFENDANT

NOTICE TO PARTIES:

You are notified that, at the request of the above-signed party, this case will be heard by a judge instead of a magistrate.

☐ There is no change in the trial date of _____.
☐ There is a new trial date of _____.
☐ See attached trial notice form.

Dated: _____ _____

_____
Clerk of Court/Deputy Clerk

CERTIFICATE OF MAILING

I hereby certify that on (date)_____, I mailed a true and correct copy of the OBJECTION TO MAGISTRATE HEARING CASE, by placing it in the United States Mail, postage pre-paid to the parties at the addresses listed above.

_____
Clerk of Court/Deputy Clerk

Small Claims Court, _____ County, Colorado Court Address:	
PLAINTIFF(S): _____ Address: _____ City/State/Zip: _____ Phone: Home _____ Work _____ v **DEFENDANT(S):** _____ Address: _____ City/State/Zip: _____ Phone: Home _____ Work _____	▲ **COURT USE ONLY** ▲ Case Number: Division: Courtroom:

PERMANENT ORDER

The Court has jurisdiction over the persons and subject matter of this action. Venue is proper before the Court.

☐ Plaintiff(s) is/are ordered to deliver on or before (date) _____, the following property
_____
_____
_____

☐ Defendant(s) is/are ordered to deliver on or before (date) _____, the following property
_____
_____
_____

☐ Plaintiff(s) ☐ Defendant(s) own(s)/possess(es) residential property properly identified and addressed as _____
There is a restrictive covenant of record that restricts the use of the residential property.

☐ Plaintiff(s) ☐ Defendant(s) has/have violated the provisions of the covenant and is/are ordered to comply as follows: _____
_____
on or before (date) _____.

VIOLATION OF THIS ORDER MAY CONSTITUTE CONTEMPT OF COURT. JUDGMENT FOR ADDITIONAL DAMAGES MAY BE ENTERED AGAINST YOU.

BY THE COURT

Dated: _____

_____
☐ Judge ☐ Magistrate

CERTIFICATE OF MAILING

I hereby certify that on (date) _____, I mailed a true and correct copy of the PERMANENT ORDER, by placing it in the United States Mail, postage pre-paid to the parties at the addresses listed above.

Dated: _____

_____
Clerk of Court/ Deputy

INDEX TO
COLORADO RULES OF PROCEDURE
FOR SMALL CLAIMS COURTS

CHAPTER 27

The Colorado Rules of Probate Procedure

Adopted by the

SUPREME COURT OF COLORADO

July 31, 1975,

Effective August 1, 1975,

and as Repealed

and Reenacted March 27, 1981,

effective July 1, 1981

ANALYSIS BY RULE

CHAPTER 27

COLORADO RULES OF PROBATE PROCEDURE

Rule 1. Scope of Rules - How Known and Cited

(a) Procedure Governed. These rules shall govern the procedure in the probate court for the city and county of Denver and district courts when sitting in probate. In case of conflict between these rules and the Colorado Rules of Civil Procedure set forth in Chapter 1, or between these rules and any local rules of probate procedure, these rules shall control.

(b) How Known and Cited. These rules shall be known and cited as the Colorado Rules of Probate Procedure, or C.R.P.P.

Source: Entire rule amended and adopted December 5, 1996, effective January 1, 1997.

ANNOTATION

Law reviews. For article, "A Potpourri of Probate Practice Aids", see 11 Colo. Law. 1850 (1982). For article, "Will Contests — Some Procedural Aspects", see 15 Colo. Law. 787 (1986).

When magistrates act in probate matters. The powers of magistrates and appellate review of their orders are governed, in the first instance, by the Colorado Rules for Magistrates. When magistrates are acting in probate matters, their powers are additionally controlled by these rules. Estate of Jordan v. Estate of Jordan, 899 P.2d 350 (Colo. App. 1995).

Rule 2. Definitions

As used in these rules, unless the context otherwise requires:

1. "Documents" means any petition, or application, inventory, claim, accounting, notice or demand for notice, motion, and any other writing which is filed with the Court.

2. "Fiduciary" means any personal representative, guardian, conservator, trustee, and special administrator.

3. "Accounting" means any written statement that substantially conforms to JDF 942 for decedents' estates, JDF 885 for conservatorships and to the 1984 version of the Uniform Fiduciary Accounting Standards as recommended by the Committee on National Fiduciary Accounting Standards.

4. "Code" means the "Colorado Probate Code" sections 15-10-101 et seq., C.R.S., as amended.

Source: Entire rule amended and adopted June 25, 2003, effective July 1, 2003; entire rule amended and effective January 8, 2009.

Rule 3. Order of Business

For matters to be heard by the court, the order of business for the day shall be as follows:

1. Petitions and motions in probate matters, defaults, and other like ex parte matters, motions to show cause, and requests for other like rulings and orders.

2. Motions and other matters requiring supporting testimony, if they do not conflict with scheduled hearings or trials;

3. Hearings/trials requiring appearances of parties according to the calendar;

4. Non-appearance hearings according to the calendar;

5. The court shall establish a system for monitoring guardianships and conservatorships, including the filing and review of annual reports and plans and shall schedule such activities as resources permit.

Source: Entire rule amended and effective November 1, 2007.

Rule 4. Minute Orders

This Rule is intended to facilitate the work of the court and to provide the bar and the general public with prompt response to petitions and motions which require court orders. Any order, not required by the circumstances to contain recitals, findings of fact, or conclusions of law, may be evidenced by a concise memorandum or minute containing the caption of the proceeding, the date of the order, and a statement of the ultimate direction or conclusion of the court. Such order shall be signed by the judge forthwith and promptly delivered or mailed to the clerk of the court in the county in which the matter is pending. The judge may make the order and sign the memorandum or minute thereof at any place within the state and at any time.

Rule 5. Preparations of Proceedings

In proceedings under the Code, the Judicial Department (JDF) forms approved by the Supreme Court should be used where applicable. Any approved form produced by a word processor should, insofar as possible, substantially follow the format and content of the approved form, not include language which otherwise would be stricken, highlight in bold or capital letters or with an appropriate check mark all alternative clauses or choices which have been selected, underline all filled-in blanks, and contain a statement in a conspicuous place that the pleading conforms in substance to the current version of the approved form, citing the form's JDF form number and effective date. In all other proceedings, pleadings which are acceptable to the court may be used. Except as otherwise provided herein and in the Code, the form and presentation of pleadings, motions, and instructions shall be governed by the Colorado Rules of Civil Procedure. All other pleadings and papers to be filed in any matter shall be prepared and fastened as may be designated by rules adopted from time to time by the court.

Source: Entire rule amended November 16, 1989, effective January 1, 1990; entire rule amended and effective November 1, 2007.

Rule 6. Forms of Claim

Any claim filed with the court shall be in the JDF form approved by the Supreme Court.

Source: Entire rule amended and effective November 1, 2007.

Rule 7. Identification of Party and Attorney

All documents presented or filed shall bear the name, address, e-mail address and telephone number of the appearing party, and of the attorney, if any.

Source: Entire rule amended and effective November 1, 2007.

Rule 8. Process and Notice

The issuance, service, and proof of service of any process, notice, or order of court under the code shall be governed by the provisions of the code and these rules. When no provision of the code or these rules is applicable, the Colorado Rules of Civil Procedure shall govern. Except when otherwise ordered by the court in any specific case or when service is by publication, if notice of a hearing on any petition or other pleading is required, the petition or other pleading shall be served with the notice. When served by

publication, the notice shall briefly state the nature of the relief requested. The petition or other pleading need not be attached to or filed with the proof of service, waiver of notice, or waiver of service.

ANNOTATION

Law reviews. For article, "The Basics on Juveniles in Probate Court for Protective Proceedings", see 36 Colo. Law. 15 (February 2007).

Rule 8.1. Constitutional Adequacy of Notice

When statutory notice is deemed by the court to be constitutionally inadequate, the court shall provide by local rule or on a case-by-case basis for such notice as will meet constitutional requirements.

ANNOTATION

Law reviews. For article, "Notice and Due Process in Probate Revisited", see 14 Colo. Law. 29 (1985).

Rule 8.2. Waiver of Notice

Unless otherwise approved by the court, a waiver of notice shall identify the nature of the hearings or other matters, notice of which is waived.

Rule 8.3. Notice of Formal Proceedings Terminating Estates

The notice of hearing on a petition under Section 15-12-1001 or Section 15-12-1002, C.R.S., shall include statements: (1) that interested persons have the responsibility to protect their own rights and interests within the time and in the manner provided by the Colorado Probate Code, including the appropriateness of claims paid, the compensation of personal representatives, attorneys, and others, and the distribution of estate assets, since the court will not review or adjudicate these or other matters unless specifically requested to do so by an interested person; and (2) that if any interested person desires to object to any matter he shall file his specific written objections at or before the hearing and shall furnish the personal representative with a copy thereof.

ANNOTATION

Law reviews. For article, "A Potpourri of Probate Practice Aids", see 11 Colo. Law. 1850 (1982).

Personal representative's petition under rule to formally close the estate converted the informal proceeding into a formal one. As such, the court had authority to order a reduction in fees. In re Estate of Santarelli, 74 P.3d 523 (Colo. App. 2003).

Rule 8.4. Information Concerning Appointment — Contents and Filing

The information concerning appointment required by Section 15-12-705, C.R.S., shall state:

1. The date of death of the decedent.
2. Whether the decedent died intestate or testate.
3. If the decedent died testate, the dates of the will and any codicils thereto, the date of admission to probate, and whether probate was formal or informal.
4. The name, address, and date of appointment of the personal representative.
5. Whether bond has been filed.
6. Whether the administration is supervised, and, if administration is unsupervised,

that the court will consider ordering supervised administration if requested by an interested person.

7. That the information is being sent to persons who have or may have some interest in the estate being administered.

8. That papers relating to the estate, including the inventory of estate assets, are on file in the described court or, if not, may be obtained from the personal representative.

9. That interested persons are entitled to receive an accounting.

10. The surviving spouse, children under twenty-one years of age, and dependent children may be entitled to exempt property and a family allowance if a request for payment is made in the manner and within the time limits prescribed by Statutes (Section 15-11-401 et seq., C.R.S.).

11. The surviving spouse may have a right of election to take a portion of the augmented estate if a petition is filed within the time limits prescribed by Statute (Section 15-11-201 et seq., C.R.S.).

12. That interested persons have the responsibility to protect their own rights and interests within the time and in the manner provided by the Colorado Probate Code, including the appropriateness of claims paid, the compensation of personal representatives, attorneys, and others, and the distribution of estate assets, since the court will not review or adjudicate these or other matters unless specifically requested to do so by an interested person.

The personal representative shall promptly file with the court a copy of the information provided and a statement of when it was provided, to whom, and at what addresses.

Source: Entire rule repealed and readopted effective October 31, 1996.

Rule 8.5. Information Concerning Informal Probate — Contents and Filing

The information concerning informal probate required by Section 15-12-306, C.R.S., shall state the name and address of the moving party, the date of the death of the decedent, the date or dates of the will admitted to informal probate, the date of informal probate, that no personal representative has been appointed, and that interested persons wishing to object to the informal probate must act within the time and in the manner provided by the Colorado Probate Code.

The moving party shall promptly file with the court a copy of the information provided and a statement of when it was provided, to whom, and at what addresses, if mailed.

Rule 8.6. Trust Registration — Release, Amendment and Transfer

If the principal place of administration of a trust has been removed from this state, the court may release a trust from registration in this state upon petition and after notice to interested parties.

If the principal place of administration of a trust has changed within this state, the trustee may transfer the registration from one court to another within this state by filing in the court to which the registration is transferred an amended trust registration statement with attached thereto court certified copies of the original trust registration statement and of any amended trust registration statement prior to the current amendment, and by filing in the court from which the registration is being transferred a copy of the amended trust registration statement. The amended statement shall indicate that the trust was registered previously in another court of this state and that the registration is being transferred.

A trustee shall file with the court of registration an amended trust registration statement to advise the court of any change in the trusteeship, of any change in the principal place of administration, or of termination of the trust.

Rule 8.7. Demands for Notice

(a) Mailing by the Clerk. Upon receipt of a demand for notice with respect to a decedent's estate, the clerk shall mail a copy of the demand to the personal representative,

if one has been appointed. The clerk shall not be required to mail a copy of the demand to the personal representative if a certificate of service is filed with the demand stating that a copy of the demand has been mailed or delivered to the personal representative.

(b) Certificate of Service Requirement After Initial Filing. After a demand for notice is filed with respect to a decedent's estate, all filings and orders to which the demand relates shall be accompanied by a certificate of service stating that a copy of the filing or order has been mailed or delivered to the person making the demand and to the personal representative. The clerk or registrar may thereafter take any authorized action, including accepting and acting upon an application for informal appointment of personal representative. Advance notice shall be required only for actions or hearings for which advance notice would otherwise be required.

Source: Adopted and effective July 2, 1992.

Rule 8.8. Non-Appearance Hearings

(a) Unless otherwise required by statute, these Rules or order of court, matters that are routine and are expected to be unopposed may be set for a Non-Appearance Hearing. Such Non-Appearance Hearings shall be conducted as follows:

(1) Attendance at the hearing is not required or expected.

(2) Any interested person wishing to object to the requested action set forth in the motion or petition attached to the notice must file a specific written objection with the Court at or before the hearing, and shall furnish a copy of the objection to the person requesting the court order. Form JDF 722 in the Appendix to these Probate Rules may be used and shall be sufficient.

(3) If no objection is filed, the Court may take action on the motion or petition without further notice or hearing.

(4) If any objection is filed, the objecting party shall, within 14 days after filing the objection, set the objection for an Appearance Hearing.

(5) Failure to timely set the objection for an Appearance Hearing as required by section (4) of this rule shall result in the dismissal of the objection with prejudice without further hearing.

(b) The notice of a Non-Appearance Hearing, together with copies of the motion or petition and proposed order must be served on all interested persons no less than 14 days prior to the setting of the hearing and shall include a clear statement of the rules governing such hearings. Form JDF 712 or JDF 963 in the Appendix to these Probate Rules may be used and shall be sufficient. The authorization of this Form shall not prevent use of another Form consistent with this rule.

Source: Entire rule added March 17, 1994, effective July 1, 1994; (a)(2) amended June 7, 1994, effective July 1, 1994; entire rule amended and effective April 10, 2008; (a)(4) and (b) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b).

ANNOTATION

Law reviews. For article, "Rule 8.8 Non-Appearance Hearings in Probate Court", see 37 Colo. Law. 45 (January 2008).

Rule 9. Verification of Documents

Except as otherwise specifically provided in the Code, rule or as identified in the applicable JDF form each document filed with the court under the Code, including applications, petitions, and demands for notice, need not be verified.

Source: Entire rule amended and effective November 1, 2007.

Rule 10. Petitions Must Indicate Persons Under Legal Disability

If any person who has any interest in the subject matter of a petition is under the age of eighteen years, or otherwise under legal disability, or incapable of adequately representing his own interests, each petition, the hearing of which requires the issuance of notice, shall state such fact and the name, age, and residence of such minor or other person when known and the name of the guardian, conservator, or personal representative, if any has been appointed.

Rule 11. Correction of Errors

Minor clerical errors in documents filed with the court may be made the subject of written requests for correction in which case the judge or registrar may make such correction on the documents specified. Significant errors in documents filed with the court shall be corrected by presentation of an amended or supplemental document, or as otherwise directed by the judge or registrar.

Rule 12. Fiduciaries — Change of Address

Every fiduciary shall promptly notify the court of any change in his address or telephone number.

Rule 13. Attorney's Entry of Appearance

An attorney desiring to enter his appearance in any proceeding, other than the attorney appearing on behalf of a party in the first instance, shall file a written entry of appearance or on oral request obtain an order recognizing his appearance. The attorney's name, address, registration number, and telephone number shall be in the written entry of appearance.

Rule 14. Attorney's Withdrawal

(a) Before the court. An attorney desiring to withdraw from a matter before the court shall obtain an order authorizing his withdrawal after due notice to his client or the filing of the client's written consent. Notice of the order authorizing withdrawal shall be sent by the withdrawing attorney to all other counsel of record, persons demanding such notice by document of record, and such other persons as the court may direct.

(b) Before the registrar. An attorney desiring to withdraw from a matter before the registrar shall file his withdrawal after due notice to his client or the filing of the client's written consent. Notice of the withdrawal shall be sent by the withdrawing attorney to all other counsel of record and any person demanding such notice by document of record.

Rule 15. Guardians Ad Litem

The court may appoint a guardian ad litem only in conformity with section 15-10-403(5), 15-14-115 or 15-18-108(2)(a), C.R.S. For appointments pursuant to 15-10-403(5) and 15-14-115, C.R.S., the court must state on the record its reasons for the appointment. In cases of uncontested probate of wills, no guardian ad litem shall be appointed for a minor, incapacitated or protected person who takes as much or more under the will than by intestacy.

Source: Entire rule amended and effective March 26, 2009.

Rule 16. Guardians or Conservators — Settlement of Personal Injury Claims

Entire rule repealed effective November 16, 1995.

Editor's note: Rule 16 concerning settlement of personal injury claims by guardians or conservators was repealed, effective November 16, 1995, by a new rule 16 concerning court approvable of settlement of claims of persons under disability.

Rule 16. Court Approval of Settlement of Claims of Persons Under Disability

(a) Where a guardian, conservator, or next friend seeks court approval of settlement of a ward's claim, such approval shall be sought by way of a petition for approval of proposed settlement. For purposes of this Rule, the term "ward" includes a protected person, an incapacitated person, or a person under disability.

(b) The petition shall request the approval of the proposed settlement as being in the ward's best interests and shall include the following information or an explanation of why the information is not applicable:

(1) Facts.

A. The ward's name and address;

B. The ward's date of birth;

C. The name(s) and address(es) of the ward's parent(s) if the ward is a minor;

D. The name(s), address(es) and description(s) of type of the ward's custodian or court appointed fiduciary, if any; and

E. The date and a brief description of the nature of the event or transaction giving rise to the claim.

(2) Liability.

A. The name and address of each party who is or may be liable for the ward's claim;

B. The basis for the ward's claim of liability;

C. The defenses, if any, to the ward's claim; and

D. The name and address of each insurance company involved in the claim, the type of policy, who was insured under the policy, and its limits.

(3) Damages.

A. The nature of the ward's claim;

B. The nature of the injuries, if any, sustained by the ward;

C. The amount of time, if any, missed by the ward from school or employment;

D. A summary of the expenses, if any, incurred for medical or other care provider services as a result of the ward's injuries;

E. A summary of income from work lost by the ward, if any, as a result of the ward's injuries;

F. The nature of the damage, if any, to the ward's property;

G. A summary of the expenses, if any, incurred as a result of any property damage to the ward's property; and

H. The identification of the source of funds for payment of any of the ward's expenses and a summary of what expenses have been paid and will be paid by each particular source.

(4) Medical Status.

A. The nature and extent of the ward's injuries and the ward's present condition;

B. The nature, extent, and duration of the treatment required or anticipated as a result of the ward's injuries;

C. The prognosis of the ward's condition, including, when applicable, the nature and extent of any disability, disfigurement, or impairment; and

D. A written statement by the ward's physician or other health care provider shall be attached setting forth the information requested by A, B, and C above.

(5) Status of Claims.

A. For this claim and any other claim that is relevant to the event or transaction giving rise to the claim, the status of the claim and, if any civil action(s) have been filed, the court, case number, and parties; and

B. For this claim and any other claim that is relevant to the event or transaction giving rise to the claim, the name and address of any party having a subrogation right and any governmental agency paying or planning to pay benefits to the ward.

(6) Proposed Settlement and Proposed Disposition of Settlement Proceeds.

A. The name and address of the person(s) making and receiving payment under the proposed settlement;

B. The amount of the settlement, terms of payment, and proposed disposition;

C. If a structured settlement, in whole or in part, the type of arrangement (e.g., annuity or insurance policy), the name of the annuity or insurance company, the rating of the annuity or insurance company, and the present cash value and cost of the annuity or insurance;

D. The amount of court costs, legal expenses, and attorneys' fees (attach a copy of attorney fee agreement and billings) incurred as a result of the transaction or event giving rise to the ward's claim; and

E. Whether there is a need for continuing court supervision, the appointment of a fiduciary, or the continuation of an existing fiduciary appointment.

(7) Attachments.

A. The petition shall list each of the attachments to the petition; and

B. A copy of the proposed settlement agreement and proposed release shall be attached to the petition.

(c) Notice. Notice of the hearing on a petition to settle a claim on behalf of persons under disability shall be given in accordance with C.R.S. § 15-14-405. See also C.R.S. § 15-14-406 and C.R.P.P. 8.1.

Source: Entire rule repealed November 16, 1995; entire rule adopted and effective November 16, 1995.

ANNOTATION

Law reviews. For article, "Personal Injury Settlements With Minors", see 21 Colo. Law. 1167 (1992). For article, "Personal Injury and Workers' Compensation Settlements for Incapacitated Persons: Part I", see 30 Colo. Law. 43 (January 2001). For article, "Personal Injury and Workers' Compensation Settlements for Incapacitated Persons: Part II", see 30 Colo. Law. 56 (February 2001). For article, "Issues for the Elderly and Disabled Client—Part II: Estate and Health Care Planning", see 30 Colo. Law. 5 (March 2001). For article "Court Approval of the Settlement of Claims of Persons Under Disability", see 35 Colo. Law. 97 (August 2006).

Rule 17. Heirs and Devisees — Unknown, Missing, or Nonexistent — Notice to Attorney General

In a decedent's estate, whenever it appears that there is an unknown heir or devisee, or that the address of any heir or devisee is unknown, or that there is no person qualified to receive a devise or distributive share from the estate, the personal representative shall promptly notify the attorney general. Thereafter, the attorney general shall be given the same information and notice required to be given to persons qualified to receive a devise or distributive share. When making any payment to the state treasurer of any devise or distributive share, the personal representative shall include a certified copy of the court order obtained under section 15-12-914, C.R.S.

Rule 18. Foreign Personal Representatives and Conservatives and Conservators

(a) Estates of Decedents

(1) After the death of a nonresident decedent, copies of the documents evidencing appointment of a domiciliary foreign personal representative may be filed as provided in Section 15-13-204 C.R.S. Such documents must have been certified, exemplified or authenticated by the appointing foreign court not more than sixty days prior to filing with a Colorado court, and shall include copies of all of the following that may have been issued by the foreign court

A. The order appointing the domiciliary foreign personal representative, and

B. The letters or other documents evidencing or affecting the domiciliary foreign personal representative's authority to act.

(2) Upon filing such documents and a sworn statement by the domiciliary foreign personal representative stating that no administration, or application or petition for administration, is pending in Colorado, the court shall issue its Certificate of Ancillary Filing, substantially conforming in form and content to JDF 930.

(b) Conservatorships

(1) After the appointment of a conservator for a person who is not a resident of this state, copies of documents evidencing the appointment of such foreign conservator may be filed as provided in Section 15-14-433 C.R.S. Such documents must have been certified, exemplified or authenticated by the appointing foreign court not more than sixty days prior to filing with a Colorado court, and shall include copies of all of the following:

A. The order appointing the foreign conservator,

B. The letters or other documents evidencing or affecting the foreign conservator's authority to act, and

C. Any bond of foreign conservator.

(2) Upon filing such documents and a sworn statement by the foreign conservator stating that a conservator has not been appointed in this state and that no petition in a protective proceeding is pending in this state concerning the person for whom the foreign conservator was appointed, the court shall issue its Certificate of Ancillary Filing, substantially conforming in form and content to JDF 892.

Source: Entire rule added and effective January 11, 2007; (a)(2), (b)(1)C., and (b)(2) amended and effective November 1, 2007.

Rule 19. Registry of Court — Payments and Withdrawals

Payment into and withdrawals from the registry of the court shall be made only upon order of court.

Rule 20. Security of Files

For good cause shown, the court may order a file to be placed under security, in which event the clerk of the court shall maintain it in an appropriate security file. Files kept under security may be examined only by counsel of record unless otherwise ordered by the court.

Rule 21. Withdrawal of Documents and Exhibits

Except as provided in Rule 22 of these rules for deposited wills, the documents and exhibits filed with the court shall not be withdrawn without order of the court. As a condition of withdrawal, the court may require a true copy of the withdrawn document to be retained in the court file.

Rule 22. Wills — Deposit for Safekeeping and Withdrawals

A will of a living person tendered to the court for safekeeping in accordance with Section 15-11-515, C.R.S., shall be placed in a "Deposited Will File", and a certificate of deposit issued. In the testator's lifetime, the deposited will may be withdrawn only in strict accordance with the statute. After the testator's death, a deposited will shall be transferred to the "Lodged Will File".

Source: Entire rule amended and effective November 16, 1995.

Rule 23. Wills — Venue — Transfer to Other Jurisdiction

Upon a showing by petition that proper venue is in a county other than that of the court in which a will of a decedent is lodged, the court may order the will transferred to the proper district or probate court within this state, or to the proper court of probate without this state. If the requested transfer is to a court within this state, no notice need be given; if the requested transfer is to a court without this state, notice shall be given to the person nominated as personal representative and such other persons as the court may direct. No

fee shall be charged for this action, but the petitioner shall advance the cost of photocopying the will for the court file, and the cost of sending the original will by certified mail, or its equivalent, to the proper court.

Source: Entire rule amended and adopted December 12, 2002, effective January 1, 2003.

Rule 24. Oral Agreements

No oral agreements of counsel of parties concerning the progress, management, or disposition of any matter pending in the court shall be enforced unless made in open court and approved by the court.

Rule 25. Jury Trial — Demand and Waiver

If a jury trial is authorized by law, any demand therefor shall be filed with the court, and the appropriate fee paid, before the matter is first set for trial. Failure to make such a demand constitutes a waiver of trial by jury.

ANNOTATION

Law reviews. For article, "Will Contests — Some Procedural Aspects", see 15 Colo. Law. 787 (1986).

Rule 25.1. Informal Probate — Separate Writings

The existence of one or more separate written statements disposing of tangible personal property under the provisions of Section 15-11-513, C.R.S., shall not cause informal probate to be declined under the provisions of Section 15-12-304, C.R.S.

ANNOTATION

Law reviews. For article, "A Potpourri of Probate Practice Aids", see 11 Colo. Law. 1850 (1982).

Rule 25.2. Proof of Will in Formal Testacy — Uncontested Case

If a petition in a formal testacy proceeding is unopposed and the conditions of Section 15-12-409, C.R.S., have been met, the court may order probate or intestacy on the basis of the pleadings. If the court requires additional proof of the matters necessary to support the order sought, it shall state on the record its reasons therefor.

Rule 26. Fiduciaries — Appointment of Nonresident — Power of Attorney

The court or registrar may appoint as fiduciary any person, resident or nonresident of this state, who is qualified to act under the code. When appointment is made of a nonresident, the person appointed shall file an irrevocable power of attorney designating the clerk of the court, and his successors in office, as the person upon whom all notices and process issued by a court or tribunal in the state of Colorado may be served, with like effect as personal service on such fiduciary, in relation to any suit, matter, cause, hearing, or thing, affecting or pertaining to the estate, trust, or guardianship proceeding, in regard to which the fiduciary was appointed. The power of attorney required by the provisions of this Rule shall set forth the address of the nonresident fiduciary, and such fiduciary shall promptly notify the court in writing of any change of such address. It shall be the duty of the clerk to forward forthwith, by registered or certified mail, any notice or process served upon him by reason thereof, to the fiduciary named therein at the address mentioned in

such power of attorney or subsequently furnished to the clerk in writing. The clerk shall make and file a certificate that he has performed the acts required by this Rule and he shall include the dates of his compliance. Service on a nonresident fiduciary, under this Rule, shall be deemed complete ten days after the mailing thereof. The clerk may require the person issuing or serving such notice or process to furnish sufficient copies thereof to have available one copy for the fiduciary and one to be retained by the clerk; and the person desiring service shall advance the costs and mailing expenses of the clerk.

Note: See Sections 15-12-603 through 15-12-606, 15-14-411, and 15-14-412, C.R.S., and Rule 65.1, C.R.C.P., with reference to any requirements for bonds and sureties.

ANNOTATION

Law reviews. For article, "Choosing a Fiduciary", see 15 Colo. Law. 203 (1986).

Rule 27. Appointment of Special Administrator or Special or Temporary Conservator

Repealed effective November 16, 1995.

Rule 27.1. Physicians' Letters or Professional Evaluation

Any physician's letter or professional evaluation utilized as the evidentiary basis to support a petition for the appointment of a guardian, conservator or other protective order under Section 15-14-401 et seq., C.R.S., unless otherwise directed by the court, should contain: (1) a description of the nature, type, and extent of the respondent's specific cognitive and functional limitations, if any; (2) an evaluation of the respondent's mental and physcal condition and, if appropriate, educational potential, adaptive behavior, and social skills; (3) a prognosis for improvement and recommendation as to the appropriate treatment or habilitation plan; and (4) the date of any assessment or examination upon which the report is based.

Source: Entire rule amended and adopted June 27, 2002, effective July 1, 2002.

Rule 28. Inventory with Financial Plan — Conservatorships — Date Due — Contents — Oath or Affirmation

Unless the deadline for filing is extended in a written order for good cause shown, within 60 days after the Order Appointing Conservator is entered by the court, each Conservator shall file with the Court and serve on every interested person an Inventory with Financial Plan. Each Inventory with Financial Plan shall include a list and value of all assets in which the protected person has an interest and shall identify all projected income and expenses of the protected person. Inventories with Financial Plans prepared by Conservators shall include their oath or affirmation that it is complete and accurate so far as they are informed on the date of filing. In the event that the assets, their value, the income or the expenses change in any material way, an Amended Inventory with Financial Plan must be promptly filed with the Court and served on all interested persons. Any Inventory with Financial Plan and any Amended Inventory with Financial Plan filed with the Court shall be deemed to include a Petition for Approval thereof and may be acted on by the Court with or without the filing of a separate Petition requesting that the Court review and accept or approve the Inventory with Financial Plan.

Note: See Sections 15-12-706 through 15-12-708 and 15-14-418, C.R.S.

Source: Entire rule amended and effective April 10, 2008.

Rule 29. Bond and Surety

(a) No bond shall be required of a fiduciary unless the statute or the court requires the filing of a secured bond. If a secured bond is required by statute, but the court waives surety or the registrar excuses bond, no bond shall be required.

(b) Any required bond shall be filed, or other arrangements for security under the statute completed, before letters are issued. Thereafter, the fiduciary shall increase the amount of bond or other security when the fiduciary receives personal property not previously covered by any bond or other security.

Note: For reduction of bond, see Section 15-12-604, C.R.S.

Rule 30. Decedents' Estates — Supervised Administration Scope of Supervision — Inventory and Accounting

In directing the activities of a supervised personal representative of a decedent's estate, the court shall order only as much supervision as in its judgment is necessary, after considering the reasons for the request for supervised administration, or circumstances thereafter arising. If supervised administration is ordered, the personal representative shall file with the court an inventory, annual interim accountings, and a final accounting, unless otherwise ordered by the court.

Rule 30.1. Conservatorship — Closing

Unless otherwise ordered by the Court, a Petition to Terminate Conservatorship and Schedule of Distribution (JDF 888) shall be accompanied by a final Conservator's Report (JDF 885). The protected person or minor, if then living, and all other interested persons, as defined by law or by the Court pursuant to §15-10-201(27), C.R.S. if any, shall be given notice of the hearing on the petition, which may be held pursuant to Rule 8.8.

Source: Entire rule amended and adopted February 24, 1999, effective July 1, 1999; corrected and effective May 3, 1999; entire rule amended and adopted June 25, 2003, effective July 1, 2003; entire rule amended and effective April 10, 2008.

Rule 31. Accountings

A fiduciary accounting shall contain sufficient information to put interested persons on notice as to all significant transactions affecting administration during the accounting period.

(a) All required accountings shall show with reasonable detail the receipts and disbursements for the period covered by the accounting, shall list the assets remaining at the end of the period, and shall describe all other significant transactions affecting administration during the accounting period. Accountings shall be typed or prepared by automated data processing. In any specific case, for good cause shown, the Court may require the fiduciary to produce such vouchers or other supporting evidence of payment as the court may deem sufficient.

(b) Accountings that substantially conform to JDF 942 for decedents' estates, JDF 885 for conservatorships and to the 1984 version of the Uniform Fiduciary Accounting Standards as recommended by the Committee on National Fiduciary Accounting Standards shall be considered acceptable as to both content and format for purposes of this rule.

Source: Entire rule repealed and reenacted November 10, 1988, effective March 1, 1989; entire rule amended and adopted June 25, 2003, effective July 1, 2003; entire rule amended and effective January 8, 2009.

Rule 31.1. Conservator's Report (Minors and Adults)

A Conservator's Report shall contain sufficient information to put the interested persons on notice as to all significant transactions affecting administration during the accounting/

reporting period. Conservator's Reports that substantially conform to JDF 885 shall be considered acceptable as to both content and format for purposes of this Rule.

(a) A Conservator's Report filed shall show with reasonable detail the receipts and disbursements for the period covered in the report, shall list the assets remaining at the end of the period, and shall describe all other significant transactions affecting administration during the reporting period. In any specific case, for good cause shown, the court may require the fiduciary to produce such invoices, billing statements, or other supporting evidence as the Court requires.

(b) A Conservator shall keep records of the administration of the estate and make them available for examination on reasonable request of an interested person.

(c) If the Court appoints a suitable person pursuant to §15-14-420(3), C.R.S. to investigate, review, and audit such accountings/reports, such costs may be the responsibility of the estate, or as ordered by the Court.

(d) Interested persons may file a pleading objecting to the appropriateness of disbursements, the compensation of fiduciaries, attorneys, and others and the distribution of estate assets.

Source: Entire rule added and effective April 10, 2008.

Rule 31.2. Guardian's Report (Minors and Adults)

A Guardian's Report (JDF 834 or JDF 850) shall contain sufficient information to put the interested persons on notice as to all significant information regarding the welfare and care of the protected person during the reporting period.

Source: Entire rule added and effective April 10, 2008.

Rule 32. Reports — Multiple Minors or Beneficiaries

When the same person is conservator or guardian of two or more related minors he/she shall file a separate report for each minor or, with court approval, he/she may file a combined report which shows the interest of each minor in the receipts, disbursements, and other transactions reported therein and the amount of money or other property held for each. This Rule shall also apply to a trustee of a court-supervised trust for two or more beneficiaries unless the trust provides otherwise.

Source: Entire rule amended and effective April 10, 2008.

Rule 33. Objections to Accounting, Final Settlement, Distribution or Discharge — Scope of Court Review in Absence of Objection

If any interested person desires to object to any accounting, to the final settlement or distribution of an estate, or to the discharge of a fiduciary, or to any other matter, he shall file his specific written objections at or before the hearing thereon, and shall furnish the fiduciary with a copy of the objections.

In formal proceedings to terminate decedents' estates, the court shall not inquire into the appropriateness of payments of claims against the estate or expenses of administration, provided notice has been given in accordance with Rule 8.3 and absent timely objection filed by an interested person. The court may review such matters as it determines necessary, on a case-by-case basis and for good cause shown.

Rule 33.1. Compensation of Personal Representatives and Attorneys

Personal representatives and attorneys representing an estate are entitled to reasonable compensation. In setting attorneys' fees, the time expended by personnel performing paralegal functions under the direction and supervision of the attorney may be considered as an item separate from and in addition to the time spent by the attorney. In setting other fees, the time expended by personnel performing paraprofessional functions may be considered as a separate item.

In the absence of unusual circumstances, the court may review such fees in decedents' estates only (1) upon petition or motion of an interested person or (2), in the case of formal proceedings terminating estates, if notice has not been given in accordance with Rule 8.3. If the court on its own motion in a decedent's estate orders a review of personal representatives' fees or attorneys' fees, such order shall state the unusual circumstances which make such a review advisable.

ANNOTATION

Probate court is permitted in "unusual circumstances" to sua sponte inquire about the propriety of personal representative and attorney fees under a plain reading of this rule. In re Estate of Santarelli, 74 P.3d 523 (Colo. App. 2003).

"Unusual circumstances" exist when, on their face, fee charges do not appear to comply with statutory criteria for determining fees. In re Estate of Santarelli, 74 P.3d 523 (Colo. App. 2003).

Rule 33.2. Informal Closings

In unsupervised administration proceedings, a personal representative may close an estate by verified statement. In any specific case, the court may prohibit such a closing only for good cause shown.

Rule 33.3. Court Order Supporting Deed of Distribution

When a court order is requested to vest title in a distributee free from the rights of other persons interested in the estate, such order shall not be granted ex parte, but shall require either the stipulation of all interested persons or notice and hearing.

Note on Use: Note that Colorado Bar Association Real Estate Title Standard 11.1.7 requires a court order only in the narrow case of vesting title in a distributee free from the rights of all other persons interested in the estate to recover the property in case of any improper distribution. Such a court order is not required to vest merchantable title in a purchaser for value from or a lender to such a distributee nor is the order required to vest merchantable title in a purchaser for value from or a lender to a transferee from such distributee.

Source: Entire rule amended and adopted June 27, 2002, effective July 1, 2002.

Rule 34. Delegation of Powers to Clerk and Deputy Clerk

(a) In addition to duties and powers exercised as registrar in informal proceedings, the court by written order may delegate to the clerk or deputy clerk any one or more of the following duties, powers and authorities to be exercised under the supervision of the court:

(1) To appoint fiduciaries and to issue letters, if there is no written objection to the appointment or issuance on file;

(2) To set a date for hearing on any matter and to vacate any such setting;

(3) To issue dedimus to take testimony of a witness to a will;

(4) To approve the bond of a fiduciary;

(5) To appoint a guardian ad litem, subject to the provisions of law and Rule 15 herein;

(6) To certify copies of documents filed in the court;

(7) To order a deposited will lodged in the records and to notify the named personal representative;

(8) To enter an order for service by mailing or by publication where such order is authorized by law or by the Colorado Rules of Civil Procedure;

(9) To correct any clerical error in documents filed in the court;

(10) To appoint a special administrator in connection with the claim of a fiduciary;

(11) To order a will transferred to another jurisdiction pursuant to Rule 23 herein;

(12) To admit wills to formal probate and to determine heirship, if there is no objection to such admission or determination by any interested person;

(13) To enter estate closing orders in formal proceedings, if there is no objection to

entry of such order by any interested person;

(14) To issue a citation to appear to be examined regarding assets alleged to be concealed, etc., pursuant to Section 15-12-723, C.R.S.;

(15) To order an estate reopened for subsequent administration pursuant to Section 15-12-1008, C.R.S.;

(16) To enter similar orders upon the stipulation of all interested persons.

(b) All orders made and proceedings had by the clerk or deputy clerk under this rule shall be made of permanent record as provided for acts of the court done by the judge.

(c) Any person in interest affected by an order entered or action taken under the authority of this rule may have the matter heard by the judge by filing a motion for such hearing within fifteen days after the entering of the order or the taking of the action. Upon the filing of such a motion, the order or action in question shall be vacated and the motion placed on the calendar of the court for as early a hearing as possible, and the matter shall then be heard by the judge. The judge may, within the same fifteen-day period referred to above, vacate the order or action on the court's own motion. If a motion for hearing by the judge is not filed within the fifteen-day period, or the order or action is not vacated by the judge on the court's own motion within such period, the order or action of the clerk or deputy clerk shall be final as of its date subject to normal rights of appeal. The acts, records, orders, and judgments of the clerk or deputy clerk not vacated pursuant to the foregoing provision shall have the same force, validity, and effect as if made by the judge.

Source: (c) amended and adopted December 5, 1996, effective January 1, 1997.

ANNOTATION

Law reviews. For article, "A Potpourri of Probate Practice Aids", see 11 Colo. Law. 1850 (1982).

Determination of the sequence of death is not a power that may be delegated under this rule. Estate of Jordan v. Estate of Jordan, 899 P.2d 350 (Colo. App. 1995).

Determination of the intent of a decedent is not a power that may be exercised under this rule. In re Estate of Hillebrandt, 979 P.2d 36 (Colo. App. 1999).

Rule 35. Rules of Court

(a) Local rules. Courts may make rules for the conduct of probate proceedings not inconsistent with these rules. Copies of all such rules shall be submitted to the Supreme Court for its approval before adoption, and, upon their promulgation, a copy shall be furnished to the office of the state court administrator to the end that all rules made as provided herein may be published promptly and that copies may be available to the public.

(b) Procedure not otherwise specified. If no procedure is specifically prescribed by rule or statute, the court may proceed in any lawful manner not inconsistent with these rules of probate procedure and the Colorado Probate Code and shall look to the Colorado Rules of Civil Procedure and to the applicable law if no rule of probate procedure exists.

ANNOTATION

Law reviews. For article, "Will Contests — Some Procedural Aspects", see 15 Colo. Law. 787 (1986).

Rule 36. Title and Citation

Repealed December 5, 1996, effective January 1, 1997.

APPENDIX A TO CHAPTER 27

The Colorado Rules of Probate Procedure

APPENDIX A TO CHAPTER 27

COLORADO PROBATE CODE FORMS

(Forms in this Appendix are available from the Colorado courts web page at http://www.courts.state.co.us/Forms/Index.cfm .)

ORDER

WHEREAS, the Colorado Supreme Court Committee on Uniform Probate Forms has revised the forms for use in probate matters, necessitated by Amendments to the Colorado Probate Code and by the repeal and reenactment of the Colorado Rules of Probate Procedure, effective July 1, 1981 and as revised in 2007 pursuant to recommendations of the Protective Proceedings Task Force.

WHEREAS, the Court has considered the revised forms prepared by the said Committee;

NOW, THEREFORE, IT IS ORDERED that the forms hereinafter set forth are approved in principle by this Court for the use in probate matters in the State of Colorado, subject to the following:

These forms are intended as guidelines and should be used in cases where they are applicable. The Court does not specifically approve any of the forms since they have not been tested in an adversary proceeding. They are not intended to be an exhaustive or complete set of forms for use in any particular case and additional or different forms may be required depending on the issues of fact and law presented in a particular proceeding.

Except where otherwise indicated, each form shown in this chapter should have a caption similar to the samples shown below. Each caption shall contain a document name and party designation that may vary depending on the type of form being used. See the applicable form shown below to determine the correct title and party designation for that particular form. Documents initiated by a party shall use a form of caption shown in sample caption A. Orders, Letters, and other documents issued by the court under the signature of the clerk or judge should omit the attorney section as shown in sample caption B.

An addendum should be used for identifying additional parties or attorneys when the space provided on a pre-printed or computer-generated form is not adequate.

Forms of captions are to be consistent with Rule 10, C.R.C.P.

Sample Caption A for documents initiated by a party

☐ District Court ☐ Denver Probate Court _____ County, Colorado Court Address:	
IN THE MATTER OF THE ESTATE OF: *[Substitute appropriate party designations & names]* **Deceased**	
Attorney or Party Without Party (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	▲ COURT USE ONLY ▲ Case Number: Division: Courtroom:
NAME OF DOCUMENT	

Sample Caption B for documents issued by the court under the signature of the clerk or judge

☐ District Court ☐ Denver Probate Court _____ County, Colorado Court Address:	
IN THE MATTER OF THE ESTATE OF: *[Substitute appropriate party designations & names]* **Deceased**	▲ COURT USE ONLY ▲ Case Number: Division: Courtroom:
NAME OF DOCUMENT	

JDF 824	Petition for Appointment of Guardian for Minor (Replaces CPC 34)
JDF 825	Consent of Parent (Replaces CPC 34-CP)
JDF 826	Consent or Nomination of Minor (Replaces CPC 34-NC)
JDF 827	Order Appointing Guardian for Minor (Replaces CPC 35)
JDF 828	Order Appointing Temporary Guardian for Minor
JDF 829	Order Appointing Emergency Guardian for Minor
JDF 830	Letters of Guardianship - Minor
JDF 834	Guardian's Report - Minor (Replaces CPC 32-GRM)
JDF 835	Petition for Termination of Guardianship - Minor
JDF 836	Order for Termination of Guardianship - Ward/Minor
JDF 841	Petition for Appointment of Guardian for Adult (Replaces CPC 32)
JDF 843	Order Appointing Emergency Guardian for Adult (Replaces CPC 33-E)
JDF 844	Notice of Appointment of Emergency Guardian and Notice of Right to Hearing (Replaces CPC 2-ERA)
JDF 846	Order Appointing Temporary Substitute Guardian for Adult
JDF 848	Order Appointing Guardian for Adult (Replaces CPC 33)
JDF 849	Letters of Guardianship - Adult
JDF 850	Guardian's Report - Adult (Replaces CPC 32-GR)
JDF 852	Petition for Termination of Guardianship - Adult
JDF 853	Notice of Death
JDF 854	Order for Termination of Guardianship - Adult
JDF 855	Petition for Modification of Guardianship - Adult or Minor
JDF 856	Order for Modification of Guardianship - Adult or Minor
JDF 857	Petition for Appointment of Co-Guardian or Successor Guardian
JDF 858	Order Appointing Co-Guardian or Successor Guardian
JDF 861	Petition for Appointment of Conservator for Minor (Replaces CPC 29)
JDF 862	Order Appointing Conservator for Minor (Replaces CPC 30-M)
JDF 863	Letters of Conservatorship - Minor
JDF 866	Order for Deposit of Funds to Restricted Account (Replaces CPC 55)
JDF 867	Acknowledgment of Deposit of Funds to Restricted Account
JDF 868	Motion to Withdraw Funds from Restricted Account
JDF 869	Order Allowing Withdrawal of Funds from Restricted Account
JDF 876	Petition for Appointment of Conservator for Adult (Replaces CPC 29)
JDF 877	Order Appointing Special Conservator - Adult or Minor (Replaces CPC 30-SC)
JDF 878	Order Appointing Conservator for Adult (Replaces CPC 30-A)
JDF 879	Petition for Appointment of Co-Conservator or Successor Conservator
JDF 880	Letters of Conservatorship - Adult
JDF 882	Conservator's Inventory with Financial Plan and Motion for Approval (Replaces CPC 20 and CPC 29-FP)
JDF 883	Order Regarding Conservator's Financial Plan
JDF 884	Order Appointing Co-Conservator or Successor Conservator
JDF 885	Conservator's Report (Replaces CPC 29-CR)
JDF 888	Petition for Termination of Conservatorship - Adult or Minor (Replaces CPC 49)
JDF 889	Waiver of Hearing, Waiver of Final Conservator's Report, Waiver of Audit, and Approval of Schedule of Distribution (Replaces CPC 52)
JDF 890	Order Terminating Conservatorship (Replaces CPC 51)
JDF 891	Foreign Conservator's Sworn Statement (Replaces CPC 60-C)
JDF 892	Certificate of Ancillary Filing - Conservatorship (Replaces CPC 61-C)
JDF 902	Demand for Notice of Filings or Orders (Replaces CPC 1)

JDF 903	Withdrawal of Demand for Notice of Filings or Orders (Replaces CPC 1-A)
JDF 910	Application for Informal Probate of Will and Informal Appointment of Personal Representative (Replaces CPC 11)
JDF 911	Acceptance of Appointment (Replaces CPC 18)
JDF 912	Renunciation and/or Nomination of Personal Representative (Replaces CPC 17-A)
JDF 913	Order for Informal Probate of Will and Informal Appointment of Personal Representative (Replaces CPC 12-T)
JDF 915	Letters Testamentary/of Administration (Replaces CPC 17)
JDF 916	Application for Informal Appointment of Personal Representative (Replaces CPC 13-A)
JDF 917	Order for Informal Appointment of Personal Representative (Replaces CPC 12-I)
JDF 920	Petition for Formal Probate of Will and Formal Appointment of Personal Representative (Replaces CPC 9)
JDF 921	Order Admitting Will to Formal Probate and Formal Appointment of Personal Representative (Replaces CPC 10)
JDF 922	Petition for Adjudication of Intestacy and Formal Appointment of Personal Representative (Replaces CPC 13-P)
JDF 923	Order of Intestacy, Determination of Heirs and Formal Appointment of Personal Representative (Replaces CPC 14)
JDF 924	Application for Informal Appointment of Special Administrator (Replaces CPC 15-A)
JDF 925	Order for Informal Appointment of Special Administrator (Replaces CPC 16-A)
JDF 926	Petition for Formal Appointment of Special Administrator (Replaces CPC 15-P)
JDF 927	Order for Formal Appointment of Special Administrator (Replaces CPC 16-P)
JDF 928	Letters of Special Administration
JDF 929	Domiciliary Foreign Personal Representative's Sworn Statement (Replaces CPC 60)
JDF 930	Certificate of Ancillary Filing - Decedent's Estate (Replaces CPC 61)
JDF 940	Information of Appointment (Replaces CPC 42)
JDF 941	Decedent's Estate Inventory (Replaces CPC 20)
JDF 942	Interim/Final Accounting (Replaces CPC 43)
JDF 943	Notice to Creditors by Publication (Replaces CPC 21-A)
JDF 944	Notice to Creditors by Mail or Delivery (Replaces CPC 21-B)
JDF 945	Notice of Disallowance of Claims (Replaces CPC 23)
JDF 946	Petition for Allowance of Claims (Replaces CPC 39-C & CPC 39-PR)
JDF 948	Petition for the Determination of Heirs or Devisees or Both, and of Interests in Property (Replaces CPC 56)
JDF 949	Notice of Hearing to Interested Persons and Owners by Inheritance (Replaces CPC 57-A)
JDF 950	Notice of Hearing by Publication (Replaces CPC 57-B)
JDF 951	Application for Informal Appointment of Successor Personal Representative
JDF 960	Petition for Final Settlement (Replaces CPC 24, CPC 24/25-S & CPC 25H)
JDF 962	Notice of Hearing on Petition for Final Settlement (Replaces CPC 24-N)
JDF 963	Notice of Non-Appearance Hearing on Petition for Final Settlement (Replaces CPC 24-NA)
JDF 964	Order for Final Settlement (Replaces CPC 25)
JDF 965	Statement of Personal Representative Closing Administration (Replaces CPC 27)
JDF 966	Statement of Personal Representative Closing Small Estate (Replaces CPC 28)
JDF 967	Verified Application for Certificate from Registrar (Replaces CPC 28-A)
JDF 968	Certificate of Registrar (Replaces CPC 28-C)
JDF 970	Response to Notice and Order Closing Estate After Three Years

JDF 971	Notice and Order Closing Estate After Three Years or More (Replaces CPC 48-B)
JDF 990	Petition to Re-Open Estate (Replaces CPC 58)
JDF 991	Order Re-Opening Estate (Replaces CPC 59)
JDF 999	Collection of Personal Property by Affidavit (Replaces CPC 40)

☐District Court ☐Denver Probate Court _____ County, Colorado Court Address: **In the Matter of the Estate of:** **Deceased**	**COURT USE ONLY**
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom

PETITION FOR TRANSFER OF LODGED WILL PURSUANT TO §15-11-516(2), C.R.S.
All wills and all codicils are referred to as the will.

The Petitioner makes the following statements:

1. Petitioner _____ (full name) is an interested person.
2. The original of an instrument purporting to be the decedent's last will has been lodged with this Court on _____ (date).
3. Venue is not proper in this Court.
4. The decedent died on _____ (date).

The Petitioner requests that the will be transferred to the following Court for the following reason(s):

Name of Court: _____ State: _____

Mailing Address: _____

- ☐ The decedent's domicile or residence was located within the jurisdiction of the Court identified above.
- ☐ The decedent's domicile or residence is not known and property of the decedent was located within the jurisdiction of the Court identified above.
- ☐ Other: _____

_____ Signature of Attorney for Petitioner Date

_____ Signature of Petitioner Date

_____ Type or Print name of Petitioner

_____ Address

_____ City, State, Zip Code

_____ Phone Number

Note: If the requested transfer is to a Court within this state, no notice is required. If the requested transfer is to a Court outside of Colorado, notice shall be given to the person nominated as personal representative and such other person as the Court may direct pursuant to Rule 23 of the Colorado Rules of Probate Procedure (C.R.P.P.).

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: _____ **In the Matter of the Estate of:** **Deceased**	**COURT USE ONLY** Case Number: Division: Courtroom:
ORDER FOR TRANSFER OF LODGED WILL	

Upon consideration of the Petition for Transfer of Lodged Will filed by _____ (name of petitioner) on _____ (date),

The Court finds:

1. The required notices have been given or waived.
2. Venue is not proper in this Court.

The Court orders that the will be transferred to the following Court having probate jurisdiction at the cost of the Petitioner pursuant to C.R.P.P. 23.

Name of Court: _____ State: _____

Date: _____ _____

❑Judge ❑Magistrate

CERTIFICATE OF SERVICE

I certify that on _____ (date) a copy of this Order and Will was sent by certified mail, or its equivalent, to the court list above.

_____
Clerk

☐District Court ☐Denver Probate Court _____ County, Colorado Court Address: ☐**In the Interest of:** ☐**In the Matter of the Estate of:**	**COURT USE ONLY**
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom
NOTICE OF HEARING	

To All Interested Persons:

A hearing on _____ (name of pleading) will be held at the following date, time and location:

Date:_____ **Time:** _____ **Courtroom or Division:**_____

Address:_____

The hearing will take approximately _____☐days ☐hours ☐minutes.

Date: _____ _____
(Your Signature)

CERTIFICATE OF SERVICE

I certify that on _____ (date) a copy of this Notice was served on each of the following::

Name of Person to Whom you are Sending this Document	**Relationship**	**Address**	**Manner of Service***

***Insert one of the following: Hand Delivery, First-Class Mail, Certified Mail, E-Served or Faxed.**

The pleading identified above is attached to this Notice or was previously served on _____ (date).

_____
Signature

☐District Court ☐Denver Probate Court _____ County, Colorado Court Address: ☐**In the Interest of:** ☐**In the Matter of the Estate of:**	**COURT USE ONLY**
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom

NOTICE OF NON-APPEARANCE HEARING PURSUANT TO C.R.P.P. 8.8

******** Attendance at this hearing is not required or expected. *********

To All Interested Persons:

A non-appearance hearing on _____ (name of Motion/Petition and proposed Order) is set at the following date, time and location:

Date: _____ (Select a future date - 10 calendar days plus 3 calendar days for mailing.)

Time: 8:00 a.m.

Address: _____

Date: _____ _____
(Your Signature)

******* IMPORTANT NOTICE*******

Any interested person wishing to object to the requested action set forth in the attached Motion/Petition and proposed Order must file a written objection with the Court on or before the hearing and must furnish a copy of the objection to the person requesting the court order. JDF 722 (Objection form) is available on the Colorado Judicial Branch website (www.courts.state.co.us). If no objection is filed, the Court may take action on the Motion/Petition without further notice or hearing. If any objection is filed, the objecting party must, within ten days after filing the objection, set the objection for an appearance hearing. Failure to timely set the objection for an appearance hearing as required shall result in the dismissal of the objection with prejudice without further hearing.

CERTIFICATE OF SERVICE

I certify that on _____ (date) a copy of this Notice along with the Motion/Petition and proposed Order identified above was served on each of the following:

Name of Person to Whom you are Sending this Document	Relationship	Address	Manner of Service*

***Insert one of the following: Hand Delivery, First-Class Mail, Certified Mail, E-Served or Faxed.**

_____
Signature

Note: Do not set matters on the non-appearance docket, unless they are expected to be routine and unopposed.

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: ❑**In the Interests of:** ❑**In the Matter of the Estate of:**	**COURT USE ONLY**
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg.#:	Case Number: Division Courtroom

NOTICE TO UNBORN, UNASCERTAINED, MINOR OR INCAPACITATED PERSONS PURSUANT TO §15-10-403(4)(b), C.R.S.

To: List the names of persons having substantially identical interests to those of the unborn or unascertained persons pursuant to §15-10-403(4)(b), C.R.S.

Name	Interest

A hearing on _____ (name of pleading) ❑a copy of which was previously sent on _____ (date) **or** ❑a copy of which is attached, will be held at the following time and location or at a later date to which the hearing may be continued.

Date: _____ **Time:** _____ **Courtroom or Division:** _____

Address: _____

The hearing will take approximately _____ ❑days ❑hours ❑minutes.

Date: _____

_____
(Your Signature)

CERTIFICATE OF SERVICE

I certify that on _____ (date) a copy of this Notice along with the pleading identified above was served on each of the following:

Full Name	Relationship	Address	Manner of Service*

***Insert one of the following: Hand Delivery, First-Class Mail, Certified Mail, E-Served or Faxed.**

Note: This form cannot be used for notice of formal proceedings terminating an estate. JDF 962, with appropriate modifications, must be used.

☐District Court ☐Denver Probate Court _____County, Colorado Court Address: ☐**In the Interests of:** ☐**In the Matter of the Estate of:**	▲ **COURT USE ONLY** ▲
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom

AFFIDAVIT REGARDING DUE DILIGENCE AND PROOF OF PUBLICATION PURSUANT TO § 15-10-401(1)(c) AND § 15-10-401(3), C.R.S.

The following persons have been given notice by publication of the hearing on _____ (title of pleading), because the addresses or identities of such persons are not known and cannot be ascertained despite diligent efforts as identified below:

Full Name	**Last Known Address**	**Describe Effort to Identify and Locate, e.g. Internet search, last known employer, family members**

Publication of the Notice of Hearing by Publication was made on _____ (date) once a week for three consecutive weeks with the last date of the publication being at least 14 days before the date of the hearing. Proof of Publication attached.

VERIFICATION AND ACKNOWLEDGEMENT

I swear/affirm under oath, that I have read the foregoing Affidavit Regarding Due Diligence and Proof of Publication and that the statements set forth therein are true and correct to the best of my knowledge and belief.

Date: _____

_____
Signature of Petitioner

Subscribed and affirmed, or sworn to before me in the County of _____, State of _____, this _____ day of _____, 20 _____.

My Commission Expires: _____

_____
Notary Public/Clerk

_____
Petitioner's Attorney Signature, if any

JDF 714 R7-12 AFFIDAVIT REGARDING DUE DILIGENCE AND PROOF OF PUBLICATION

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: ❑In the Interests of: ❑In the Matter of the Estate of:	▲ COURT USE ONLY ▲
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom

NOTICE OF HEARING BY PUBLICATION PURSUANT TO § 15-10-401, C.R.S.

To: _____

Last Known Address, if any: _____

A hearing on _____ (title of pleading) for (brief description of relief requested)

_____

_____

_____

will be held at the following time and location or at a later date to which the hearing may be continued:

Date: _____ **Time:** _____ **Courtroom or Division:** _____

Address: _____

Publish only this portion of form.

_____
Type or Print name of Person Giving Notice

_____
Address

_____
City, State, Zip Code

Instructions to Newspaper: _____

_____ _____
Name of Newspaper Signature of Person Giving Notice or Attorney for Person Giving Notice

Publish the above Notice once a week for three consecutive calendar weeks.

_____
Type or Print name of Attorney for Person Giving Notice

NOTES:

- Insert name and last known address (if any) of persons whose present address is unknown. For persons whose identities are unknown, identify persons through name and last known address of an ancestor.
- This Notice must be published in a newspaper having general circulation in the county where the hearing is to be held once during each week of three consecutive weeks with the last date of the publication being at least 14 days before the date of the hearing pursuant to §15-10-401(1)(c), C.R.S.
- The contents of the Petition or other pleading which is the subject of the hearing need not be published as a part of this Notice, but this Notice must briefly state the nature of the relief requested. (Rule 8, C.R.P.P.)
- This form cannot be used for notice of formal proceedings terminating an estate. JDF 963 must be used pursuant to C.R.P.P. 8.3

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: ❑**In the Interests of** ❑**In the Matter of the Estate of:**	**COURT USE ONLY**
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom

PERSONAL SERVICE AFFIDAVIT

I declare under oath that I am 18 years or older and not a party to the action and that I served _____ (identify title of documents) on _____ (name of person) in _____ (name of County/State) on _____ (date) at _____ (time) at the following location:

_____.

❑ By handing the documents to a person identified to me as the ❑Protected Party, ❑Minor, or ❑Interested Person in this case.

❑ By identifying the documents, offering to deliver them to a person identified to me as the ❑Protected Party, ❑Minor, or ❑Interested Person in this case who refused service, and then leaving the documents in a conspicuous place.

I have charged the following fees for my services in this matter:

❑Private process server

❑Sheriff, _____County
Fee $ _____ Mileage $ _____

_____
Signature of Process Server

_____
Name (Print or type)

Subscribed and affirmed, or sworn to before me in the County of _____, State of _____, this _____ day of _____, 20 _____.

My Commission Expires: _____

_____
Notary Public

☐District Court ☐Denver Probate Court _____ County, Colorado Court Address: ☐**In the Interests of:** ☐**In the Matter of the Estate of:**	**COURT USE ONLY**
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom

WAIVER OF NOTICE

I, _____ (full name) being of full age, waive notice of the following hearings or other matters:

_____

_____

_____

_____

_____
Signature of Attorney Date

_____
Signature Date
(Type or print name, address and telephone # below)

_____
Type or Print name

_____
Address

_____
City, State, Zip Code

_____
Phone Number

Subscribed to and affirmed or sworn to before me in the County of _____, State of _____, this _____ day of _____, 20 ____, by _____.

My Commission Expires: _____

_____
Notary Public/Clerk

Note:

- Unless otherwise approved by the Court, a waiver of notice shall identify the nature of the hearings or other matters, notice of which is waived pursuant to Rule 8.2 of Colorado Rules of Probate Procedure (C.R.P.P.)
- When filed with the Court, a copy of the petition or other pleading need not be attached to this waiver.

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: ❑**In the Interest of:** ❑**In the Matter of the Estate of:**	▲ **COURT USE ONLY** ▲
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg.#:	Case Number: Division Courtroom

IRREVOCABLE POWER OF ATTORNEY
DESIGNATING CLERK OF COURT AS AGENT FOR SERVICE OF PROCESS

I, _____ (name), a nonresident of the State of Colorado, irrevocably designate and appoint the Clerk of this Court, and any successor in that office, as the person upon whom may be served all notices and process issued by a court or tribunal in the State of Colorado. This power of attorney is applicable only for notices and process issued to me in my fiduciary capacity and that affect or pertain to the above captioned matter. This Power of Attorney shall not be affected by my disability and it shall terminate upon my final discharge.

VERIFICATION AND ACKNOWLEDGMENT

I (Proposed Fiduciary) verify that the facts set forth in this document are true as far as I know or am informed. I understand that penalties for perjury follow deliberate falsification of the facts stated herein. (§15-10-310, C.R.S.)

Date: _____

_____
Signature of Proposed Fiduciary

_____
Type or Print name of Proposed Fiduciary

_____
Address

_____
City, State, Zip Code

_____
Phone Number

The foregoing instrument was acknowledged before me in the County of _____, State of Colorado, this ____day of _____, 20___, by the Proposed Fiduciary.

My Commission Expires: _____

_____
Notary Public/Deputy Clerk

Note:

- The address provided to the Court is the address where the Clerk of Court will forward all notices and processes. I Therefore, it is important that you provide current contact information to the Court in writing.

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: ❑**In the Interests of:** ❑**In the Matter of the Estate of:**	**COURT USE ONLY**
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom

OBJECTION: TO NON-APPEARANCE HEARING

I object to the requested action set forth in the motion or petition entitled _____, filed on _____ (date), which is set for a non-appearance hearing on _____ (date).

The grounds for my objection are as follows:

_____

_____

_____

_____

_____

_____

In accordance with Colorado Rule of Probate Procedure 8.8, I will immediately furnish a copy of this ***Objection*** to the person who filed the motion or petition.

I understand that I must contact the Court to set this matter for an appearance hearing at a later date within 10 calendar days after filing this ***Objection.*** If I fail to do so, I know that my *Objection* will be dismissed with prejudice. I will coordinate the hearing date with the other parties.

Date: _____ _____

Signature

CERTIFICATE OF SERVICE

I certify that on _____ (date) a copy of this Objection was served on each of the following:

Full Name	Relationship	Address	Manner of Service*

***Insert one of the following: Hand Delivery, First-Class Mail, Certified Mail, E-Served or Faxed.**

_____

Signature

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: ❑**In the Interests of:** ❑**In the Matter of the Estate of:**	**COURT USE ONLY**
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom
CLAIM	

Name of Claimant: _____ Telephone Number: _____

Address: _____

Claim is made against this estate, itemized as follows:

Date(s) Obligation Incurred	Type of Service or Basis of Claim	Amount
	Total	$

_____
Signature of Claimant Date

Decedent Estate Action:

- For information on claims not due and contingent or unliquidated claims, see §15-12-810, C.R.S. All claims defined pursuant to §15-10-201(8), C.R.S. must be filed with the Court or presented to the Personal Representative of the estate.
- If presented to the Personal Representative, either this form or a written statement complying with §15-12-804, C.R.S. can be used. If filed with the Court, Rule 6 of the Colorado Rules of Probate Procedure requires that this form be used.
- If this form is presented to the Personal Representative, it is recommended that the below Receipt be completed.

Protected Proceeding Estate Action:

- This form can be used for the presentation and allowance of claims filed with the Court pursuant to §15-14-429, C.R.S.

RECEIPT

I received a copy of this claim on _____ (date).

_____
Signature of ❑Personal Representative ❑Conservator

JDF 726 9/08 CLAIM

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: ❑**In the Interests of:** ❑**In the Matter of the Estate of:**	**COURT USE ONLY**
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom

WITHDRAWAL OR SATISFACTION OF CLAIM AND RELEASE

I, _____ (name of claimant), hereby grant a full and final release to the estate and to the fiduciary and any successor for any liability in connection to the claim(s) described below and

❑ withdraw the claim.

❑ acknowledge that the claim has been satisfied.

Date(s) Obligation Incurred	Type of Claim	Amount
	Total	$

Date: _____

_____
Signature of Claimant

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: _____ ❑**In the Interests of:** ❑**In the Matter of the Estate of:**	**COURT USE ONLY** Case Number: Division Courtroom
DECREE OF FINAL DISCHARGE **PURSUANT TO §15-12-1001, §15-12-1002, C.R.S. OR §15-14-431, C.R.S.**	

The Court finds that _____, (name) the:

❑ Personal Representative of this estate has filed receipts showing compliance with the Order for Final Settlement and Distribution on _____ (date).

❑ Conservator of this estate has filed receipts showing compliance with the Order Terminating Conservatorship on _____ (date).

It is ordered that

1. the fiduciary is discharged from this trust and office.
2. the fiduciary and the surety on any bond are released and discharged from any and all liability arising in connection with the performance of the fiduciary's duties.
3. Other: _____

Date: _____

_____
❑Judge ❑Magistrate ❑Registrar

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: ❑**In the Interest of:** ❑**In the Matter of the Estate of:**	▲ **COURT USE ONLY** ▲
Attorney or Party Without Attorney (Name and Address): Phone Number: _____ E-mail:_____ FAX Number: _____ Atty. Reg. #: _____	Case Number: Division _____ Courtroom _____

RECEIPT AND RELEASE

Received from _____, ❑Personal Representative ❑Conservator ❑partial ❑full payment and satisfaction of the following:

- ❑the devise to me in the Will under article(s) _____.
- ❑my share of the estate as a devisee in the Will.
- ❑my share of the estate as an heir.
- ❑my distribution from the conservatorship case.
- ❑Other: _____

❑Cash in the amount of $ _____.

❑Tangible personal property described as: * _____

_____

_____

_____

❑Real property described as: * _____

_____

_____

_____

❑The following securities: * _____

_____

_____

_____

❑Other (describe): * _____

_____

_____

❑I grant a partial release and satisfaction to the estate and to the fiduciary as to the above partial distribution.

❑I grant a full and final release and satisfaction to the estate and to the fiduciary and his or her successors for any liability in connection with my interest in the estate.

VERIFICATION

I, verify that the facts set forth in this document are true as far as I know or am informed. I understand that penalties for perjury follow deliberate falsification of the facts stated herein. (§15-10-310, C.R.S.)

_____

Signature of Person Signing Receipt and Release Date

*** Attach additional sheets as necessary.**

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Matter of the Trust created by:** ❑Settlor ❑Testator	**COURT USE ONLY**
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg.#:	Case Number: Registration Number: Division Courtroom

TRUST REGISTRATION STATEMENT

Important Notice

The Court will not routinely review or adjudicate matters unless it is specifically requested to do so by a beneficiary, creditor, or other interested person. All interested persons, including beneficiaries and creditors, have the responsibility to protect their own rights and interests in the estate or trust in the manner provided by the provisions of this code by filing an appropriate pleading with the Court by which the estate or trust is being administered and serving it on all interested persons pursuant to §15-10-401, C.R.S.

1. **Information about the Trustee:**

   Name: _____

   Address: _____

   City: _____ State: _____ Zip Code: _____

   Email Address: _____ Work Phone #: _____

2. The records of this Trust are kept at the principal place of administration, which is in _____ (City/County) at the following address:

   _____

3. **This Trust**

   ❑has not been registered elsewhere.

   ❑has been registered previously on _____ (date) with the _____ (name of Court) in the State of _____ pursuant to 15-16-102(3), C.R.S.

4. **This is**

❑ a Testamentary Trust established by the Will of _____

which Will was admitted to probate on _____ (date), in _____ (name of Court) in the State of _____ in case number: _____.

❑ an Inter Vivos Trust established by _____ (name of Settlor) dated _____.

1. The original Trustee is _____
2. If multiple trusts are registered on this date, provide additional identifying information:

_____

The undersigned trustee acknowledges the existence of this Trust and submits to the jurisdiction of this Court in any proceeding relating to this Trust. Within 30 days of registration, the Trustee represents that the Trustee shall comply with §15-16-303(2), C.R.S.

Date: _____ _____
Signature of Trustee

INFORMATION OF TRUST REGISTRATION

It is not necessary that the Information portion of this form be completed on the copy of the Statement filed with the Court.

TO:

_____ _____
_____ _____
_____ _____
_____ _____

You are a beneficiary with a present interest or you represent a beneficiary with a future interest, in the Trust(s) described in the above Trust Registration Statement.

The name of the Trust(s) is/are: _____

Upon reasonable request, you are entitled to information about this Trust and its administration pursuant to §15-16-303, C.R.S.

Date: _____ _____
Signature of Trustee

Note:

- File this Registration Statement in the County where the Trust is being administered pursuant to §15-16-101(1), C.R.S. For further requirements, see §15-11-901, C.R.S. and §15-16-101, C.R.S. and Colorado Rules of Probate Procedure Rule 8.6.
- The requirements of §15-16-303(2), C.R.S. may be satisfied by mailing a copy of this statement to entitled persons. See also §15-10-403, C.R.S.

☐District Court ☐Denver Probate Court _____ County, Colorado Court Address: **In the Matter of the Trust Created by:** **Settlor**	▲ COURT USE ONLY ▲
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg.#:	Case Number: Division Courtroom

MOTION TO RELEASE TRUST REGISTRATION STATEMENT

The Trustee makes the following statements:

1. This Trust was registered with this Court on _____ (date) with registration number _____.

2. The Court has jurisdiction over this Motion to Release Trust Registration Statement. (§15-16-201(1)(d), C.R.S.)

3. The Trustee requests that the Court release registration of the trust because:

   ☐the principal place of administration has been changed to the following address:

   Address: _____

   City: _____ State:_____ Zip Code: _____

   ☐Other:

   _____

   _____

   _____

The Trustee provided notice to all interested persons. (§15-10-401, C.R.S. and §15-16-206, C.R.S.)

The Trustee respectfully requests that the Court release the Trust Registration and release the Trustee, the beneficiaries, and the trust from the Court's jurisdiction.

Date: _____

_____
Signature of Trustee

CERTIFICATE OF SERVICE

I certify that on _____ (date) a copy of this Motion was served on each of the following:

Name of Person to Whom you are Sending this Document	Relationship	Address	Manner of Service*

*Insert one of the following: Hand Delivery, First-Class Mail, Certified Mail, E-Served or Faxed.

_____
Signature

❑District Court ❑Denver Probate Court _____County, Colorado Court Address: **In the Matter of the Trust Created by:** **Settlor**	▲ **COURT USE ONLY** ▲ Case Number: Division Courtroom

ORDER TO RELEASE TRUST REGISTRATION STATEMENT

This matter comes before the Court on the Motion to Release Trust Registration Statement filed on _____ (date). The Court having reviewed the Motion and any responses received from interested persons, enters the following Orders:

1. The Motion is granted. The Trust Registration is released from the jurisdiction of this Court.

2. The Court further Orders:

_____

_____

_____

Date: _____

_____

❑Judge ❑Magistrate

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Matter of the Trust Created by:** ❑Settlor ❑Testator	**COURT USE ONLY**
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg.#:	Case Number: Registration Number: Division Courtroom
AMENDED TRUST REGISTRATION STATEMENT	

Important Notice

The Court will not routinely review or adjudicate matters unless it is specifically requested to do so by a beneficiary, creditor, or other interested person. All interested persons, including beneficiaries and creditors, have the responsibility to protect their own rights and interests in the estate or trust in the manner provided by the provisions of this code by filing an appropriate pleading with the Court by which the estate or trust is being administered and serving it on all interested persons pursuant to §15-10-401, C.R.S.

The following amendments to the previously filed Trust Registration Statement for this trust filed on _____ _____ (date) are made:

❑ _____ (name of Trustee) is no longer a trustee. The Successor Trustee is:

Name: _____

Address: _____

City: _____ State: _____ Zip Code: _____

Email Address: _____ Work Phone #: _____

❑ the principal place of administration has been changed to the following address:

Address: _____

City: _____ State: _____ Zip Code: _____

❑ This Trust has terminated.

❑ The registration of this Trust is transferred to this Court from _____ (name of Court) in the State of Colorado. This trust was previously registered under Registration No. _____. Attached is a court certified copy of the original Trust Registration Statement and any Amended Trust Registration Statement filed prior to this Amendment.

The undersigned Trustee/Successor Trustee acknowledges the existence of this Trust and submits to the jurisdiction of this Court in any proceeding relating to this Trust. Within 30 days of registration, the Trustee represents that the Trustee shall comply with §15-16-303(2), C.R.S.

Date: _____ _____
Signature of Trustee/Successor Trustee

INFORMATION OF TRUST REGISTRATION

It is not necessary that the Information portion of this form be completed on the copy of the Statement filed with the Court.

To:

_____ _____
_____ _____
_____ _____
_____ _____

You are a beneficiary with a present interest or you represent a beneficiary with a future interest, in the Trust(s) described in the above Trust Registration Statement.

The name of the Trust(s) is/are: _____

Upon reasonable request, you are entitled to information about this Trust and its administration pursuant to §15-16-303, C.R.S.

Date: _____ _____
Signature of Trustee

Note:

- The requirements of §15-16-303(2), C.R.S. may be satisfied by mailing a copy of this statement to entitled persons. See also §15-10-403, C.R.S.
- For further requirements, see §15-11-901, C.R.S. and §15-16-101, C.R.S. and Colorado Rules of Probate Procedure Rule 8.6.

☐District Court ☐Denver Probate Court _____ County, Colorado Court Address: ☐**In the Interests of:** ☐**In the Matter of the Estate of:**	**COURT USE ONLY**
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom

REQUEST FOR MINOR CORRECTION
PURSUANT TO RULE 11 OF COLORADO RULES OF PROBATE PROCEDURE

I, _____ (name), filed _____ (name of documents) on _____ (date) and a correction is necessary as follows:

_____

_____

_____

_____

_____

_____

_____

_____ _____
Signature of Attorney Date Signature of Party Date

CERTIFICATE OF SERVICE

I certify that on _____ (date) a copy of this Request for Minor Correction was served on each of the following:

Full Name	Relationship	Address	Manner of Service*

***Insert one of the following: Hand Delivery, First-Class Mail, Certified Mail, E-Served or Faxed.**

_____
Signature

Note:

- Use of this form should be limited to correcting minor clerical errors in pleadings and petitions.
- Any significant errors in documents filed shall be corrected by filing an amended or supplemental document.

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: ❑**In the Interest of:** ❑**In the Matter of the Estate of:**	**COURT USE ONLY** Case Number: Division Courtroom

ORDER APPOINTING GUARDIAN AD LITEM

1. Upon the ❑Court's own motion; ❑stipulation of the parties; ❑motion of _____ (appointee name) at the following address:

   _____

   Phone number: _____ Attorney Registration #: _____

   is appointed as Guardian ad Litem for the following person _____.

2. This Order is entered pursuant to Section:

   ❑15-10-403(5) in a trust, estate, or judicially supervised settlement matter - **appointment of a Guardian ad Litem** to represent the interests of a minor, an incapacitated, protected, unborn, or unascertained person, or a person whose identity or address is unknown. The reason for the appointment and the Guardian ad Litem's duties are as follows:

   _____

   _____

   _____

   _____

   _____

   _____

   ❑15-14-115 in a matter regarding a person under disability - **appointment of a Guardian ad Litem** to represent the interests of a respondent or an incapacitated or protected person. The reason for the appointment is as follows:

   _____

   _____

   _____

   _____

   _____

3. The Guardian ad Litem's duty is/are:

   ❑to investigate and prepare specific written recommendations regarding:

   ❑the allegations of incapacity or of the need for financial protection.

   ❑the appropriateness of limitations to the Guardianship/Conservatorship.

   ❑the appropriateness/qualifications of the nominee.

❑issues raised in the Visitor's Report.
❑issues raised in the Guardian's/Conservator's Report.
❑issues raised by _____.
❑the appropriateness of termination of the Guardianship/Conservatorship.
❑other _____

❑to advocate for and represent the best interests of the above named person regarding the following issues: _____

_____

❑Other: _____

_____

_____

4. The appointee shall have access to all relevant information regarding the Respondent in compliance with the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and other privacy laws, without further order, authorization or release. Relevant information includes, but is not limited to the following records, reports, and evaluations: medical, psychiatric, psychological, drug, alcohol, law enforcement, social services, school, financial, and estate planning. This Order provides the authority to release such information to the appointee regardless of the original source of information. The appointee shall not disclose this information inappropriately.

5. The Guardian ad Litem shall prepare a written report, including recommendations.
❑The report shall be filed and served upon interested persons at least 10 calendar days before the hearing for which the report was prepared If no hearing is currently set, the report must be filed within 30 calendar days from the date of appointment.
❑The report shall be filed and served upon interested persons by _____ (date).

6. ❑Unless otherwise ordered by the Court, the Guardian ad Litem or Visitor appointment is automatically terminated 30 days after the hearing at which the report is considered. If the hearing is waived, appointment is terminated 30 days after the report is filed.
❑Other (explain) _____

7. The appointee shall be compensated by:
❑The captioned estate. ❑The maximum hourly rate is set at $_____.
❑The State of Colorado because all responsible parties are indigent (JDF 208 completed). (See CJD 04-05)
❑Person to be determined by the Court at a later date.
❑Other (explain) _____

_____

8. Acceptance of this appointment requires the appointee to comply with Chief Justice Directive 04-05. Failure to comply may result in termination of the appointment and/or removal from the appointment list.

Next appearance is on_____ (date), at _____ (time), in_____ (division).

Date: _____ _____

❑Judge ❑Magistrate ❑Registrar

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Interests of:** **Ward/Protected Person**	**COURT USE ONLY** Case Number: Division Courtroom
PROVISIONAL LETTERS PURSUANT TO §15-14.5-302, C.R.S.	

_____ (Name) was appointed or qualified by this Court with an order for provisional appointment on _____ (date) as:

❑ Conservator. These are Letters of Conservatorship

❑ Guardian. These are Letters of Guardianship for an incapacitated person.

These Provisional Letters are proof of the Guardian's/Conservator's authority to act and shall expire 60 days from issuance, unless extended by order of the Court with the following limitations.

The Guardian shall have access to Ward's medical records and information to the same extent that the Ward is entitled. The Guardian shall be deemed to be Ward's personal representative for all purposes relating to Ward's protected health information, as provided in HIPAA, Section 45 CFR 164.502(g)(2).

The Guardian does not have the authority to obtain hospital or institutional care and treatment for mental illness, developmental disability or alcoholism against the will of the Ward pursuant to §15-14-316(4), C.R.S.

Other limitations: _____

_____

_____

Date: _____

_____
Probate Registrar/(Deputy)Clerk of Court

CERTIFICATION

Certification Stamp

or

Certified to be a true copy of the original in my custody and to be in full force and effect as of:

Date: _____

_____
Probate Registrar/(Deputy)Clerk of Court

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Interest of:** **Ward/Protected Person**	**COURT USE ONLY**
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom
PETITION REQUESTING COLORADO TO ACCEPT ❑GUARDIANSHIP ❑CONSERVATORSHIP FROM SENDING STATE	

This Petition is submitted pursuant to §15-14.5-302, C.R.S. of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act.

The Guardian and/or Conservator, Petitioner hereby submits certified copies of any documents evidencing authority to act (Order of Appointment, Letters) and the Provisional Order of Transfer from the sending state relating to a ❑Guardianship ❑Conservatorship, as identified below:

Sending State: _____ **Sending Court:** _____

Sending Court Case #: _____

1. **Information about the Guardian and/or Conservator:**

   Name: _____

   Street Address: _____

   Mailing Address, if different: _____

   City:_____ State:_____ Zip Code:_____ Home Phone #: _____

   Email Address: _____ Work Phone #:_____

2. **Information about the Ward/Protected Person:**

   Name: _____ Current age: _____ Date of Birth: _____

   Address (Include name of facility, if any): _____

   _____

   City: _____ State: _____ Zip Code: _____ Telephone Number: _____

   Type of Residence: ❑Private ❑Nursing Home ❑Assisted Living Home ❑Other: _____

3. **The Petitioner requests that Colorado accept this Guardianship/Conservatorship for the following reasons:**

_____

_____

_____

_____

_____

4. The Petitioner shall provide this Petition and a Notice of Non-Appearance Hearing (JDF 712) to persons entitled to notice. (§15-14.5-302(2), C.R.S.)

5. The interested persons given notice are as follows:

Name of Interested Person Requiring Notice in Sending State	**Relationship to Ward/Protected Person**
Name of Interested Person Requiring Notice in Colorado, not listed above	**Relationship to Ward/Protected Person**

VERIFICATION AND ACKNOWLEDGMENT

I (Petitioner) verify that the facts set forth in this document are true as far as I know or am informed. I understand that penalties for perjury follow deliberate falsification of the facts stated herein. (§15-10-310, C.R.S.)

_____
Signature of Guardian and/or Conservator Date

The foregoing instrument was acknowledged before me in the County of _____, State of Colorado, this ____day of _____, 20___, by the Petitioner.

My Commission Expires: _____

_____
Notary Public/Deputy Clerk

_____
Signature of Attorney Date

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address:	
In the Interests of: **Ward/Protected Person**	**COURT USE ONLY** Case Number: Division Courtroom

PROVISIONAL ORDER TO ACCEPT
❑GUARDIANSHIP ❑CONSERVATORSHIP IN COLORADO FROM SENDING STATE PURSUANT TO §15-14.5-302, C.R.S.

Upon consideration of the Petition to Accept and having reviewed the provisional order to transfer from _____ (name of state) pursuant to §15-14.5-301(6)(a), C.R.S., any objections filed and after ❑evidentiary hearing **or** ❑non-appearance hearing;

The Court finds:

1. That the statements in the Petition are true and notice has been properly given or waived.
2. That the transfer is not contrary to the interests of the Ward/Protected Person.
3. That the Guardian and/or Conservator is eligible for appointment in this state.

The Court orders the following:

1. This Court provisionally grants the Petition to Accept.

2. This Court shall appoint _____ (name) as the ❑Guardian ❑Conservator upon receipt of a final court order transferring the proceeding to Colorado from the sending state.

3. The Court further orders:

   ❑ Pending filing of the Final Order Confirming the Transfer to Colorado, the Court directs the issuance of Provisional Letters to expire within 60 days.

   ❑ _____

   _____

   _____

Date: _____ _____

❑Judge ❑Magistrate

Note:
Upon receipt of the Provisional Order to Accept Transfer issued by the Colorado Court, it is the responsibility of the Guardian and/or Conservator to file this Provisional Order and necessary documents to terminate the guardianship and/or conservatorship with the sending state. It is anticipated that the sending state will not issue a Final Order Confirming the Transfer to Colorado, until such documents are filed.

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: In the Interest of: Ward/Protected Person:	▲ COURT USE ONLY ▲ Case Number: Division: Courtroom:

FINAL ORDER ACCEPTING ❑GUARDIANSHIP ❑CONSERVATORSHIP IN COLORADO FROM SENDING STATE PURSUANT TO §15-14.5-302, C.R.S.

The Court has received the Final Order Confirming Transfer from _____ (state) and:

The Court appoints the following person as ❑Guardian ❑Conservator:

Name:_____

Address: _____

City: _____ State:_____ Zip Code: _____ Email Address: _____

Home Phone #:_____ Work Phone #: _____

The Court directs the issuance of ❑Letters of Guardianship ❑Letters of Conservatorship consistent with the final order of transfer that includes the order of appointment issued by _____ (state).

The Court orders the following pursuant to §15-14.5-302(6), C.R.S.:

1. The Guardian and/or Conservator shall notify the Court within 30 days if his/her home address, email address, or phone number changes and/or any change of address for the Ward/Protected Person.

2. ❑The Guardian shall file an Annual Guardian's Report (JDF 850) on or before _____ (date) beginning in _____ (year) for the duration of the guardianship.

3. ❑The Conservator shall file an Annual Conservator's Report (JDF 885) on or before _____ (date) beginning in _____ (year) for the duration of the conservatorship.

4. Copies of all future filings with the Court shall be provided to the following identified as interested persons in this matter, by the one filing such documents. In addition, the Guardian and/or Conservator shall provide a copy of the required reports, to the following interested persons within ten days of filing with the Court.

Name of Interested Person	Relationship to Ward/Protected Person
	Ward/Protected Person
	Spouse, if applicable
	Adult Children, if applicable
	Parents, if applicable
	Conservator, if applicable
	Guardian, if applicable

5. The Guardian and/or Conservator shall provide a copy of this Final Order to the Ward/Protected Person and interested persons within 30 days of appointment and file a Notice of Appointment (JDF 812) with the Court. See §§ 15-14-311 or 15-14-409, C.R.S.

6. **The Court further orders**

_____

_____

_____

Date: _____ _____

❑Judge ❑Magistrate

Notice to Interested Persons

You have the right to request termination or modification of the guardianship pursuant to §§ 15-14-210 and 15-14-318, C.R.S. and/or conservatorship pursuant to § 15-14-431, C.R.S.

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Interests of:** **Ward/Protected Person**	**COURT USE ONLY**
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom
PETITION TO TRANSFER ❑GUARDIANSHIP ❑CONSERVATORSHIP FROM COLORADO TO RECEIVING STATE	

This Petition is submitted pursuant to §15-14.5-301, C.R.S. of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act.

As the Guardian and/or Conservator, Petitioner requests the Court to approve the transfer of this ❑Guardianship and/or ❑Conservatorship, to _____ (County) in _____ (State).

1. The Ward/Protected Person ❑is physically present in **or** ❑is reasonably expected to permanently move to the state identified above **or** ❑the Protected Person has significant connections to the receiving state.

2. The Petitioner requests that Colorado transfer this Guardianship/Conservatorship for the following reasons:

_____
_____
_____
_____
_____
_____
_____
_____
_____

3. The Petitioner has made reasonable and sufficient plans for care and services for the Ward and/or has made adequate arrangements for the management of the Protected Person's property in the receiving state.

4. The Petitioner will provide this Petition and a Notice of Non-Appearance Hearing (JDF 712) to persons entitled to notice. (§15-14.5-302(2), C.R.S.)

5. The interested persons given notice are as follows:

Name of Interested Person Requiring Notice in Colorado	Relationship to Ward/ Protected Person

VERIFICATION

I (Petitioner) verify that the facts set forth in this document are true as far as I know or am informed. I understand that penalties for perjury follow deliberate falsification of the facts stated herein. (§15-10-310, C.R.S.)

Signature of Petitioner or Attorney Date

Type or Print name of Petitioner

Address

City, State, Zip Code

Phone Number

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Interests of:** **Ward/Protected Person**	**COURT USE ONLY** Case Number: Division Courtroom

PROVISIONAL ORDER RE: PETITION TO TRANSFER FROM COLORADO TO RECEIVING STATE ❑GUARDIANSHIP ❑CONSERVATORSHIP PURSUANT TO §15-14.5-301, C.R.S.

Upon consideration of the Petition to Transfer, any objections filed and ❑evidentiary hearing **or** ❑non-appearance hearing;

The Court finds that:

1. The statements in the Petition are true and notice has been properly given or waived.
2. The transfer is not contrary to the interests of the Ward/Protected Person.
3. The Ward/Protected Person is physically present in or is reasonably expected to move permanently to the receiving state or the Protected Person has significant connections to the receiving state pursuant to §15-14.5-201, C.R.S.
4. The plan for care and services for the Ward in the receiving state is reasonable and sufficient and/or adequate arrangements will be made for the management of the Protected Person's property.
5. The Court is satisfied that the Guardianship and/or Conservatorship will be accepted in the receiving state.

The Court orders the following:

1. Provisionally grants the Petition to Transfer to _____ (county) in _____ (state).

2. The ❑Guardian ❑Conservator shall file a Petition to Accept in the receiving state requesting a Provisional Order to Accept.

3. The ❑Guardian ❑Conservator shall file a final report (JDF 850 and/or JDF 885) for Colorado to terminate this Guardianship and/or Conservatorship pursuant to §15-14.5-301(6)(b), C.R.S. and the following documents as otherwise ordered by the Court for good cause pursuant to §15-14-318, C.R.S. and §15-14-431, C.R.S.: _____

Date: _____ _____

❑Judge ❑Magistrate

CERTIFICATION

Certification Stamp or Certified to be a true copy of the original in my custody and to be in full force and effect as of:

Date: _____ _____

Probate Registrar/(Deputy)Clerk of Court

Note:
The Colorado Court shall not issue a Final Order Confirming Transfer until a provisional order from the receiving State is filed pursuant to §15-14.5-301(6)(a), C.R.S. In addition, the required documents to terminate this guardianship and/or conservatorship must be filed with the Colorado Court unless as otherwise directed by the Court pursuant to §15-14-431, C.R.S.

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Interests of:** **Ward/Protected Person**	**COURT USE ONLY** Case Number: Division Courtroom

FINAL ORDER CONFIRMING TRANSFER TO RECEIVING STATE AND TERMINATING ❑GUARDIANSHIP ❑CONSERVATORSHIP IN COLORADO PURSUANT TO §15-14.5-301, C.R.S.

The Court has received a Provisional Order from the receiving state pursuant to §15-14.5-301(6)(a), C.R.S. Further the Court has received documents it required pursuant to §15-14-431, C.R.S. to terminate this Guardianship/Conservatorship and issues this Final Order Confirming Transfer.

1. This ❑Guardianship ❑Conservatorship is terminated and all Letters of Guardianship/Letters of Conservatorship are no longer valid in Colorado.

2. ❑The most current Conservator's Report is attached.

3. The Guardian/Conservator shall provide a copy of this Final Order to the Ward/Protected Person and interested persons.

Date: _____

_____
❑Judge ❑Magistrate

☐District Court ☐Denver Probate Court _____ County, Colorado Court Address:	
In the Interests of: **Protected Person**	▲ COURT USE ONLY ▲ Case Number: Division: Courtroom:

ACKNOWLEDGMENT OF RESPONSIBILITIES
☐CONSERVATOR AND/OR ☐GUARDIAN

I, _____ (name) acknowledge that I was appointed as the conservator and/or guardian for _____ (name of ward or protected person) on _____ (date) and I understand that Letters of Guardianship/Conservatorship will not be issued until this form is signed and provided to the court. I agree to comply with statutory and court requirements and understand that I am responsible for preparing and filing reports and/or plans with the court and providing copies to all interested persons as identified in the Order of Appointment.

I have received the following information to review regarding my responsibilities.

☐User's Manual for Guardians ☐User's Manual for Conservators

☐Viewed DVD/Video

☐Pamphlets

☐Attendance at mandatory training session on _____ (date).

☐Other: _____

Acknowledgment of Responsibilities:

1. I am responsible for providing the court with any changes to my mailing address, email address, and telephone number, within 30 days.
2. I am responsible for maintaining supporting documentation for all receipts into the accounts and all disbursements out of the accounts under my control during the duration of my appointment. Supporting documentation includes bank statements and check copies, credit card statements and receipts, sales receipts, and other such forms of proof that support my reports. I understand that the court or any interested persons may request copies at any time.
3. If funds must be placed in a restricted account, I understand that any withdrawals require a court order.
   ☐The Acknowledgment of Deposit of Funds to Restricted Account (JDF 867) must be returned to the court as documentation that the funds were deposited, within 30 days or by _____ (date).
   ☐All requests for withdrawal must be in writing by submitting a Motion to Withdraw Funds (JDF 868).
4. I understand that the following reports and/or plans are due on _____ (date).
   ☐Initial Guardian's Report/Care Plan - Adult (JDF 850)
   ☐Conservator's Inventory with Financial Plan (JDF 882)
5. I understand that the following reports are due on _____ (date) and every year thereafter on such day and month, unless I am notified by the court.
   ☐Guardian's Report - Minor (JDF 834).
   ☐Guardian's Report - Adult (JDF 850).
   ☐Conservator's Report (JDF 885).
6. I understand that all reports must be filed on the most current version of the form and that the forms are available on the state court website: http://www.courts.state.co.us

My signature below indicates that I have read and understand my responsibilities as a newly appointed guardian and/or conservator.

Date: _____ _____
Guardian and/or Conservator

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address:	
In the Interest of: **Respondent**	▲ **COURT USE ONLY** ▲
Attorney or Party Without Attorney (Name and Address): Phone Number: Email: FAX Number: Atty Reg. #:	Case Number: Division Courtroom

ACCEPTANCE OF OFFICE - GUARDIANSHIPS AND CONSERVATORSHIPS

1. I, _____ (name) accept appointment to, and agree to perform the duties and discharge the trust of, the office of: (Check all that apply.)

   ❑Guardian.
   ❑Emergency guardian.
   ❑Temporary guardian.
   ❑Conservator.
   ❑Special conservator.

2. I submit personally to the jurisdiction of this court in any proceeding relating to this matter.

3. A legible copy of my driver's license, passport or other government-issued identification is filed/e-filed as a separate document.

4. ❑I request that the court waive required background information because I am: (If this paragraph applies, check all boxes below that apply, skip questions 5 through 9, and sign in the presence of a notary public or court clerk.)

   ❑a public administrator.
   ❑a trust company, bank, credit union, savings and loan, or other financial institution.
   ❑a state or county agency.
   ❑the respondent's parent and I reside with the respondent.
   ❑a person or entity for whom good cause exists to waive such disclosures. State reasons:

   _____
   _____
   _____

The court may require a nominee to obtain additional background information that the court considers necessary to assist it in determining the fitness of the nominee for the appointment sought. Such information may include requiring a nominee to obtain fingerprint-based criminal history record checks through the Colorado Bureau of Investigation and the Federal Bureau of Investigation at the nominee's expense. (§15-14-110(5), C.R.S.)

5. I ❑have been ❑have not been convicted of, pled no contest to, or received a deferred sentence for one or more felonies or misdemeanors. If so, describe all:

Name of State and Court Issuing Order

6. I ❑have ❑have not had a temporary or permanent civil restraining/protection order issued against me. If so, describe all:

Name of State and Court Issuing Order

7. A civil judgment ❑has been ❑has not been entered against me. If so, describe all:

Name of State and Court Entering Judgment

8. I ❑have been ❑have not been relieved from one or more court-appointed responsibilities. If so, describe all:

Name of State and Court Relieving Nominee

9. True copies of my name-based criminal history record check obtained through the Colorado Bureau of Investigation and my current credit report are filed/e-filed as separate documents. (See instructions below.)

10. The nominee acknowledges and understands that if the nominee fails to file required reports with the court or fails to respond to an order of the court to show cause why the nominee should not be held in contempt of court, Colorado law authorizes the court to access data and records of state agencies in order to obtain contact information, as defined in sections 15-14-317 (4) (c) and 15-14-420 (6) (c), C.R.S.

Note: Social security numbers should not be attached to or written on this Acceptance of Office.

VERIFICATION AND ACKNOWLEDGMENT

I verify that the statements set forth in this document and its attachments are accurate and complete to the best of my knowledge or belief. I understand that penalties for perjury follow deliberate falsification of the facts stated herein. (§15-10-310, C.R.S.)

_____
Signature of Proposed Guardian/Conservator Date

The foregoing instrument was acknowledged before me in the County of _____, State of Colorado, this ____day of _____, 20___, by the Proposed Guardian/Conservator.

My Commission Expires: _____

_____
Notary Public/Deputy Clerk

_____
Signature of Attorney Date

☐District Court ☐Denver Probate Court _____ County, Colorado Court Address: **In the Interest of:** **Respondent**	**COURT USE ONLY**
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom

NOTICE OF HEARING TO INTERESTED PERSONS

To All Interested Persons:

A hearing on the Petition identified below will be held at the following date, time and location.

Date:_____ **Time:**_____ **Courtroom or Division:**_____

Address:_____

☐Petition for Appointment of Guardian ☐Adult ☐Minor

☐Petition for Appointment of Conservator ☐Adult ☐Minor

☐Other: _____

The outcome of this proceeding may limit or completely take away the Respondent's right to make decisions about the Respondent's personal affairs or financial affairs or both. The Respondent must appear in person unless excused by the court. The Petitioner is required to make reasonable efforts to help the Respondent attend the hearing.

The Respondent has the right to be represented by an attorney of the Respondent's choice at the Respondent's expense. If the Respondent cannot afford an attorney, one may be appointed for the Respondent at State expense. The Respondent may request a professional evaluation. The Respondent has the right to present evidence and subpoena witnesses and documents; examine witnesses, including any court-appointed physician, psychologist, or other qualified individual providing evaluations, and the court visitor; and otherwise participate in the hearing. The Respondent may ask that the hearing be held in a manner that reasonably accommodates the Respondent. The Respondent has the right to request that the hearing be closed, but the hearing may not be closed over the Respondent's objection.

Date: _____

_____
(Your Signature)

CERTIFICATE OF SERVICE

I certify that on _____ (date) a copy of this Notice along with the Petition identified above was served on each of the following:

Name of Person to Whom you are Sending this Document	Relationship to Respondent	Address	Manner of Service*

***Insert one of the following: Hand Delivery, First-Class Mail, Certified Mail, E-Served or Faxed.**

_____
Signature

☐District Court ☐Denver Probate Court _____ County, Colorado Court Address: In the Interest of: Respondent:	▲ COURT USE ONLY ▲
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom
NOTICE OF HEARING TO RESPONDENT (ADULT OR MINOR)	

To Respondent:

A hearing on the following Petition will be held at the following date, time and location.

Date:_____ **Time:**_____ **Courtroom or Division:**_____

Address:_____

☐Petition for Appointment of Guardian ☐Adult ☐Minor

☐Petition for Appointment of Conservator ☐Adult ☐Minor

***** IMPORTANT NOTICE TO ADULT RESPONDENTS*****

The outcome of this proceeding may limit or completely take away your right to make decisions about your personal affairs or your financial affairs or both. You must appear in person unless excused by the Court. The petitioner is required to make reasonable efforts to help you attend the hearing.

You have the right to be represented by an attorney of your choice at your own expense. If you cannot afford an attorney, one may be appointed for you at State expense. You may request a professional evaluation of your condition. You have the right to present evidence and subpoena witnesses and documents; examine witnesses, including any court-appointed physician, psychologist, or other qualified individual providing evaluations, and the court visitor; and to otherwise participate in the hearing. You may ask that the hearing be held in a manner that reasonably accommodates you. You have the right to request that the hearing be closed, but the hearing may not be closed over your objection.

_____
Signature of Person Giving Notice or Attorney

Note:

- This Notice of Hearing to Respondent must be personally served on the Respondent (12 years of age or older), along with a copy of the Petition, at least 14 days prior to the hearing pursuant to § 15-14-113, C.R.S. as well as § 15-14-309(1), C.R.S. or § 15-14-404(1), C.R.S.
- Do not attach copies of the Petition when filing the Notice of Hearing to Respondent with Personal Service Affidavit with the Court.

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Interest of:** **Respondent**	▲ **COURT USE ONLY** ▲
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom
PERSONAL SERVICE AFFIDAVIT	

I declare under oath that I am 18 years or older and not a party to the action and that I served a copy of the Notice of Hearing to Respondent and a copy of the Petition on the Respondent identified above in _____ (name of County/State) on _____ (date) at _____ (time) at the following location: _____, by handing the documents to a person identified to me as the Respondent in this case.

_____
Signature of Process Server

_____
Name (Print or type)

The foregoing instrument was acknowledged before me in the County of _____, State of Colorado, this _____ day of _____, 20 _____, by _____.

My Commission Expires: _____

_____
Notary Public/Deputy Clerk

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Interest of:** **Respondent**	**COURT USE ONLY** Case Number: Division: Courtroom:

ORDER APPOINTING COURT VISITOR

On the Court's own Motion, _____ is appointed as the Court Visitor in this matter. The Court finds that this appointment is necessary

❑ to investigate the allegations made in the Petition for Appointment of Guardian pursuant to §15-14-305(1) C.R.S.

and/or

❑ to investigate the allegations made in the Petition for Appointment of a Conservator pursuant to §15-14-406(1) C.R.S.

In compliance with the Health Insurance Portability and Accountability Act of 1996 or HIPAA, the Court Visitor shall have access, without further release or liability, to all relevant information regarding the Respondent including, but not limited to, psychiatric, psychological, drug, alcohol, medical, law enforcement, school, social services, financial reports, evaluations, and other information.

The Court Visitor shall also have access to interview the Respondent in person in order to fulfill the duties of a Court Visitor. If a hearing has been set, the hearing is scheduled at the following time and location:

Date: _____ **Time:** _____ **Courtroom or Division:** _____

Address: _____

The Visitor fee is:

❑ the responsibility of the Petitioner.

❑ to be submitted to the Court and paid at State expense. A finding of indigency has been made by the Court.

❑ to be determined at a later date by the Court.

Date: _____

_____

❑Judge ❑Magistrate ❑Probate Registrar/(Deputy)Clerk of Court

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Interest of:** **Respondent**	▲ **COURT USE ONLY** ▲
Court Visitor (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #. :	Case Number: Division Courtroom

VISITOR'S REPORT

❑GUARDIANSHIP ❑CONSERVATORSHIP ❑COMBINED

Instruction to court visitor: Please complete every applicable section of this form. If a section is not applicable, please enter N/A.

I, _____(name), submit the following report concerning the investigation that I conducted as the court-appointed visitor in this ❑guardianship pursuant to §15-14-305, C.R.S. ❑conservatorship pursuant to §15-14-406, C.R.S.

Summary:

	Yes	No
A. A **lawyer** should be appointed to represent the respondent. Reason: ❑The respondent requested a lawyer. ❑Other: _____	❑	❑
B. A **guardian ad litem** should be appointed to represent the respondent's best interests. Reason: _____	❑	❑
C. A **professional evaluator** should be appointed to examine the respondent and prepare an evaluation. Reason: ❑The respondent has demanded an evaluation. ❑Other: _____	❑	❑
D. I believe the proposed guardianship, including the type of guardianship, is appropriate and that less restrictive means of intervention are unavailable. Suggested limitations on guardian's powers and duties: _____	❑	❑
E. The nominated guardian should be appointed for the respondent.	❑	❑
F. I believe the proposed conservatorship, including the type of conservatorship, is appropriate and that less restrictive means of intervention are unavailable. Suggested limitations on conservator's powers and duties, and assets over which the conservator should be granted authority: _____	❑	❑
G. The nominated conservator should be appointed for the respondent.	❑	❑

H. Significant concern(s):

_____

_____

_____

I. Observations:

A. The activities of daily living (daily functions) that the respondent can manage without assistance; could manage with the assistance of supportive services or benefits, including the use of appropriate technological assistance; and cannot manage are as follows:

_____

_____

_____

_____

B. The financial functions that the respondent can or cannot effectively manage:

_____

_____

_____

_____

II. Interview of Respondent:

I interviewed the respondent, in person, on _____ (date) at _____ (location). I provided the Notice of Rights to Respondent (JDF 797) and, to the extent the respondent was able to understand, explained the rights contained therein.

A. Other persons present at the interview:

_____

_____

B. Respondent's physical appearance:

_____

_____

C. Respondent was oriented to time and place ❑**Yes** ❑**No**

D. After I explained the substance of the petition, the nature, purpose, and effect of the proceeding, and the general powers and duties of a guardian, conservator, or both, as appropriate to this case, I asked the following questions and the respondent answered as follows:

1. Do you understand what I've explained to you? ❑**Yes** ❑**No** ❑**Did not respond**
If **No,** please explain or comment. _____

_____

2. Do you understand the statement of rights (JDF 797)? ❑Yes ❑No ❑Did not respond

3. Do you have a lawyer? ❑Yes ❑No ❑Did not respond
If **Yes**, please provide name:_____

4. Do you want a lawyer to be appointed for you? ❑Yes ❑No ❑Did not respond
If **Yes**, please explain: _____

_____

5. Do you have a doctor? ❑Yes ❑No ❑Did not respond
If **Yes**, please provide name:_____

6. Is your doctor the same doctor who provided the letter attached to the petition filed in these proceedings? ❑Yes ❑No ❑Did not respond

7. Who are the family members or other people who are the most helpful to you?
_____

_____

_____

Guardianship Only

1. Do you need any help with your daily living activities or daily functions? ❑Yes ❑No ❑Did not respond
If **Yes**, in what areas? _____

_____

2. Do you know the proposed guardian? ❑Yes ❑No ❑Did not respond
Proposed guardian is _____.

3. Do you think that he or she should be appointed as your guardian?
❑Yes ❑No ❑Did not respond

4. How do you feel about the proposed guardianship? (Scope, powers, duties and duration.)
❑**Did not respond**
❑**Responded as follows:** _____

_____

_____

_____

_____

Conservatorship Only

1. Do you need any help with your finances? ❑Yes ❑No ❑Did not respond
Identify specific areas (check writing, bill paying, etc.) _____

_____

_____

2. Do you know the proposed conservator? ❑Yes ❑No ❑Did not respond
Proposed conservator is _____.

3. Do you think that he or she should be appointed as your conservator? ❑Yes ❑No ❑Did not respond

4. How do you feel about the proposed conservatorship? (Scope, powers, duties and duration.)
❑Did not respond
❑Responded as follows: _____

III. Interview of Person Nominated as Guardian:

A. Date and place of interview:

B. Person seeking appointment was asked and responded as follows:

1. Name and address:

2. Relationship (including non-family) to respondent:

3. Occupation: _____

4. Why was this petition initiated?

5. Where has the respondent resided during the last three months?

a. Who, if anyone, has been caring for the respondent during this period?

b. What type of care has been provided?
❑None
❑In-home care
❑Assisted living
❑Hospital or nursing home

c. What type of care will be provided if you are appointed as guardian?
- ❑None
- ❑In-home care
- ❑Assisted living
- ❑Hospital or nursing home

6. What changes in residence are contemplated?
❑None
❑Private home ❑Other facility. Please provide name and address:
_____

7. What are your qualifications to be guardian for respondent? _____
_____
_____

IV. Interview of Person Nominated as Conservator:

A. Date and place of interview:
_____
_____

B. Person seeking appointment was asked and responded as follows:

1. Name and address:
_____
_____
_____

2. Relationship (including non-family) to respondent:
_____
_____

3. Occupation: _____

4. Why was this petition initiated?
_____
_____

5. Where has the respondent resided during the last three months?
_____
_____

6. Who, if anyone, has been handling the respondent's financial affairs during this period?
_____
_____

7. Does the respondent owe you (conservator nominee) any money or property? ❑ Yes ❑ No
If **Yes,** please explain. _____

_____

8. Do you (conservator nominee) owe the respondent any money or property? ❑ Yes ❑ No
If **Yes,** please explain. _____

_____

9. What are your qualifications to be conservator for respondent? _____

_____

_____

V. Interview of Petitioner, if Different than the Nominated Guardian or Conservator:

A. Name of person: _____

B. Date and place of interview: _____

_____

C. Petitioner was asked and responded as follows:

1. Occupation: _____

2. Have there been any significant changes since you filed the petition? ❑ Yes ❑ No

Comments: _____

_____

_____

VI. Interview of Other Interested Persons:

D. Name of person: _____ Relationship to respondent: _____

E. Date and place of interview:

_____

_____

F. Other person asked and responded as follows:

1. Address: _____

2. Occupation: _____

3. Should a guardian or conservator be appointed? ❑ Yes ❑ No

Comments: _____

_____

_____

Note: **This section should be completed as many times as there are interested persons interviewed. Attach the additional interview notes to this report.**

VII. Report on Condition of Respondent's Current Residence:

A. Date visited: ___/___/___

B. Address: _____

_____

C. Type of dwelling: _____

D. Condition:

1. Lawn and landscaping: _____
2. Exterior: _____
3. Interior: _____

a. Utilities working ❑Yes ❑No Additional comments _____
b. Clean ❑Yes ❑No Additional comments _____
c. Fire hazards ❑Yes ❑No Additional comments _____
d. Other (explain) _____

E. I believe the respondent's current dwelling meets his or her needs. ❑Yes ❑ No

VII. Report on Condition of Respondent's Proposed Residence, if a change is contemplated:

A. Date visited: ___/___/___

B. Address: _____

C. Type of dwelling: _____

D. Condition:

1. Lawn and landscaping: _____
2. Exterior: _____
3. Interior: _____

a. Utilities working ❑Yes ❑No Additional comments _____
b. Clean ❑Yes ❑No Additional comments _____
c. Fire hazards ❑Yes ❑No Additional comments _____
d. Other (explain) _____

E. I believe the respondent's proposed dwelling meets his or her needs. ❑Yes ❑No

VIII. Physicians or Other Persons Who Are Known to Have Treated, Advised, or Assessed the Respondent's Relevant Physical or Mental Condition:

Please identify the sources of the information: _____

_____

A. Physicians and psychiatrists: _____

Comments: _____

_____

B. Psychologists and psychotherapists:_____

Comments:_____

_____

C. Nurses and nurse aids:_____

Comments:_____

_____

D. Other compensated health care providers:_____

Comments:_____

_____

E. Family members, relatives, and friends:_____

Comments:_____

_____

F. Others:_____

Comments:_____

_____

I represent that there is no conflict of interest between any party and me.

Date: _____

_____

Signature of Court Visitor

☐District Court ☐Denver Probate Court _____ County, Colorado Court Address: **In the Interest of:** **Ward/Protected Person**	**COURT USE ONLY**
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom

NOTICE OF APPOINTMENT OF GUARDIAN AND/OR CONSERVATOR

Instructions: Within 30 days after appointment of the Guardian and/or Conservator, this Notice, along with a copy of the Order Appointing Guardian and/or Order Appointing Conservator, must be given to all persons given notice of the Petition for appointment, including the Ward/Protected Person, if he/she is 12 years of age or older. (§15-14-311, C.R.S. and §15-14-409, C.R.S.)

Check the boxes that apply:

☐The Court appointed a Guardian for the above named Ward. Details of the appointment are included in the attached order.

☐The Court appointed a Conservator for the above named Protected Person. Details of the appointment are included in the attached order.

You have the right to request termination or modification of the Guardianship and/or Conservatorship.

Date: _____

_____
Signature of Guardian and/or Conservator and/or Attorney

CERTIFICATE OF SERVICE

I certify that on _____ (date), a copy of this Notice along with a copy of the Order Appointing Guardian and/or Conservator was served on each of the following:

Name of Person to Whom you are Sending this Document	Relationship to Ward/Protected Person	Address	Manner of Service*
	Ward/Protected Person		

***Insert one of the following: Hand Delivery, First-Class Mail, Certified Mail, E-Served or Faxed.**

_____
Signature

Note: A copy of this Notice must be promptly filed with the Court. Do not attach copies of the Order Appointing Guardian or Order Appointing Conservator when filing this Notice with the Court.

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Interests of:** **Minor**	▲ COURT USE ONLY ▲
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom

AFFIDAVIT OF ACCEPTANCE OF APPOINTMENT BY WRITTEN INSTRUMENT AS GUARDIAN FOR MINOR PURSUANT TO § 15-14-202, C.R.S.

I, _____ (name of Guardian), accept the appointment of Guardian for the above named unmarried Minor who is _____ years of age and born on _____ (date).

1. **Information about the Appointed Guardian:**

   Name: _____ Relationship to Minor: _____

   Address: _____

   City: _____ State: _____ Zip Code: _____ Home Phone #: _____

   Email Address: _____ Work Phone #: _____

2. The appointment was made by ❑Will **or** ❑other signed writing by _____ (the Minor's parent) on _____ (date):

   Appointment by Will:

   ❑Certified copy of will is attached.

   or

   ❑Filed in this Court on _____ (date) in the following case number: _____

   or

   ❑Filed in _____ (County) in _____ (State) in the following case number: _____.

   Appointment by other signed writing:

   ❑Original signed writing is attached and is signed by the parent or guardian with at least two witnesses and all signatures must be notarized.

3. The parents of the Minor are _____ and _____.

   ❑both parents are deceased.

   ❑(Name) _____ was the last parent to die and at that time was a resident of _____ (name of County/State).

   ❑(Name) _____ is deceased and _____ (name) survives, but has been adjudicated incapacitated and order is attached.

   ❑both parents are alive and have been adjudicated incapacitated. Attach orders adjudicating incapacity.

4. No other Guardian for the Minor has been appointed.

5. I submit personally to the jurisdiction of this Court in any proceeding relating to this guardianship that may be instituted by any interested person. Notice of any such proceeding may be mailed to me by ordinary mail at my address stated above, or at such other address as I may later report to the Court.

VERIFICATION AND ACKNOWLEDGMENT

I swear/affirm under oath that I have read the foregoing Affidavit and that the statements set forth therein are true and correct to the best of my knowledge.

Date: _____ _____
Signature of Guardian

Subscribed and affirmed, or sworn to before me in the County of _____, State of _____, this _____ day of _____, 20 _____.

My Commission Expires: _____ _____
Notary Public/Deputy Clerk

Certificate of Service

I certify that on _____ (date) a copy of this Affidavit was served on each of the following:

Name of Person You are Sending this Document To (Interested Persons)	Relationship to Minor	Address	Manner of Service*

*Insert hand delivery, first class U.S. Mail, certified U.S. Mail, E-filed, or Fax.

Date: _____ _____
Signature of Person Certifying Service

Note:

- Notice of this Affidavit of Acceptance of Appointment must be given to the appointing parent or Guardian, if living, the Minor, if he/she is 12 years of age or older, and a person other than the parent or Guardian having care and custody of the Minor.
- Any person receiving this Affidavit may cause this appointment to terminate by filing a written objection to this appointment within 35 days after receipt of the Affidavit. However, filing of an objection will not preclude the appointment of this or another suitable guardian by the Court in a proper proceeding.
- The minor, if 12 years of age or older, can consent or refuse to consent to the appointment of the Guardian within 35 days after receipt of the Affidavit. The Verified Consent of Minor (JDF 826) must be filed with the Court.

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: _____ **In the Interests of:** **Minor**	**COURT USE ONLY**
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom

PETITION FOR CONFIRMATION OF APPPOINTMENT OF GUARDIAN PURSUANT TO §15-14-202(6), C.R.S.

I, _____ (name of appointed Guardian), hereby petition the Court to confirm my appointment as Guardian and state the following:

1. The Affidavit of Acceptance of Appointment was filed with the Court on _____ (date) and this Petition is filed within 30 calendar days from said filing date.

2. The Minor, if 12 years of age or older, ❑has or ❑has not consented to the appointment of the Guardian and the Verified Consent of Minor (JDF 826) has been filed with the Court.

3. The Appointed Guardian believes that the confirmation is in the best interest of the Minor.

4. This Petition and the Affidavit of Acceptance of Appointment (JDF 821) has been given to the following persons (all applicable must be given notice):
   - ❑ Appointing parent or guardian, if living.
   - ❑ All adults with whom the Minor is currently residing.
   - ❑ All adults who had care and custody of the Minor in the last 60 days.
   - ❑ The Minor, if 12 years of age or older.

Date: _____ _____
Signature of Petitioner

Date: _____ _____
Signature of Attorney for Petitioner

Certificate of Service

I certify that on _____ (date) a copy of this Petition was served on each of the following:

Name of Person You are Sending this Document To (Interested Persons)	Relationship to Minor	Address	Manner of Service*

*Insert hand delivery, first class U.S. Mail, certified U.S. Mail, E-filed, or Fax.

Date: _____ _____
Signature of Person Certifying Service

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Interest of:** **Minor**	▲ **COURT USE ONLY** ▲
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom

PETITION FOR APPOINTMENT OF GUARDIAN FOR MINOR

1. **The Petitioner is:**
   ❑a person interested in the welfare of the Minor.
   or
   ❑the Minor and is 12 years of age or older.

   This is a Petition for appointment of a:
   ❑Guardian. (Note: the appointment will expire on the Minor's 18th birthday, unless otherwise ordered by the Court.)
   ❑Temporary Guardian (not to exceed six months). (§15-14-204(4), C.R.S.)
   ❑Emergency Guardian (not to exceed 60 days). (§15-14-204(5), C.R.S.)

2. **Information about the Petitioner:**
   Name: _____ Relationship to Minor: _____
   Street Address: _____
   Mailing Address, if different: _____
   City:_____ State:_____ Zip Code:_____ Home Phone #:_____
   Email Address:_____ Work Phone #:_____

3. **Information about the Minor:**
   Name:_____ Current age:___ Date of Birth: _____
   Street Address:_____
   Mailing Address, if different: _____
   City:_____ State:_____ Zip Code:_____ Home Phone #:_____
   Email Address:_____

4. **Information about the parents:**
   Mother's Name:_____ ❑Deceased
   Street Address:_____
   Mailing Address, if different: _____

City:_____ State:_____ Zip Code:_____ Home Phone #:_____

Email Address:_____ Work Phone #:_____

Father's Name: _____ ❑Deceased ❑Unknown (attach Birth Certificate)

Street Address: _____

Mailing Address, if different: _____

City:_____ State:_____ Zip Code:_____ Home Phone #:_____

Email Address:_____ Work Phone #:_____

5. The parent or Guardian ❑has nominated ❑has not nominated a Guardian by Will or other writing. (Attach copy of document, if applicable.)

6. Venue for this proceeding is proper in this county because the Minor

❑resides in this county.

❑is present in this county at the time the proceeding is commenced.

7. The best interest of the Minor will be served by the appointment of a Guardian.

8. The minor is unmarried and

❑the parent(s) consent(s) to the appointment of a Guardian. (Attach Consent of Parent - JDF 825).

❑all parental rights have been terminated by

❑prior court order. (Attach a copy of the court order to this Petition.)

❑death. (If available, attach a copy of the death certificate to this Petition.)

❑parents are unwilling or unable to exercise their parental rights. (Briefly explain.)

_____

_____

_____

_____

❑guardianship has previously been granted to a third party who has died or become incapacitated and the Guardian has not appointed a successor Guardian by Will or written instrument.
(Describe and attach order or any relevant documents.)

_____

_____

_____

_____

9. ❑Petitioner is, 21 years of age or older, nominates himself/herself and requests to be appointed as Guardian.

or

❑Petitioner nominates the following person, who is 21 years of age or older, to be appointed as Guardian. (§15-14-206, C.R.S.)

Name: _____ Relationship to Minor: _____

Street Address: _____

Mailing Address, if different: _____

City: _____ State: _____ Zip Code: _____ Home Phone #: _____

Email Address: _____ Work Phone #: _____

10. ❑ The Minor, who is 12 years of age or older, has nominated a Guardian. (Attach Consent or Nomination of Minor - JDF 826).

11. ❑ It is necessary to appoint a **Temporary Guardian** (may not exceed six months) for the Minor until a hearing can be held on this Petition because an immediate need exists and the appointment of a Temporary Guardian is in the best interest of the Minor. (§15-14-204(4), C.R.S.)

(Describe the immediate need.) _____

_____

_____

_____

_____

_____

_____

_____

12. ❑ It is necessary to appoint an **Emergency Guardian** (may not exceed 60 days) for the Minor because of the likelihood of substantial harm to the Minor's health or safety, an emergency exists and no other person appears to have authority to act in the circumstances. (§15-14-204(5) C.R.S.)

(Describe the nature of the emergency.) _____

_____

_____

_____

_____

_____

13. The following person had the primary care and custody of the Minor during the 60 days prior to the filing of this Petition:

Name: _____ Relationship to Minor: _____

Street Address: _____

Mailing Address, if different: _____

City: _____ State: _____ Zip Code: _____ Home Phone #: _____

Email Address: _____ Work Phone #: _____

Dates of Care: _____

14. ❑The parents are both deceased. The following person is the adult relative nearest in kinship that can be found:

Name: _____ Relationship to Minor: _____

Street Address: _____

Mailing Address, if different: _____

City: _____ State: _____ Zip Code: _____ Home Phone #: _____

Email Address: _____ Work Phone #: _____

15. ❑The following person is currently acting as Guardian or Conservator for the Minor in Colorado or elsewhere.

Name: _____ Relationship to Minor: _____

Street Address: _____

Mailing Address, if different: _____

City: _____ State: _____ Zip Code: _____ Home Phone #: _____

Email Address: _____ Work Phone #: _____

16. The Guardian may receive compensation.

❑The hourly rates to be charged, any amounts to be charged pursuant to a published fee schedule, including the rates and basis for charging fees for any extraordinary services, and any other bases upon which a fee charged to the estate will be calculated, are as stated below or in an attachment to this Petition. *

_____

_____

_____

❑The basis of compensation has not yet been determined.

17. The Guardian may compensate his, her, or its counsel.

❑The hourly rates to be charged, any amounts to be charged pursuant to a published fee schedule, including the rates and basis for charging fees for any extraordinary services, and any other bases upon which a fee charged to the estate will be calculated, are as stated below or in an attachment to this Petition. *

_____

_____

_____

❑The basis of compensation has not yet been determined.

* There is a continuing obligation to disclose any material changes to the basis for charging fees. (§ 15-10-602 C.R.S.)

18. The Minor's assets are:

Description of Assets (e.g. bank accounts, property) ❑None	Estimated Value
	$
Total	$

19. The Minor's income is:

Description of Income (e.g. social security, insurance) ❑None	Estimated Amount of Income
	$
Total	$

The Petitioner requests that an appointment of a Guardian be made after notice and hearing.

❑**In addition, Petitioner requests the following:**

_____

_____

_____

VERIFICATION AND ACKNOWLEDGMENT

I (Petitioner) verify that the facts set forth in this document are true as far as I know or am informed. I understand that penalties for perjury follow deliberate falsification of the facts stated herein. (§15-10-310, C.R.S.)

_____
Signature of Petitioner Date

The foregoing instrument was acknowledged before me in the County of _____, State of Colorado, this ____day of _____, 20___, by the Petitioner.

My Commission Expires: _____

_____
Notary Public/Deputy Clerk

_____
Signature of Attorney Date

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Interest of:** **Minor**	**COURT USE ONLY**
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #.:	Case Number: Division Courtroom
CONSENT OF PARENT	

I, _____ (name) am the parent of the above named minor.

I consent to the appointment of _____ (name) as Guardian.

❑I consent to a Guardianship with the following restrictions:

_____

_____

_____

_____

_____

VERIFICATION AND ACKNOWLEDGMENT

I (Parent) verify that the facts set forth in this document are true as far as I know or am informed. I understand that penalties for perjury follow deliberate falsification of the facts stated herein. (§15-10-310, C.R.S.)

_____
Signature of Parent Date

_____
Address

_____
City State Zip Code

_____
Daytime Phone Number

The foregoing instrument was acknowledged before me in the County of _____, State of Colorado, this ____day of _____, 20___, by the Parent.

My Commission Expires: _____

_____
Notary Public/Deputy Clerk

☐District Court ☐Denver Probate Court _____ County, Colorado Court Address: **In the Interest of:** **Minor**	**COURT USE ONLY**
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom

CONSENT OR NOMINATION OF MINOR

I,_____ (name of minor) am 12 years of age or older and I:

☐**Consent** to the appointment of _____ (name) as my Guardian.

☐**Do not consent** to the appointment of _____ (name) as my Guardian.

☐**Nominate** _____ (name), who is 21 years of age or older, as my ☐Guardian ☐Conservator. (Optional)

VERIFICATION AND ACKNOWLEDGMENT

I (Minor) verify that the facts set forth in this document are true as far as I know or am informed. I understand that penalties for perjury follow deliberate falsification of the facts stated herein. (§15-10-310, C.R.S.)

_____
Signature of Minor Date

The foregoing instrument was acknowledged before me in the County of _____, State of Colorado, this ____day of _____, 20___, by the Minor.

My Commission Expires: _____

_____
Notary Public/Deputy Clerk

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Interest of:** **Minor**	**COURT USE ONLY** Case Number: Division Courtroom

ORDER APPOINTING GUARDIAN FOR MINOR

Upon consideration of the Petition for Appointment of Guardian for the above Minor and hearing on _____ _____ (date),

The Court finds that:

1. Venue is proper and required notices have been given or waived.
2. The person is a minor born on _____ (date).
3. An interested person seeks appointment of a Guardian.
4. The Minor's best interests will be served by the appointment of a Guardian.
5. ❑The Minor's parent(s) consent to the appointment of a Guardian.
   ❑The Minor's parents' parental rights have been terminated by prior court order.
   ❑The Minor's parents are deceased.
   ❑The Minor's parents are unwilling or unable to exercise their parental rights.
   ❑Guardianship has previously been granted to a third party who has died or become incapacitated and the Guardian has not appointed a successor Guardian by Will or written instrument.

The Court has considered any expressed wishes of the Minor concerning the selection of the Guardian. The Court has considered the powers and duties of the Guardian, the scope of the Guardianship, and the priority and qualifications of the Nominee.

The Court appoints the following person as Guardian of the Minor:

Name:_____

Street Address:_____

Mailing Address, if different: _____

City:_____ State:_____ Zip Code:_____ Home Phone #: _____

Email Address: _____ Work Phone #:_____

The Court directs the issuance of Letters of Guardianship as follows:

❑The Letters shall expire on _____ (date), the Minor's 18th birthday, unless otherwise ordered by the Court.

❑The powers and duties of the Guardian are unrestricted.

❑The powers and duties of the Guardian are limited by the following restrictions:

The Court orders the following:

1. The Guardian shall notify the Court within 30 days if his/her home address, email address, or phone number changes and/or any change of address for the Minor.

2. The Guardian may not establish or move the Minor's custodial dwelling outside the State of Colorado without a Court order.

3. Within 30 days of appointment, the Guardian shall provide a copy of this Order Appointing Guardian for Minor to the Minor if 12 years or older and persons given notice of the Petition and shall advise those persons using Notice of Appointment of Guardian and/or Conservator (JDF 812) that they have the right to request termination or modification of the Guardianship.

4. ❑The Guardian shall file an annual report (JDF 834) with the Court each year by ❑the Minor's birthday or ❑by _____ (date).

5. Copies of all future Court filings must be provided to the following:

Name of Interested Person	Relationship to Minor
	The Minor if 12 years or older at the time of mailing
	Parent or adult nearest in kinship
	Parent or adult nearest in kinship
	Guardian

6. **The Court further orders:**

Date: _____

_____
❑Judge ❑Magistrate

☐District Court ☐Denver Probate Court _____County, Colorado Court Address: **In the Interests of:** **Minor**	**COURT USE ONLY** Case Number: Division Courtroom

ORDER APPOINTING TEMPORARY GUARDIAN FOR MINOR PURSUANT TO 15-14-204(4), C.R.S.

Upon consideration of the Petition for Appointment of Temporary Guardian for the above Minor and/or hearing on _____ (date),

The Court finds that:

1. Venue is proper and that the required notices have been given or waived.
2. The person is a minor born on _____ (date).
3. A qualified person seeks appointment.
4. An immediate need exists for the appointment of Temporary Guardian and the appointment would be in the best interest of the Minor.
5. The temporary guardianship can not exceed six months.

The Court appoints the following person as Temporary Guardian of the Minor:

Name: _____

Address: _____

City: _____ State: ___ Zip Code: _____ Email Address: _____

Home Phone #: _____ Work Phone #: _____

The Court directs the issuance of Letters of Guardianship as follows:

- ☐ This temporary guardianship expires on _____ (date not to exceed six months from appointment.)
- ☐ The powers and duties of the Temporary Guardian are unrestricted.
- ☐ The powers and duties of the Temporary Guardian are limited by the following restrictions:

_____

_____

_____

_____

_____

_____

_____

The Court orders the following:

1. The Guardian shall notify the Court within 30 days if his/her home address, email address, or phone number changes and/or any change of address for the Minor.

2. The Guardian may not establish or move the Minor's custodial dwelling outside the State of Colorado without a Court order pursuant to §15-14-208(2)(b), C.R.S.

3. Copies of all future filings with the Court shall be provided to the following identified as interested persons in this matter, by the one filing such documents.

Name of Interested Person	Relationship to Minor
	Minor if 12 years or older at time of mailing
	Parent or adult nearest in kinship
	Parent or adult nearest in kinship

4. The Guardian shall provide a copy of this Order Appointing Temporary Guardian for Minor to the Minor (if 12 years of age or older) and interested persons within five days after the appointment pursuant to §15-14-204(4), C.R.S.

5. **The Court further orders:**

_____

_____

_____

_____

_____

Dated: _____

_____
❑Judge ❑Magistrate

☐District Court ☐Denver Probate Court _____County, Colorado Court Address: **In the Interests of:** **Minor**	**COURT USE ONLY** Case Number: Division Courtroom

ORDER APPOINTING EMERGENCY GUARDIAN FOR MINOR PURSUANT TO 15-14-204(5), C.R.S.

Upon consideration of the Petition for Appointment of Emergency Guardian for the above minor and hearing on _____ (date),

The Court finds that:

1. Venue is proper.
2. Notice pursuant to §15-14-204(5), C.R.S. was:
   - ☐ Reasonable.
   - ☐ Dispensed with because the Court finds from affidavit or testimony that the Minor will be substantially harmed before a hearing can be held on the Petition.
3. The person is a minor born on _____ (date).
4. Following the procedures in §15-14-201 et seq., is likely to result in substantial harm to the Minor's health or safety and no other person appears to have authority to act in the circumstances pursuant to §15-14-204(5), C.R.S.
5. The Minor's best interest will be served by the appointment of an Emergency Guardian.
6. The emergency guardianship can not exceed 60 days.

The Court appoints the following person as Emergency Guardian of the Minor:

Name: _____

Address: _____

City: _____ State: ___ Zip Code: _____ Email Address: _____

Home Phone #: _____ Work Phone #: _____

The Court directs the issuance of Letters of Guardianship as follows:

- ☐ This emergency guardianship expires on _____ (date not to exceed 60 days from appointment.)
- ☐ The powers and duties of the Emergency Guardian are as follows:
  - ☐ To perform any and all acts necessary for the day-to-day care, custody, education, recreation, and property of the Minor.
  - ☐ To authorize any and all medical and dental care for the health and well being of the Minor. This care includes, but is not limited to medical and dental exams and tests, x-rays, surgeries, anesthesia, and hospital care.
  - ☐ To authorize mental health treatment, subject to §27-10-107, C.R.S.
  - ☐ Other: _____

If the Emergency Guardian is appointed without notice, notice of the appointment must be given within 48 hours after the appointment and a hearing on the appropriateness of the appointment held within five days after the appointment. The hearing will be held at the following time and location:

Date: _____ **Time:** _____ **Courtroom or Division:** _____

Address: _____

The Court further orders:

_____

_____

_____

_____

_____

Date: _____

_____

❑Judge ❑Magistrate

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Interest of:** **Minor**	**COURT USE ONLY** Case Number: Division Courtroom

LETTERS OF GUARDIANSHIP - MINOR

_____ (name of Guardian) was appointed or confirmed by the Court on _____ (date) as:

- ❑ Guardian pursuant to §15-14-204, C.R.S. These letters shall expire on minor's 18th birthday, unless otherwise ordered by the Court.
- ❑ Emergency Guardian pursuant to §15-14-204(5), C.R.S. These letters shall expire on _____ (a date not to exceed 60 days from the date of appointment). The Guardian's powers are specified in the Order.
- ❑ Temporary Guardian pursuant to §15-14-204(4), C.R.S. These letters shall expire on _____ (a date not to exceed six months from the date of appointment).

These Letters of Guardianship for a Minor whose date of birth is _____, are proof of the Guardian's full authority to act pursuant to §15-14-207, C.R.S., except for the following restrictions:

The Minor's place of residence shall not be changed from the State of Colorado without an order of the Court pursuant to §15-14-208(2)(b), C.R.S.

❑ Other limitations:

_____

_____

_____

_____

Date: _____

_____
Probate Registrar/(Deputy)Clerk of Court

CERTIFICATION

Certified to be a true copy of the original in my custody and to be in full force and effect as of _____.
Date

_____
Probate Registrar/(Deputy)Clerk of Court

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Interest of:** **Minor**	**COURT USE ONLY**
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom

GUARDIAN'S REPORT – MINOR

Current Reporting Period From _____ To _____
(MM/DD/YYYY) (MM/DD/YYYY)

Instructions to Guardian:

If ordered by the Court, Colorado law requires that every guardian of a minor complete a Guardian's Report every year. When you complete this report, you must file the report with the Court and mail copies of the report to the Minor, if 12 years of age or older, and all interested persons as identified in the Order Appointing Guardian. Complete the Certificate of Service at the end of this report to show the names and addresses of all the people to whom you mailed the report and the date on which you mailed it.

I. SUMMARY OF REPORT

	Yes	No
A. Do you recommend that the guardianship continue? If **No**, explain: _____	❑	❑
B. Have you had any criminal charges filed against you or convictions entered since the last report? If **Yes**, explain: _____	❑	❑
C. Do you recommend any changes to the guardianship? If **Yes**, explain: _____	❑	❑
D. Do you wish to remain guardian? If **No**, explain: _____	❑	❑
E. Has the Minor's physical and medical condition (hospitalization/injuries) changed since the last report? If **Yes**, explain: _____	❑	❑

	Yes	No
F. Is the Minor covered under health/dental insurance? If **Yes**, describe coverage: _____ _____	❑	❑
G. Is there a need for medical, social or psychological evaluations of the Minor? If **Yes**, explain: _____ _____	❑	❑
H. Has the Minor's residence changed since the last report? Identify specifics in **Section V.**	❑	❑

I. The Minor's care and living situation is: ❑Excellent ❑Average ❑Below Average

II. MINOR'S INFORMATION

❑**New Residence from last Report**

Name: _____ Age: _____

Address: _____

City: _____ State: _____ Zip Code: _____ Telephone Number: _____

Type of Residence: ❑Relative/Guardian's Home ❑Group Home ❑Foster Home ❑Other: _____

Name of Facility, if applicable: _____

III. GUARDIAN'S INFORMATION

❑**Updated Information from last Report**

Guardian's Name: _____ Email address: _____

Address (Street and P.O. Box): _____

City: _____ State: ___ Zip Code: _____ Telephone Number: _____

Co-Guardian's Name: _____ Email address: _____

Address (Street and P.O. Box): _____

City: _____ State: ___ Zip Code: _____ Telephone Number: _____

IV. EDUCATION AND EXTRACURRICULAR ACTIVITIES

A. Is the Minor attending school?: ❑**Yes** ❑**No** If **Yes,** complete the information below:

Name of School: _____ Current Grade Level: _____

Address: _____

Phone Number: _____ Minor's grades are: ❑Excellent ❑Average ❑Below Average

If below average explain why.

_____

_____

B. If the Minor is old enough, does he/she have a job? ❑**Yes** ❑**No** Describe.

_____

_____

C. Identify a few of the minor's goals, accomplishments, and any extracurricular activities during this reporting period.

_____

_____

_____

_____

V. PLACEMENT AND CARE SUPERVISION

A. If the Minor has moved since the last reporting period, identify the date of the move, address of residence, type of residence and reason for the change.

Date of Move	Address of Residence	Type of Residence	Reason for Change

B. Who currently provides the majority of the Minor's supervision?

Name: _____ Telephone Number: _____

VI. FINANCIAL MATTERS

A. Do you have possession or control of the Minor's assets, e.g. property, financial accounts? ❑**Yes** ❑**No**
If **Yes**, describe: _____

_____

B. Do you have control of the Minor's Income? ❑**Yes** ❑**No**
If **Yes**, describe: _____

_____

C. Do you or the Minor receive any financial support from the biological parents? ❑**Yes** ❑**No** If there is a current child support order, provide the name of the court, case number, date of most recent order, and status of the payments.

Name of Court	Case Number	State	Date of Current Order	Amount	Payment Status e.g. on time, late

D. If applicable, identify the Representative Payee for Social Security and other income benefits.
Name: _____ Phone Number: _____

E. Have any fees been paid to you in your role as guardian? ❑**Yes** ❑**No**
If **Yes**, describe:

_____

_____

F. Have any fees been paid to others for the care of the Minor or his/her property? ❑**Yes** ❑**No**
If **Yes**, describe: _____

_____

Complete this section only if there is no Conservatorship and the Guardian has custody of funds.

SUMMARY OF FINANCIAL ACTIVITY DURING REPORTING PERIOD		
Beginning balance of bank accounts (savings, checking, etc.)	$	
Plus monies received (social security, pension beneficiary, child support, interest, etc.) from any source on behalf of the person	+$	
Less total fees to care providers	-$	
Less total monies paid to the Minor, e.g. personal needs	-$	
Less total fees paid to guardian	-$	
Less any other expenses, e.g. housing, insurance, maintenance	-$	
Ending balance of bank accounts	$	

You are required to maintain supporting documentation for all receipts and all disbursements under your control during the duration of this appointment. The Court or any Interested Persons as identified in the Order Appointing Guardian may request copies at any time.

VII. PERSONAL CARE AND OTHER ISSUES

A. Date of the Minor's last medical exam: _____ Dental exam: _____

B. Are the Minor's immunizations current? ❑**Yes** ❑**No**

If **No**, explain: _____

_____

C. Describe any medical, educational, vocational, counseling and other services provided to the Minor.

_____

_____

_____

D. Identify any significant events involving the Minor since the last report e.g. special awards or recognition, health issues, criminal charges/convictions, behavioral issues

_____

_____

_____

E. Does the Minor have any contact with the biological parents and/or other family members? ❑**Yes** ❑**No**
Briefly describe the visits: Name of person visiting, frequency and length of visits and date of the last visit. _____

F. Do you believe the current plan for care is in the Minor's best interest? ❑**Yes** ❑**No**
If **No**, describe your recommended changes:

Note: If you wish to modify or terminate this guardianship, you must file a separate Petition with the Court.

VERIFICATION

I verify that the facts set forth in this document are true as far as I know or am informed. I understand that penalties for perjury follow deliberate falsification of the facts stated herein. §15-10-310, C.R.S.

Guardian's Signature Date Co-Guardian's Signature Date

Certificate of Service

I certify that on _____ (date) a copy of this Guardian's Report was served on each of the following:

Name of Person to Whom You are Sending this Document (Interested Persons)	Relationship to Protected Person	Address	Manner of Service*
	Minor, if 12 or older		

*Insert hand delivery, first class U.S. Mail, certified U.S. Mail, E-filed, or Fax.

Signature of Person Certifying Service

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Interest of:** **Minor**	**COURT USE ONLY**
Attorney or Party Without Attorney (name and address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom
PETITION FOR TERMINATION OF GUARDIANSHIP – MINOR *******To be used only when Guardianship is to be terminated prior to the Minor's 18th birthday.*******	

1. **The Petitioner is:**
   - ❑the mother.
   - ❑the father.
   - ❑the Guardian.
   - ❑the Minor.
   - ❑another person interested in the welfare of the Minor. (State nature of interest.)

   _____
   _____

2. **Information about Petitioner:**

   Name: _____

   Street Address: _____

   Mailing Address, if different: _____

   City: _____ State: _____ Zip Code: _____ Home Phone #: _____

   E-mail address: _____ Work Phone #: _____

3. **Petitioner requests that this guardianship be terminated for the following reason(s):**
   - ❑The parent(s) can reassume parental responsibilities. (Explain circumstances.)

     _____
     _____
     _____
     _____

   - ❑The Minor was adopted on or about _____ (date). ❑Certified copy of Final Decree of Adoption is attached.
   - ❑The Minor is emancipated. (Explain circumstances.)

     _____
     _____
     _____

❑Other: (Attach additional sheets, if necessary.)

_____

_____

_____

_____

4. The Minor (if 12 years of age or older), Guardian, and the following person(s) designated by the Court in the Order Appointing Guardian, are required by law to be given notice of the time and place of hearing on this Petition, if a hearing is deemed necessary by the Court:

Name	Address	Relationship to Minor

VERIFICATION

I, (Petitioner) verify that the facts set forth in this document are true as far as I know or am informed. I understand that penalties for perjury follow deliberate falsification of the facts stated herein. (§15-10-310, C.R.S.)

_____

Signature of Petitioner or Attorney for Petitioner Date

CERTIFICATE OF SERVICE

I certify that on _____ (date) a copy of this Petition for Termination of Guardianship - Minor was served on each of the following:

Name of Person to Whom you are Sending this Document	Relationship to Minor	Address	Manner of Service*

***Insert one of the following: Hand Delivery, First-Class Mail, Certified Mail, E-Served or Faxed.**

_____

Signature

Note:
The Petitioner must contact the Court to set a date and time for a hearing.

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Interests of:** **Ward/Minor**	▲ COURT USE ONLY ▲ Case Number: Division Courtroom

ORDER FOR TERMINATION OF GUARDIANSHIP – WARD/MINOR PURSUANT TO §15-14-210, C.R.S.

Upon consideration of the Verified Petition for Termination of Guardianship for an order terminating guardianship filed on _____ (date) or upon proper notice and hearing held on _____ (date):

The Court finds and orders that the statements in the Petition are true and correct; and/or that notice has been properly given or waived; and that the welfare and best interests of the ward/minor will be served by the termination of this guardianship because:

❑ The parent(s) can now reassume parental responsibilities.

❑ The ward/minor was adopted on or about _____ (date). ❑Hearing is waived for good cause.

❑ The ward/minor is emancipated.

❑ The death of the ward/minor.

❑ Other: _____

_____

_____.

It is further ordered that:

_____

_____

_____.

Date: _____ _____

❑Judge ❑Magistrate

CERTIFICATE OF SERVICE

I certify that on _____ (date) a copy of this Order was served on each of the following:

Full Name	Relationship to Ward/Minor	Address	Manner of Service*

***Insert one of the following: Hand Delivery, First-Class Mail, Certified Mail, E-Served or Faxed.**

_____
Clerk

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Interest of:** **Respondent**	▲ **COURT USE ONLY** ▲
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #.:	Case Number: Division Courtroom
PETITION FOR APPOINTMENT OF GUARDIAN FOR ADULT	

1. The Petitioner is

❑a person interested in the welfare of the Respondent.

or

❑the Respondent.

This is a Petition for appointment of a:

❑Permanent Guardian. (§15-14-304(1) and (2), C.R.S.)

❑Emergency Guardian (not to exceed 60 days). (§15-14-312, C.R.S.)

2. Information about the Petitioner:

Name: _____ Relationship to Respondent: _____

Street Address: _____

Mailing Address, if different: _____

City: _____ State: _____ Zip Code: _____ Home Phone #: _____

Email Address: _____ Work Phone #: _____

3. Information about the Respondent:

Name: _____ Age: _____ Date of Birth: _____

Street Address: _____

Mailing Address, if different: _____

City: _____ State: _____ Zip Code: _____ County of Residence: _____

Home Phone #: _____

❑If this appointment is made, the Respondent's residence will change to:

_____

4. **Information about the Respondent's spouse or adult who has resided with the Respondent for more than six months in the last year:**

Name: _____ Relationship to Respondent: _____

Street Address: _____

Mailing Address, if different: _____

City: _____ State: _____ Zip Code: _____ Home Phone #: _____

Email Address: _____ Work Phone #: _____

5. Venue for this proceeding is proper because the Respondent

❑ resides in this county.

❑ is present in this county. **(Check this box only** if requesting an Emergency Guardian.) (§15-14-108(2), C.R.S.)

❑ is admitted to an institution pursuant to an order of a court of competent jurisdiction sitting in this county. **(Attach copy of order.)**

6. ❑ An appointment of a guardian for the Respondent has been previously made. **(Attach copy of Order.)**

7. ❑ A Power of Attorney exists for financial or medical matters. **(Attach a copy.)** The agent's name and mailing address is:

_____

_____

8. ❑ A valid designated beneficiary agreement exists. **(Attach a copy of the agreement to the Petition.)** The designated beneficiary's name and address is:

_____

_____

9. The Respondent is unable to effectively receive or evaluate information or both, make or communicate decisions to such an extent that the individual lacks the ability to satisfy essential requirements for physical health, safety, or self-care, even with appropriate and reasonably available technological assistance. (§15-14-102(5), C.R.S.)

10. The Respondent's identified needs cannot be met by less restrictive means, including use of appropriate and reasonably available technological assistance.

11. Guardianship is necessary due to the following disabilities or impairments: ❑ Physician's letter attached.

_____

_____

_____

_____

_____

_____

12. Petitioner requests the powers and duties to be ❑unlimited/unrestricted or ❑limited/with restrictions. The requested limitations/restrictions on the Guardian's powers and duties, if any, are as follows:

_____

_____

_____

_____

_____

13. ❑Petitioner is, 21 years of age or older, nominates himself/herself and requests to be appointed as Guardian.
or
❑Petitioner nominates the following person, who is 21 years of age or older, to be appointed as Guardian.

Name: _____

Street Address: _____

Mailing Address, if different: _____

City: _____ State: _____ Zip Code: _____ Home Phone #: _____

Email Address: _____ Work Phone #: _____

14. The nominated Guardian has priority for appointment because he/she is: (§15-14-310, C.R.S.)

❑a Guardian currently acting for the Respondent in Colorado or elsewhere.

❑nominated in writing by Respondent, including nomination in a durable power of attorney or designated beneficiary agreement.

❑an agent under a medical power of attorney.

❑an agent under a general durable power of attorney.

❑the spouse of the Respondent.

❑the parent of the Respondent.

❑an adult child of the Respondent.

❑an adult with whom Respondent has resided for more than six months immediately before the filing of this Petition.

❑other: _____

15. ❑The Respondent nominated the following person as Guardian, but the Petitioner does not seek that person's appointment for the following reason:

_____

_____

Name: _____ Relationship to Respondent: _____

Street Address: _____

Mailing Address, if different: _____

City: _____ State: _____ Zip Code: _____ Home Phone #: _____

Email Address: _____ Work Phone #: _____

16. ❑It is necessary to appoint an **Emergency Guardian** for the Respondent because complying with the normal procedures for the appointment of a Guardian will likely result in substantial harm to the Respondent's health, safety, or welfare and no other person appears to have authority and willingness to act in the circumstances. (§15-14-312, C.R.S.) The nature of the emergency is as follows:

_____

_____

_____

_____

17. Information about adult children and parents. ❑**None** (If none, list an adult relative that can be found with reasonable efforts, such as a brother, sister, aunt, uncle, etc.)

Name: _____ Relationship: ❑Adult Child or ❑Parent

Street Address: _____

Mailing Address, if different: _____

City: _____ State: _____ Zip Code: _____ Home Phone #: _____

Email Address: _____ Work Phone #: _____

Name: _____ Relationship: ❑Adult Child or ❑Parent

Street Address: _____

Mailing Address, if different: _____

City: _____ State: _____ Zip Code: _____ Home Phone #: _____

Email Address: _____ Work Phone #: _____

Name: _____ Relationship: _____

Street Address: _____

Mailing Address, if different: _____

City: _____ State: _____ Zip Code: _____ Home Phone #: _____

Email Address: _____ Work Phone #: _____

18. Information about each person currently responsible for primary care and custody of the Respondent, including the Respondent's treating physician: ❑**None**

Name of Treating Physician: _____ Phone #: _____

Street Address: _____

Mailing Address, if different: _____

City: _____ State: _____ Zip Code: _____ Email Address: _____

Name of Caregiver _____ Phone #: _____

Street Address: _____

Mailing Address, if different: _____

City: _____ State: _____ Zip Code: _____ Email Address: _____

19. ❑**The following person is the Legal Representative for the Respondent not otherwise designated above.** (Representative payee, trustee, custodian of a trust, etc. §15-14-102(6), C.R.S.)

Name: _____ Type of Legal Representative: _____

Phone #: _____ Email Address: _____

Mailing Address: _____

City: _____ State: _____ Zip Code: _____

20. The Guardian may receive compensation.

❑The hourly rates to be charged, any amounts to be charged pursuant to a published fee schedule, including the rates and basis for charging fees for any extraordinary services, and any other bases upon which a fee charged to the estate will be calculated, are as stated below or in an attachment to this Petition. *

_____

_____

_____

❑The basis of compensation has not yet been determined.

21. The Guardian may compensate his, her or its counsel.

❑The hourly rates to be charged, any amounts to be charged pursuant to a published fee schedule, including the rates and basis for charging fees for any extraordinary services, and any other bases upon which a fee charged to the estate will be calculated, are as stated below or in an attachment to this Petition. *

_____

_____

_____

❑The basis of compensation has not yet been determined.

* There is a continuing obligation to disclose any material changes to the basis for charging fees. (§ 15-10-602 C.R.S.)

22. The Respondent's assets are:

Description of Assets (e.g. bank accounts, insurance, pensions, property) ❑**None**	**Estimated Value**
	$
Total	**$**

23. The Respondent's income is:

Description of Income (e.g. social security, pension) ❑**None**	**Estimated Amount of Income**
	$
Total	$

The Petitioner requests that an appointment of a Guardian be made after notice and hearing.

❑**In addition, the Petitioner requests the following:**

_____

_____

VERIFICATION AND ACKNOWLEDGMENT

I (Petitioner) verify that the facts set forth in this document are true as far as I know or am informed. I understand that penalties for perjury follow deliberate falsification of the facts stated herein. (§15-10-310, C.R.S.)

_____
Signature of Petitioner Date

The foregoing instrument was acknowledged before me in the County of _____, State of Colorado, this ____day of _____, 20___, by the Petitioner.

My Commission Expires: _____

_____
Notary Public/Deputy Clerk

_____
Signature of Attorney Date

☐District Court ☐Denver Probate Court _____County, Colorado Court Address: **In the Interest of:** **Respondent**	**COURT USE ONLY** Case Number: Division Courtroom

ORDER APPOINTING EMERGENCY GUARDIAN FOR ADULT PURSUANT TO §15-14-312, C.R.S.

Upon consideration of the Petition for Appointment of Emergency Guardian for the above Respondent and/or hearing on _____ (date),

The Court finds:

1. That venue is proper.
2. Notice pursuant to §15-14-312, C.R.S. was:
   ☐Reasonable.
   ☐Dispensed with because the Court finds from testimony that the Respondent will be substantially harmed if the appointment is delayed. The nature of the emergency is:

   _____
   _____
   _____
   _____
3. Pursuant to §15-14-312(1), C.R.S., it is necessary to appoint an Emergency Guardian for the Respondent because of the likelihood of substantial harm to the Respondent's health, safety, or welfare, and that no other person appears to have authority and willingness to act in the circumstances.
4. The emergency guardianship cannot exceed 60 days.

The Court appoints the following person as Emergency Guardian of the Respondent:

Name:_____

Street Address: _____

Mailing Address, if different: _____

City:_____ State:_____ Zip Code:_____ Email Address:_____

Home Phone #:_____ Work Phone #:_____

Appointment of Emergency Guardian, with or without notice, is not a determination of the Respondent's incapacity.

The Court directs the issuance of Letters of Guardianship as follows:

This emergency guardianship expires on_____ (date not to exceed 60 days from appointment)

An Emergency Guardian may exercise only the powers specified in this Order. The powers and duties of the Emergency Guardian are as follows:

_____

_____

_____

_____

_____

The Court orders the following:

1. The Court appoints the following attorney to represent the Respondent:

   Name:_____

   Address:_____

   City:_____ State:_____ Zip Code:_____ Email Address: _____

   Phone #:_____ Attorney Registration #: _____

2. If this Order was issued without notice, this Order Appointing Emergency Guardian along with Notice of Appointment of Emergency Guardian and Notice of Right to Hearing (JDF 844) must be personally served on the Respondent within 48 hours after the appointment. A copy of the completed Personal Service Affidavit (JDF 718) must be promptly filed with the Court.

3. ❑Powers of attorney, whether executed prior to or following the entry of this Order, are terminated, except as follows: _____

   _____

   _____

   _____

4. **The Court further orders:**

   _____

   _____

   _____

   _____

Date: _____

_____

❑Judge ❑Magistrate

☐District Court ☐Denver Probate Court _____ County, Colorado Court Address:	
In the Interest of: **Respondent**	▲ **COURT USE ONLY** ▲
Attorney or Party Without Attorney (Name and Address): Phone Number:_____ E-mail: _____ FAX Number:_____ Atty. Reg.#: _____	Case Number: Division ____ Courtroom _____

NOTICE OF APPOINTMENT OF EMERGENCY GUARDIAN AND NOTICE OF RIGHT TO HEARING PURSUANT TO §15-14-312, C.R.S.

To: _____ (name of Respondent)

The Court appointed an emergency guardian for you. Details of the appointment are included in the attached Order. Appointment of an emergency guardian is NOT a determination of your incapacity.

If you would like the Court to review the appropriateness of the appointment, the Court will hold a hearing within 14 days after receiving your request.

The Court also appointed the following attorney to represent you for the duration of the emergency appointment:

Name:_____

Mailing Address:_____

Telephone #: _____ Fax #: _____ Email:_____

_____
Signature of Emergency Guardian or Attorney for Emergency Guardian

Note:

If not present at the hearing, this Notice must be personally served on the Respondent, along with a copy of the Order Appointing Emergency Guardian within 48 hours of the appointment pursuant to §15-14-312(2), C.R.S. A copy of this Notice (JDF 844) and the Personal Service Affidavit (JDF718) must be filed with the Court.

☐District Court ☐Denver Probate Court _____County, Colorado Court Address: **In the Interests of:** **Ward**	**COURT USE ONLY** Case Number: Division Courtroom

ORDER APPOINTING TEMPORARY SUBSTITUTE GUARDIAN FOR ADULT PURSUANT TO §15-14-313, C.R.S.

Upon consideration of the Petition for Appointment of Temporary Substitute Guardian for the above Ward and/or hearing on _____ (date),

The Court finds:

1. Venue is proper and that the required notices have been given or waived
2. A qualified person seeks appointment.
3. That the current Guardian is not effectively performing his/her duties and that the welfare of the Ward requires immediate action pursuant to §15-14-313, C.R.S.
4. The temporary substitute guardianship can not exceed six months.

The Court appoints the following person as Temporary Substitute Guardian of the Ward:

Name: _____

Address: _____

City: _____ State: ___ Zip Code: _____ Email Address: _____

Home Phone #: _____ Work Phone #: _____

The Court directs the issuance of Letters of Guardianship as follows:

This temporary substitute guardianship expires on _____ (date not to exceed six months from appointment).

The Temporary Substitute Guardian has the same powers as set forth in the previous Order Appointing Guardian, except as follows:

_____

_____

_____

_____

_____

_____

The Court orders the following:

1. The Temporary Substitute Guardian shall notify the Court within 30 days if his/her home address, email address, or phone number changes and/or any change of address for the Ward.

2. The authority and Letters of any Guardian previously appointed by this Court are hereby suspended.

3. The Temporary Substitute Guardian shall provide a copy of all future filings with the Court to the following identified as interested persons in this matter:

Name of Interested Person	Relationship to Ward
	Spouse
	Parent
	Adult Children

4. If an appointment is made without previous notice to the Ward, the affected Guardian and other interested persons, the Temporary Substitute Guardian, within five days after the appointment shall provide a copy of this of this Order Appointing a Temporary Substitute Guardian for Adult pursuant to §15-14-313(1), C.R.S.

5. **The Court further orders:**

_____
_____
_____
_____
_____

Dated: _____

_____
❑Judge ❑Magistrate

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Interest of:** **Ward**	**COURT USE ONLY** Case Number: Division Courtroom
ORDER APPOINTING GUARDIAN FOR ADULT	

Upon consideration of the Petition for Appointment of Guardian for the above Ward and hearing on _____ (date),

The Court finds that:

1. Venue is proper and required notices have been given or waived.
2. The evidence is clear and convincing that the Ward is an incapacitated person and the Ward's needs cannot be met by less restrictive means, including the use of appropriate and reasonably available technological assistance.
3. The nature and extent of the Ward's incapacity is as follows:

_____

_____

_____

The Court has considered any express wishes of the Ward concerning the selection of the Guardian. The Court has considered the powers and duties of the Guardian, the scope of the guardianship, and the priority and qualifications of the Nominee.

The Court appoints the following person as Guardian:

Name:_____

Street Address:_____

Mailing Address, if different: _____

City:_____ State:_____ Zip Code:_____ Home Phone #: _____

Email Address: _____ Work Phone #:_____

The Court directs the issuance of Letters of Guardianship as follows:

The Guardian does not have the authority to obtain hospital or institutional care and treatment for mental illness, developmental disability or alcoholism against the will of the Ward. (§15-14-316(4), C.R.S.)

❑The powers and duties of the Guardian are unrestricted.

❑The powers and duties of the Guardian are limited by the following restrictions:

_____

_____

_____

_____

The Court orders the following:

1. The Guardian shall notify the Court within 30 days if his/her home address, email address, or phone number changes.

2. The Guardian may not establish or move the Ward's custodial dwelling outside the State of Colorado without a Court order. (§15-14-315(1)(b), C.R.S.)

3. Within 30 days of appointment, the Guardian shall provide a copy of this Order Appointing Guardian for Adult to the Ward and to persons given notice of the Petition and shall advise those persons using Notice of Appointment of Guardian and/or Conservator (JDF 812) that they have the right to request termination or modification of the Guardianship.

4. The Guardian shall file the Initial Guardian's Report/Care Plan (JDF 850) by _____ (date 60 days from appointment) and shall file Annual Guardian's Report (JDF 850) by each _____ (date) beginning in _____ (year), for the duration of the Guardianship.

5. ❑The Guardian may manage the day-to-day finances for the support, care, education, health and welfare of the Ward. The Guardian is required to maintain supporting documentation for all receipts and all disbursements during the duration of this appointment. The Court further orders the following:

_____

_____

_____

6. ❑Medical powers of attorney, whether executed prior to or following the entry of this Order, are terminated, except as follows:

_____

_____

7. Copies of all future Court filings must be provided to the following:

Name of Interested Person	Relationship to Ward
	The Ward
	Spouse
	Parent
	Adult Child
	Guardian

8. **The Court further orders:**

_____

_____

Date: _____

_____

❑Judge ❑Magistrate

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address:	
In the Interest of: **Respondent/Ward**	**COURT USE ONLY** Case Number: Division Courtroom

LETTERS OF GUARDIANSHIP – ADULT

_____ (name of Guardian) was appointed by Court Order on _____ (date) as:

- ❑ Guardian pursuant to §15-14-311, C.R.S.
- ❑ Emergency Guardian pursuant to §15-14-312(1), C.R.S. These letters shall expire on _____ (a date not to exceed 60 days from the date of appointment). The Guardian's powers are specified in the Order.
- ❑ Temporary Substitute Guardian pursuant to §15-14-313, C.R.S. These letters shall expire on _____ (a date not to exceed six months from the date of appointment). The Guardian's powers are specified in the previous order of appointment.

The Guardian shall have access to Respondent's/Ward's medical records and information to the same extent that the Respondent/Ward is entitled. The Guardian shall be deemed to be Respondent's/Ward's personal representative for all purposes relating to Respondent's/Ward's protected health information, as provided in HIPAA, Section 45 CFR 164.502(g)(2).

These Letters of Guardianship are proof of the Guardian's full authority to act, except for the following restrictions:

The Guardian does not have the authority to obtain hospital or institutional care and treatment for mental illness, developmental disability or alcoholism against the will of the Respondent/Ward pursuant to §15-14-316(4), C.R.S.

The Respondent/Ward's place of residence shall not be changed from the State of Colorado without an order of the Court pursuant to §15-14-315(1)(b), C.R.S.

❑ Other limitations: _____

_____

_____

Date: _____

_____
Probate Registrar/(Deputy)Clerk of Court

CERTIFICATION

Certified to be a true copy of the original in my custody and to be in full force and effect as of _____.
Date

_____
Probate Registrar/(Deputy)Clerk of Court

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Interest of:** **Ward**	**COURT USE ONLY**
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom

GUARDIAN'S REPORT – ADULT

❑INITIAL REPORT/CARE PLAN ❑ANNUAL REPORT

Current Reporting Period From _____ To _____
(MM/DD/YYYY) (MM/DD/YYYY)

Instructions to Guardian:

Colorado law requires that every guardian of an adult complete a Guardian's Report every year. When you complete this report, you must file the report with the Court and mail copies of the report to the Ward and all interested persons as identified in the Order Appointing Guardian. Complete the Certificate of Service at the end of this report to show the names and addresses of all the people to whom you mailed the report and the date on which you mailed it.

I. SUMMARY OF REPORT

	Yes	No
A. Do you recommend that the guardianship continue? If **No**, explain: _____	❑	❑
B. Have you had any criminal charges filed against you or convictions entered since the last report? If **Yes**, explain: _____	❑	❑
C. Do you recommend any changes to the guardianship? If **Yes**, explain: _____	❑	❑
D. Do you wish to remain guardian? If **No**, explain: _____	❑	❑
E. Has the Ward's physical and medical condition (hospitalization/injuries) changed since the last report? If **Yes**, explain: _____	❑	❑

	Yes	No
F. Has the Ward been hospitalized in the last year? If **Yes**, explain: _____	❑	❑
G. Is there a need for further medical, social or psychological evaluations of the Ward? Please explain: _____	❑	❑
H. Has the Ward's residence changed since the last report? Identify specifics in **Section V.**	❑	❑
I. Does the Ward have sufficient financial resources?	❑	❑

II. WARD'S INFORMATION

❑**New Residence from last Report**

Name: _____ Age: _____

Address (Include name of facility): _____

_____

City: _____ State: ___ Zip Code: _____ Telephone Number: _____

Type of Residence: ❑Private ❑Nursing Home ❑Assisted Living Home ❑Other: _____

III. GUARDIAN'S INFORMATION

❑**Updated Information from last Report**

Guardian's Name: _____ Email address: _____

Address (Street and P.O. Box):_____

City: _____ State: ___ Zip Code: _____ Telephone Number: _____

Co-Guardian's Name: _____ Email address: _____

Address (Street and P.O. Box):_____

City: _____ State: ___ Zip Code: _____ Telephone Number: _____

IV. CURRENT CONDITION OF THE WARD

Describe the Ward's mental, physical, and social condition and if any additional evaluations are needed.

_____

_____

_____

_____

_____

_____

_____

_____

V. PLACEMENT AND CARE SUPERVISION

A. If the Ward has moved since the last reporting period, identify the date of the move, address of residence, type of residence and reason for the change.

Date of Move	Name of Facility and Address	Type of Residence	Reason for Change

B. Who currently supervises the Ward's care and treatment on a daily basis?

Name: _____ Telephone Number: _____

VI. VISITATION OF WARD

Colorado law requires that a guardian maintain sufficient contact with the Ward.

A. How often do you visit the Ward? ❑Daily ❑Weekly ❑Monthly ❑Other: _____

B. How often do you contact the Ward or the Ward's care provider?
❑Daily ❑Weekly ❑Monthly ❑Other: _____

C. When was the last time you saw the Ward in person? _____ (date)

D. How long are the visits and summarize your activities with and on behalf of the Ward?

_____
_____
_____
_____
_____

E. Does the Ward participate in decision-making? ❑**Yes** ❑**No** Briefly describe.

_____
_____
_____

VII. FINANCIAL MATTERS

A. Are there sufficient financial resources to take care of the Ward? ❑**Yes** ❑**No** If **No,** what do you believe is the best way to handle this problem?

_____
_____
_____

B. Do you have possession or control of the Ward's assets, e.g. property, financial accounts? ❑**Yes** ❑**No**
If **Yes**, describe: _____

_____

C. Do you have control of the Ward's Income? ❑Yes ❑No
If **Yes**, describe: _____

_____

D. If applicable, identify the Representative Payee for Social Security and other income benefits.
Name: _____ Phone Number: _____

E. Have any fees been paid to you in your role as guardian? ❑Yes ❑No
If **Yes,** describe: _____

_____

F. Have any fees been paid to others for the care of the Ward or his/her property? ❑Yes ❑No
If **Yes**, describe and identify name of person: _____

_____

Complete this section only if there is no Conservatorship and the Guardian has custody of funds.

SUMMARY OF FINANCIAL ACTIVITY DURING REPORTING PERIOD		
Beginning balance of bank accounts (savings, checking, etc.)	$	
Plus money received (Social Security, SSI, pension, disability, interest, etc) from any source on behalf of the person	+$	
Less total fees to care providers	-$	
Less total monies paid to the Ward, e.g. personal needs	-$	
Less total fees paid to guardian	-$	
Less any other expenses, e.g. housing, insurance, maintenance	-$	
Ending balance of bank accounts	$	

You are required to maintain supporting documentation for all receipts and all disbursements under your control during the duration of this appointment. The Court or any Interested Persons as identified in the Order Appointing Guardian may request copies at any time.

VIII. PERSONAL CARE AND OTHER ISSUES

A. Describe the medical, educational, vocational and other services provided to the Ward.

_____

_____

_____

_____

_____

_____

_____

_____

B. Do you believe the current plan for care, treatment and/or rehabilitation is in the Ward's best interest? ❑**Yes** ❑**No** If **No**, describe what changes would be appropriate.

_____

_____

_____

_____

C. The Ward's care is ❑**Very Good** ❑**Good** ❑**Adequate** ❑**Poor**

D. Describe your plans for the Ward's future care including any recommended changes.

_____

_____

_____

_____

Note: If you wish to modify or terminate this guardianship, you must file a separate Petition with the Court.

VERIFICATION

I verify that the facts set forth in this document are true as far as I know or am informed. I understand that penalties for perjury follow deliberate falsification of the facts stated herein. 15-10-310, C.R.S.

_____ _____ _____ _____

Guardian's Signature Date Co-Guardian's Signature Date

Certificate of Service

I certify that on _____ (date) a copy of this Guardian's Report was served on each of the following:

Name of Person to Whom You are Sending this Document (Interested Persons)	Relationship to Protected Person	Address	Manner of Service*
	Ward		

***Insert hand delivery, first class U.S. Mail, certified U.S. Mail, E-filed, or Fax.**

_____

Signature of Person Certifying Service

☐District Court ☐Denver Probate Court _____ County, Colorado Court Address: **In the Interests of:** **Ward**	▲ COURT USE ONLY ▲
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg.#.:	Case Number: Division Courtroom

PETITION FOR TERMINATION OF GUARDIANSHIP – ADULT PURSUANT TO §15-14-318, C.R.S.

1. Petitioner(s), _____ (full name(s))

Current address: _____

Residence, if different: _____

E-mail address: _____

☐ is the guardian.

☐ is the ward.

☐ is a person interested in the welfare of the ward. (State nature of interest.)

_____

2. The guardian was appointed on _____ (date).

3. The Petitioner(s) requests that the guardianship be terminated because the ward no longer meets the standard for establishing the guardianship for the following reasons:

_____

_____

_____

_____

_____

_____

_____.

☐ Physician's letter or professional evaluation by qualified person is attached, if appropriate in compliance with C.R.P.P. 27.1 (§15-14-306, C.R.S.)

4. The Court, in its Order Appointing Guardian, ordered that notice of all proceedings be given to the following person(s):

Full Name	Address	Relationship

The persons listed above will be given notice of the time and place for hearing on this Petition, pursuant to §15-14-309(3), C.R.S.

The Petitioner requests that the Court appoint: (Check box(es) as appropriate.)

- ☐ Court Visitor
- ☐ Guardian ad Litem (GAL)
- ☐ Attorney
- ☐ Other: _____
- ☐ None.

The Ward is required to be present at the hearing, unless excused by the Court for good cause.

☐ The Petitioner requests that the Ward be excused from attending the hearing for the following reasons:

_____

_____

_____

_____

_____ _____

Signature of Attorney for Petitioner Date Signature of Petitioner Date

CERTIFICATE OF SERVICE

I certify that on _____ (date) a copy of this Petition for Termination of Guardianship - Adult was served on each of the following:

Full Name	Relationship to Ward	Address	Manner of Service*

***Insert one of the following: Hand Delivery, First-Class Mail, Certified Mail, E-Served or Faxed.**

_____

Signature

Note:
The Petitioner must contact the Court to set a date and time for a hearing.

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Interest of:** **Ward/Protected Person**	**COURT USE ONLY**
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg.#:	Case Number: Division Courtroom

NOTICE OF DEATH

This Notice is submitted pursuant to §15-14-314(2)(g),C.R.S. and/or §15-14-431(1), C.R.S.

1. _____ (name), who died on _____ (date) was the subject of a ❑Guardianship and/or ❑Conservatorship.

2. ❑The Guardian's authority to act on behalf of the Ward has terminated.

   ❑The Conservator's authority to act on behalf of the Protected Person is limited and the Conservator will conclude administration of the conservatorship estate pursuant to §15-14-428 and 431, C.R.S.

VERIFICATION

I, (Guardian/Conservator) verify that the facts set forth in this document are true as far as I know or am informed. I understand that penalties for perjury follow deliberate falsification of the facts stated herein. (§15-10-310, C.R.S.)

_____
Signature of Guardian/Conservator or Attorney Date

CERTIFICATE OF SERVICE

I certify that on _____ (date) a copy of this Notice was served on each of the following:

Name of Person to Whom you are Sending this Document	Relationship to Protected Person/Ward	Address	Manner of Service*

***Insert one of the following: Hand Delivery, First-Class Mail, Certified Mail, E-Served or Faxed.**

_____
Signature

☐District Court ☐Denver Probate Court _____ County, Colorado Court Address: **In the Interest of:** **Ward**	**COURT USE ONLY** Case Number: Division Courtroom
ORDER FOR TERMINATION OF GUARDIANSHIP - ADULT PURSUANT TO §15-14-318, C.R.S.	

Upon consideration of the ☐Petition for Termination of Guardianship or ☐Notice of Death (JDF 853) or Certificate of Death, the Court finds and orders that this guardianship is terminated because:

☐Death of the Ward.

☐The Ward no longer meets the standard for continuing the guardianship.

☐The following good cause:

_____

_____

_____

_____

_____

_____

Date: _____

_____

☐Judge ☐Magistrate

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Interests of:** **Ward/Minor**	▲ COURT USE ONLY ▲
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg.#.:	Case Number: Division Courtroom
PETITION FOR MODIFICATION OF GUARDIANSHIP – ❑ADULT ❑MINOR PURSUANT TO §15-14-318, C.R.S. OR §15-14-210, C.R.S.	

1. Petitioner: _____ (full name)

Relationship to Ward: _____

Current address: _____

Residence, if different: _____

E-mail address: _____

❑ is the ❑mother. ❑father.

❑ is the ward/minor.

❑ is guardian..

❑ is a person interested in the welfare of the ward. (State nature of interest.)

_____

2. The guardian was appointed on _____ (date).

3. The authority of the guardian should be modified as follows:

_____

_____

_____

_____

_____

_____

_____

❑ Physician's letter or professional evaluation by qualified person is attached, if appropriate in compliance with C.R.P.P. 27.1 (§15-14-306, C.R.S.)

4. The Court, in its Order Appointing Guardian, ordered that notice of all proceedings be given to the following person(s):

Full Name	Address	Relationship

The Petitioner requests that the Court appoint: (Check box(es) as appropriate.)

- ☐ Court Visitor
- ☐ Guardian ad Litem (GAL)
- ☐ Attorney for Ward/Minor
- ☐ Other: _____
- ☐ None.

The Ward is required to be present at the hearing, unless excused by the Court for good cause.

☐ The Petitioner requests that the Ward be excused from attending the hearing for the following reasons:

_____

_____

_____

_____

_____ _____

Signature of Attorney for Petitioner Date Signature of Petitioner Date

CERTIFICATE OF SERVICE

I certify that on _____ (date) a copy of this Petition for Modification of Guardianship was served on each of the following:

Full Name	Relationship to Protected Person	Address	Manner of Service*

***Insert one of the following: Hand Delivery, First-Class Mail, Certified Mail, E-Served or Faxed.**

_____

Signature

Note:
The Petitioner must contact the Court to set a date and time for a hearing.

☐District Court ☐Denver Probate Court _____ County, Colorado Court Address: **In the Interests of:** **Ward/Minor**	▲ **COURT USE ONLY** ▲ Case Number: Division Courtroom

ORDER FOR MODIFICATION OF GUARDIANSHIP ☐ADULT ☐MINOR PURSUANT TO §15-14-318, C.R.S. OR §15-14-210, C.R.S.

Upon consideration of the Petition for Modification of Guardianship filed on _____ (date) or upon proper notice and hearing held on _____ (date):

The Court finds that the statements in the Petition are true and correct; that notice has been properly given or waived, and it is in the best interests of the ward/minor that this guardianship be modified because:

☐ The extent of protection or assistance previously granted is currently excessive or insufficient.

☐ The ward's/minor's capacity to provide for himself/herself has changed.

☐ Other: _____

_____

The Court orders the following modifications to this guardianship:

☐ The guardian is granted additional authority as follows:

_____

_____

☐ The authority of the guardian is limited by the following restrictions:

_____

_____

☐ Other: _____

_____

☐ Amended Letters of Guardianship shall issue.

Date: _____ _____

☐Judge ☐Magistrate

CERTIFICATE OF SERVICE

I certify that on _____ (date) a copy of this Order was served on each of the following:

Full Name	Relationship to Ward/Minor	Address	Manner of Service*

***Insert one of the following: Hand Delivery, First-Class Mail, Certified Mail, E-Served or Faxed.**

_____
Clerk

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Interest of:** **Ward**	▲ **COURT USE ONLY** ▲
Attorney or Party Without Attorney (name and address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom
PETITION FOR APPOINTMENT OF ❑CO-GUARDIAN ❑SUCCESSOR GUARDIAN	

This Petition is submitted pursuant to §15-14-112, C.R.S. and the Petitioner makes the following statements:

1. Petitioner, _____ (name), is an interested person. State relationship to Ward:_____

2. Letters of Guardianship were issued on _____ (date).

3. The previously appointed Guardian, _____ (name)::
   ❑joins in this petition.
   ❑tendered a resignation approved by the Court on _____ (date).
   ❑died on _____ (date of death).
   ❑was removed by a Court order issued on _____ (date).
   ❑is the Petitioner and hereby tenders his/her resignation.
   ❑other:_____

4. ❑Petitioner is, 21 years of age or older, nominates himself/herself and requests to be appointed as ❑Co-Guardian **or** ❑Successor Guardian.
   or
   ❑Petitioner nominates the following person, who is 21 years of age or older, to be appointed as ❑Co-Guardian **or** ❑Successor Guardian.

   Name: _____
   Street Address:_____
   Mailing Address, if different: _____
   City:_____ State:_____ Zip Code:_____ Home Phone #: _____
   Email Address:_____ Work Phone #:_____

5. The nominated ❑Co-Guardian **or** ❑Successor Guardian has priority for appointment because he/she is: (§15-14-310, C.R.S.)

❑a Guardian currently acting for the Ward in Colorado or elsewhere.

❑nominated in writing by Ward, including nomination in a durable power of attorney or designated beneficiary agreement.

❑an agent under a medical power of attorney.

❑an agent under a general durable power of attorney.

❑the spouse of the Ward.

❑the parent of the Ward.

❑an adult child of the Ward.

❑an adult with whom Ward has resided for more than six months immediately before the filing of this Petition.

❑other: _____

6. The Co-Guardian or Successor Guardian may receive compensation.

❑The hourly rates to be charged, any amounts to be charged pursuant to a published fee schedule, including the rates and basis for charging fees for any extraordinary services, and any other bases upon which a fee charged to the estate will be calculated, are as stated below or in an attachment to this Petition. *

_____

_____

_____

❑The basis of compensation has not yet been determined.

7. The Co-Guardian or Successor Guardian may compensate his, her, or its counsel.

❑The hourly rates to be charged, any amounts to be charged pursuant to a published fee schedule, including the rates and basis for charging fees for any extraordinary services, and any other bases upon which a fee charged to the estate will be calculated, are as stated below or in an attachment to this Petition. *

_____

_____

_____

❑The basis of compensation has not yet been determined.

* There is a continuing obligation to disclose any material changes to the basis for charging fees. (§ 15-10-602 C.R.S.)

8. The Petitioner hereby adopts the statements in the original petition for appointment that led to the appointment of the current Guardian.

9. Petitioner requests that the nominee be appointed as Co-Guardian or Successor Guardian and that Letters of Guardianship be issued ❑forthwith ❑after the following event:

_____

_____

_____

VERIFICATION AND ACKNOWLEDGMENT

I (Petitioner) verify that the facts set forth in this document are true as far as I know or am informed. I understand that penalties for perjury follow deliberate falsification of the facts stated herein. (§15-10-310, C.R.S.)

_____
Signature of Petitioner Date

The foregoing instrument was acknowledged before me in the County of _____, State of Colorado, this ____day of _____, 20___, by the Petitioner.

My Commission Expires: _____

_____
Notary Public/Deputy Clerk

_____
Signature of Attorney Date

CERTIFICATE OF SERVICE

I certify that on _____ (date) a copy of this Petition for Appointment of Co-Guardian or Successor Guardian was served on each of the following:

Name of Person to Whom you are Sending this Document	Relationship to Protected Person	Address	Manner of Service*
	Protected Person		

*Insert one of the following: Hand Delivery, First-Class Mail, Certified Mail, E-Served or Faxed.

_____
Signature

Note:
The Petitioner must contact the Court to set a date and time for a hearing.

❑District Court ❑Denver Probate Court _____County, Colorado Court Address: **In the Interests of:** **Ward**	▲ ▲ **COURT USE ONLY** Case Number: Division Courtroom

ORDER APPOINTING CO-GUARDIAN OR SUCCESSOR GUARDIAN

Upon consideration of the Petition of Appointment of Co-Guardian or Successor Guardian filed by _____ (name of petitioner) on _____ (date),

The Court finds:

1. The previously appointed guardian has joined in the petition, resigned, died or been removed.
2. The best interests of the ward/minor will be served upon this appointment.
3. Any required notices have been given or waived.

The Court orders the following

1. The Court appoints _____ (full name) as ❑co-guardian ❑successor guardian and directs the issuance of Letters of Guardianship with the restriction that the guardian does not have the authority to obtain hospital or institutional care and treatment for mental illness, developmental disability or alcoholism against the will of the ward pursuant to §15-14-316(4), C.R.S. The address, telephone number and e-mail is as follows:

   Address: _____

   Telephone Number: _____ Email: _____

2. ❑This appointment is effective forthwith.

   ❑This appointment is effective upon evidence of the following information being filed with the Court:

   _____

   _____

   _____

3. ❑The provisions of the original order apply.

   ❑File the Guardian's Report (JDF 850) by_____ (date 60 days from appointment).

   ❑File the Annual Guardian's Report (JDF 834 or JDF 850) by _____ (date) **and then annually one year from said date unless otherwise ordered by the Court.**

   ❑Other: _____

   _____

4. The Court further orders:

_____

_____

_____

_____

_____

_____

Date: _____ _____

❑Judge ❑Magistrate

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Interest of:** **Minor**	▲ COURT USE ONLY ▲
Attorney or Party Without Attorney (name and address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom
PETITION FOR APPOINTMENT OF CONSERVATOR FOR MINOR	

1. **The Petitioner is:**

❑a person who would be adversely affected by lack of effective management of the Minor's property and business.

❑a person who is interested in the estate, financial affairs, or welfare of the Minor.

❑the Minor and is 12 years of age or older.

This is a Petition for appointment of a:

❑Conservator. (Note: the appointment will expire when the Minor reaches the age of 21, unless otherwise ordered by the Court.)

❑Special Conservator. While a petition to establish a conservatorship is pending, a Special Conservator is needed to preserve and apply the Minor's property as may be required for the support of the Minor or individuals who are dependent upon the Minor.

❑Special Conservator. A Special Conservator is necessary to assist in the accomplishment of the following protective arrangement or other single transaction. A permanent conservatorship is not requested.

_____

_____

2. **Information about the Petitioner:**

Name: _____ Relationship to Minor: _____

Street Address: _____

Mailing Address, if different: _____

City: _____ State: _____ Zip Code: _____ Home Phone #: _____

Email Address: _____ Work Phone #: _____

3. **Information about the Minor:**

Name: _____ Age: _____ Date of Birth: _____

Street Address: _____

Mailing Address, if different: _____

City: _____ State: _____ Zip Code: _____ Home Phone #: _____

Email Address: _____ Work Phone #: _____

4. **Information about the Minor's parents:**

Mother's Name:_____ ❑**Deceased**

Street Address:_____

Mailing Address, if different: _____

City:_____ State:____ Zip Code:_____ Home Phone # _____

Email Address:_____ Work Phone #:_____

Father's Name: _____ ❑**Deceased** ❑**Unknown** **(attach Birth Certificate)**

Street Address:_____

Mailing Address, if different: _____

City:_____ State:____ Zip Code:_____ Home Phone # _____

Email Address:_____ Work Phone #:_____

5. **Venue for this proceeding is proper in this county because the Minor**

❑resides in this county.

❑does not reside in this state, but has property in this county.

6. ❑**A conservator is required because of the Minor's age. The Minor**

❑owns or will receive money or property that requires management or protection that cannot otherwise be provided; **and/or**

❑has or may have business affairs that may be put at risk or prevented because of his or her age; **and/or**

❑needs money for support and education and protection is necessary or desirable to obtain or provide money.

7. ❑ **A conservator is required for reasons other than the Minor's age.** The Minor is unable to manage property and business affairs because he/she is unable to effectively receive and evaluate information or both or to make or communicate decisions, even with the use of appropriate and reasonably available technological assistance due to the following disabilities or impairments: ❑Physician's letter attached.

_____

_____

_____

_____

_____

In addition:

❑the Minor has property that will be wasted or dissipated unless proper management is provided.
and/or

❑the Minor, or persons entitled to the Minor's support, require money for support, care, education, health, and welfare, and protection is necessary or desirable to obtain or provide money.

8. ❑A Conservator is required because the Minor is missing, detained, or unable to return to the United States. The nature of the Minor's disappearance or detention and any efforts to locate the Minor are as follows:

_____

_____

_____

9. The Petitioner requests the Conservator's powers and duties be ❑unlimited/unrestricted or ❑limited/with restrictions. The property to be placed under the Conservator's control and the requested limitations/restrictions on the Conservator's powers and duties, if any, are as follows:

_____

_____

_____

_____

_____

_____

10. ❑Petitioner is, 21 years of age or older, nominates himself/herself and requests to be appointed as Conservator or Special Conservator.

or

❑Petitioner nominates the following person, who is 21 years of age or older, to be appointed as Conservator or Special Conservator.

Name: _____ Relationship to Minor: _____

Street Address:_____

Mailing Address, if different: _____

City:_____ State:_____ Zip Code:_____ Home Phone #:_____

Email Address:_____ Work Phone #:_____

11. The nominated Conservator has priority for appointment because he/she is:

❑nominated by the Minor and the Minor is 12 years of age or older. (Attach Consent or Nomination by Minor - JDF 825).

❑an interested person. (State nature of interest.)

_____

_____

_____

_____

_____

_____

_____

12. The Conservator may receive compensation.

❑The hourly rates to be charged, any amounts to be charged pursuant to a published fee schedule, including the rates and basis for charging fees for any extraordinary services, and any other bases upon which a fee charged to the estate will be calculated, are as stated below or in an attachment to this Petition. *

_____

_____

_____

❑The basis of compensation has not yet been determined.

13. The Conservator may compensate his, her, or its counsel.

❑The hourly rates to be charged, any amounts to be charged pursuant to a published fee schedule, including the rates and basis for charging fees for any extraordinary services, and any other bases upon which a fee charged to the estate will be calculated, are as stated below or in an attachment to this Petition. *

_____

_____

_____

❑The basis of compensation has not yet been determined.

* There is a continuing obligation to disclose any material changes to the basis for charging fees. (§ 15-10-602 C.R.S.)

14. Sections **a and b** below identify assets and the source and amount of estimated income (public benefits, real property, proceeds from insurance policy, proceeds from pension, etc.) of the Minor, together with an estimate of the value.

a. The Minor's assets are:

Description of Assets (e.g. bank accounts, property) ❑**None.**	**Estimated Value**
	$
Total	**$**

b. The Minor's income is:

Description of Income (e.g. social security, insurance or pension) ❑**None.**	**Estimated Amount of Income**
	$
Total	**$**

15. ❑The following person is currently acting as Guardian or Conservator for the Minor in Colorado or elsewhere:

Name:_____ Relationship to Minor:_____

Street Address:_____

Mailing Address, if different: _____

City:_____ State:_____ Zip Code:_____ Home Phone #:_____

Email Address:_____ Work Phone #:_____

16. ❑The Minor's parents are deceased. The following person is the adult relative nearest in kinship that can be found with reasonable efforts:

Name:_____ Relationship to Minor:_____

Street Address:_____

Mailing Address, if different: _____

City:_____ State:_____ Zip Code:_____ Home Phone #:_____

Email Address:_____ Work Phone #:_____

17. The following person had the primary care and custody of the Minor during the 60 days prior to the filing of this Petition:

Name:_____ Relationship to Minor:_____

Street Address:_____

Mailing Address, if different: _____

City:_____ State:_____ Zip Code:_____ Home Phone #:_____

Email Address:_____ Work Phone #:_____

Dates of Care:_____

18. ❑The following person is a legal representative for the Minor not otherwise designated above. (Representative payee, trustee, custodian of a trust, etc. §15-14-102(6), C.R.S.)

Name:_____ Type of Legal Representative: _____

Mailing Address:_____

City:_____ State:_____ Zip Code:_____

Email Address:_____ Phone #: _____

The Petitioner requests than an appointment of a Conservator be made after notice and hearing.

❑In addition, the Petitioner requests the following:

_____

_____

VERIFICATION AND ACKNOWLEDGMENT

I (Petitioner) verify that the facts set forth in this document are true as far as I know or am informed. I understand that penalties for perjury follow deliberate falsification of the facts stated herein. (§15-10-310, C.R.S.)

_____
Signature of Petitioner Date

The foregoing instrument was acknowledged before me in the County of _____, State of Colorado, this ____day of _____, 20___, by the Petitioner.

My Commission Expires: _____

_____
Notary Public/Deputy Clerk

_____
Signature of Attorney Date

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address:	
In the Interest of: **Minor**	▲ COURT USE ONLY ▲ Case Number: Division Courtroom
ORDER APPOINTING CONSERVATOR FOR MINOR	

Upon consideration of the Petition for Appointment of Conservator for the above Minor and hearing on _____ (date),

The Court finds that:

1. Venue is proper and required notices have been given or waived.
2. An interested person seeks the appointment of a Conservator.
3. The person is a minor born on _____ (date).
4. The Minor's best interest will be served by appointment of a Conservator.
5. The appointment of a Conservator is necessary because the Minor

❑owns money or property that requires management or protection that cannot otherwise be provided.

❑has or may have business affairs that may be put at risk or prevented because of the Minor's age.

❑needs money for support and education and that protection is necessary or desirable to obtain provide money.

❑for reasons other than age the Minor is unable to manage property and business affairs because he/she is unable to effectively receive and evaluate information or both or to make or communicate decisions, even with the use of appropriate and reasonably available technological assistance. The evidence is clear and convincing in this regard. Additionally, it has been shown that the Minor has property that will be wasted or dissipated unless proper management is provided or that the Minor, or persons entitled to the Minor's support, require money for support, care, education, health, and welfare, and protection is necessary or desirable to obtain or provide money.

❑A Conservator is required because the Minor is missing, detained, or unable to return to the United States.

The Court has considered any expressed wishes of the Minor concerning the selection of the Conservator. The Court has considered the powers and duties of the Conservator, the scope of the Conservatorship, and the priority and qualifications of the Nominee.

The Court appoints the following person as Conservator of the Minor:

Name:_____

Street Address: _____

Mailing Address, if different: _____

City:_____ State:_____ Zip Code:_____ Home Phone: _____

Email Address: _____ Work Phone:_____

The Court directs the issuance of Letters of Conservatorship as follows:

☐ The Letters shall expire on _____ (date) the Minor's 21st birthday, unless otherwise ordered by the Court.

☐ The powers and duties of the Conservator are unrestricted. The Conservator may exercise all the powers granted in §15-14-425, C.R.S.

☐ The powers and duties of the Conservator are limited by the following restrictions:

_____

_____

_____

_____

_____

_____

_____

_____

The Court orders the following:

1. The Conservator shall notify the Court within 30 days if his/her home address, email address, or phone number changes and any change of address for the Minor.

2. Within 30 days of appointment, the Conservator shall provide a copy of this Order Appointing Conservator for Minor to the Minor, if 12 years or older, and persons given notice of the Petition and shall advise those persons using Notice of Appointment of Guardian and/or Conservator (JDF 812) that they have the right to request termination or modification of the Conservatorship.

3. The Conservator shall file for approval with the Court a Conservator's Inventory with Financial Plan (JDF 882) on or before_____ (date within 60 days from appointment). The value of the assets must be reported as of the date of this Order.

4. The Conservator shall file a Conservator's Report (JDF 885) with the Court each year on or before _____ (date). The time period covered in the report shall begin on _____ (date) and end on _____ (date). The Conservator is required to maintain all supporting documentation; including receipts and disbursements.

5. The Conservator shall
   ☐ serve without bond for the following reason(s):_____
   _____
   ☐ serve with bond in the amount of $ _____. The bond must be posted with the Court by _____ (date). If bond is posted by a surety, notice of any proceeding must be provided to the surety.

6. Copies of all future Court filings must be provided to the following:

Name of Interested Person	Relationship to Minor
	The Minor if 12 years or older at the time of mailing
	Parent or adult nearest in kinship
	Parent or adult nearest in kinship
	Conservator

7. **The Court further orders:**

_____

_____

_____

Date: _____ _____

❑Judge ❑Magistrate

☐District Court ☐Denver Probate Court _____ County, Colorado Court Address:	
In the Interests of: **Minor**	**COURT USE ONLY** Case Number: Division Courtroom

LETTERS OF CONSERVATORSHIP - MINOR

_____ (name) was appointed by Court Order on _____ (date) as Conservator.

These Letters of Conservatorship for a Minor whose date of birth is _____, are proof of the Conservator's full authority to act, except for the following restrictions:

_____

_____

_____

_____

_____

Date: _____

_____
Probate Registrar/(Deputy)/Clerk of Court

CERTIFICATION

Certified to be a true copy of the original in my custody and to be in full force and effect as of _____.
Date

_____
Probate Registrar/(Deputy)Clerk of Court

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Interests of:** **Protected Person/Minor**	▲ **COURT USE ONLY** ▲ Case Number: Division: Courtroom:

ORDER FOR DEPOSIT OF FUNDS TO RESTRICTED ACCOUNT

It is Ordered that _____ (name of Fiduciary) shall open an account in a federally insured financial institution for the sole benefit of the Minor/Protected Person. The account shall be opened on behalf of the Minor/Protected Person. The account shall be opened using the sample title, *"____ (Name of Fiduciary) as Conservator for _____ (Name Protected Person)".*

The Fiduciary shall deposit $ _____ and funds received subsequently into the account. This person may make internal transfers of funds in order to take advantage of changes in interest rates.

It is Ordered that, except for internal transfers, the financial institution shall permit no withdrawals from the account(s), except by separate certified Order of this Court.

It is further Ordered that an Acknowledgment of Deposit of Funds to Restricted Account (JDF 867) must be returned to the Court within 30 days. No attorney fees may be paid in this case until the Acknowledgment form is signed and returned to the Court.

Dated: _____

_____
❑Judge ❑Magistrate

Certificate of Service

I certify that on _____ (date) a copy of this Order was served on each of the following:

Full Name	Relationship to Protected Person	Address	Manner of Service*

***Insert one of the following: Hand Delivery, First-Class Mail, Certified Mail, or Faxed.**

_____
Signature

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Interests of:** **Protected Person/Minor**	▲ **COURT USE ONLY** ▲
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom

ACKNOWLEDGMENT OF DEPOSIT OF FUNDS TO RESTRICTED ACCOUNT

_____ (name of federally insured financial institution), acknowledges that funds have been deposited by _____ (name of fiduciary) as the ❑Conservator, ❑Guardian, ❑Next Friend, or ❑Parent for _____ (name of Protected Person or Minor) as follows:

Title of Account	Account Number - last 4-digits only	Amount
		$
Total		$

This institution submits itself to the jurisdiction of this Court and agrees that it shall not permit any withdrawal of funds except upon being furnished a certified copy of an Order of this Court authorizing such withdrawal.

Date: _____

_____
Signature of Authorized Bank Officer

_____
Type name and title of Authorized Bank Officer
(Type or print name, address and telephone # below of Bank)

_____

_____

_____

_____

Note: Return to the Court name and address as shown above.

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Interest of:** **Protected Person/Minor**	**COURT USE ONLY**
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom

MOTION TO WITHDRAW FUNDS FROM RESTRICTED ACCOUNT

I, _____ (name of Conservator(s)), respectfully request authority to withdraw $ _____, on deposit in the restricted account(s) listed below:

Attach current bank statement.

Name and Address of Financial Institution	**Account Number (last 4-digits only)**	**Current Balance in Account**
		$
Total		$

The funds are requested for the following purchase/reasons(s): Attach supporting documentation for your request.

_____

_____

_____ _____

Signature of Conservator and/or Attorney Date

Signature of Conservator and/or Attorney Date

_____ _____

Address

Address

_____ _____

City, State and Zip Code

City, State and Zip Code

❑Check if new address

❑Check if new address

Date: _____

_____

Signature of Minor if 12 years of age or over

Certificate of Service

I certify that on _____ (date) a copy of this Motion to Withdraw Funds from Restricted Account was served on each of the following:

Name of Person to Whom You are Sending this Document (Interested Persons)	**Relationship to Protected Person**	**Address**	**Manner of Service***

***Insert one of the following: Hand Delivery, First-Class Mail, Certified Mail, E-Served or Faxed.**

_____

Signature

☐District Court ☐Denver Probate Court _____ County, Colorado Court Address: _____ **In the Interest of:** _____ **Protected Person/Minor**	▲ **COURT USE ONLY** ▲ Case Number:_____ Division: _____ Courtroom: _____

ORDER ALLOWING WITHDRAWAL OF FUNDS FROM RESTRICTED ACCOUNT

This matter comes before the Court on the Motion to Withdraw Funds from Restricted Account filed on _____ (date). The Court, having reviewed the Motion and supporting documentation, if attached, and any responses received from interested persons, enters the following Orders:

☐The Motion is **GRANTED**. The Conservator is authorized to withdraw $_____ from the account(s) specified in the Motion and as identified below:

Name and Address of Financial Institution	**Account Number (last 4-digits only)**	**Amount to Withdraw from Account**
		$
Total		$

☐The Conservator is required to file a copy of the receipt(s) for the purchase with the Court within ten days.

Note: All Conservators are required to keep all original receipt(s).

☐The Motion is **DENIED** for the following reasons:

_____

_____

_____

☐The Court further Orders:

_____

_____

Date: _____

_____
☐Judge ☐Magistrate

CERTIFICATION

I certify that this is a true and correct copy of the original in my custody.

Date: _____

_____
Probate Registrar/(Deputy)Clerk of Court

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Interest of:** **Respondent**	▲ **COURT USE ONLY** ▲
Attorney or Party Without Attorney (name and address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom
PETITION FOR APPOINTMENT OF CONSERVATOR FOR ADULT	

1. **The Petitioner is**

❑a person who would be adversely affected by lack of effective management of the Respondent's property and business.

❑a person who is interested in the estate, financial affairs, or welfare of the Respondent.

❑the Respondent.

This is a Petition for appointment of a:

❑Permanent Conservator.

❑Special Conservator. While a petition to establish a conservatorship is pending, there is a need to preserve and apply the property of the Respondent as may be required for the support of the Respondent or individuals who are in fact dependent upon the Respondent. (§15-14-406(7), C.R.S.)

❑Special Conservator. There is a need for a protective arrangement or other single transaction. A permanent conservatorship is not requested. (§15-14-412(3), C.R.S.)

2. **Information about the Petitioner:**

Name: _____ Relationship to Respondent: _____

Street Address: _____

Mailing address, if different: _____

City: _____ State: _____ Zip Code: _____ Home Phone #: _____

Email Address: _____ Work Phone #: _____

3. **Information about the Respondent:**

Name: _____ Age: _____ Date of Birth: _____

Street Address: _____

Mailing Address, if different: _____

City: _____ State: _____ Zip Code: _____ County of Residence: _____

❑If this appointment is made, the Respondent's dwelling will change to:

_____

4. **Information about the Respondent's spouse or adult who has resided with the Respondent for more than six months in the last year**:

Name: _____ Relationship to Respondent: _____

Street Address: _____

Mailing Address, if different: _____

City: _____ State: _____ Zip Code: _____ Home Phone #: _____

Email Address: _____ Work Phone #: _____

5. **Venue for this proceeding is proper in this county because the Respondent**

❑ resides in this county.

❑ does not reside in this state, but has property in this county.

6. ❑ A Power of Attorney exists for financial or medical matters. (***Attach a copy to the Petition.)*** The agent's name and mailing address is:

_____

_____

7. ❑ A valid designated beneficiary agreement exists. (***Attach a copy of the agreement to the Petition.)*** The designated beneficiary's name and mailing address is:

_____

_____

8. ❑ A Conservator is required because the Respondent is unable to manage property and business affairs because he/she is unable to effectively receive and evaluate information or both or to make or communicate decisions, even with the use of appropriate and reasonably available technological assistance due to the following disabilities or impairments: ❑ Physician's letter attached.

_____

_____

_____

_____

_____

_____

_____

In addition:

❑ the Respondent has property which will be wasted or dissipated unless proper management is provided.
and/or

❑ the Respondent, or persons entitled to the Respondent's support, require money for support, care, education, health, and welfare, and protection is necessary or desirable to obtain or provide money.

9. ❑A Conservator is required because the Respondent is missing, detained, or unable to return to the United States. The nature of the Respondent's disappearance or detention and any efforts to locate the Respondent are as follows:

_____

_____

_____

_____

10. The Petitioner requests the Conservator's powers and duties be ❑unlimited/unrestricted or ❑limited/with restrictions. The property to be placed under the Conservator's control and the requested limitations/restrictions on the Conservator's powers and duties, if any, are as follows:

_____

_____

_____

_____

_____

_____

11. ❑Petitioner is, 21 years of age or older, nominates himself/herself and requests to be appointed as Conservator or Special Conservator.

or

❑Petitioner nominates the following person, who is 21 years of age or older, to be appointed as Conservator or Special Conservator.

Name: _____ Relationship to Respondent: _____

Street Address: _____

Mailing Address, if different: _____

City: _____ State: _____ Zip Code: _____ Home Phone #: _____

Email Address: _____ Work Phone #: _____

12. The nominated Conservator has priority for appointment because he/she is: (§15-14-413,C.R.S.)

❑a Conservator, Guardian or other fiduciary appointed or recognized by a court in another jurisdiction where the protected person resides.

❑nominated in writing by Respondent, including nomination in a durable power of attorney or designated beneficiary agreement.

❑an agent appointed by the Respondent to manage the Respondent's property under a durable power of attorney.

❑the spouse of the Respondent.

❑an adult child of the Respondent.

❑a parent of the Respondent.

❑an adult with whom Respondent has resided for more than six months immediately before the filing of this Petition.

13. ❑The Respondent nominated the following person as Conservator, but the Petitioner does not seek that person's appointment for the following reason:

_____

_____

_____

Name:_____ Relationship to Respondent: _____

Street Address:_____

Mailing Address, if different: _____

City:_____ State:_____ Zip Code:_____ Home Phone #:_____

Email Address:_____ Work Phone #:_____

14. The Conservator may receive compensation.

❑The hourly rates to be charged, any amounts to be charged pursuant to a published fee schedule, including the rates and basis for charging fees for any extraordinary services, and any other bases upon which a fee charged to the estate will be calculated, are as stated below or in an attachment to this Petition. *

_____

_____

_____

❑The basis of compensation has not yet been determined.

15. The Conservator may compensate his, her, or its counsel.

❑The hourly rates to be charged, any amounts to be charged pursuant to a published fee schedule, including the rates and basis for charging fees for any extraordinary services, and any other bases upon which a fee charged to the estate will be calculated, are as stated below or in an attachment to this Petition. *

_____

_____

_____

❑The basis of compensation has not yet been determined.

* There is a continuing obligation to disclose any material changes to the basis for charging fees. (§ 15-10-602 C.R.S.)

16. Sections **a and b** below identify assets and the source and amount of anticipated income or receipts (public benefits, income, real property, proceeds from insurance policy, proceeds from pension, etc.), together with an estimate of the value.

a. The Respondent's assets are:

Description of Assets (e.g. bank accounts, insurance, pensions, property) ❑**None.**	**Estimated Value**
	$
Total	**$**

b. The Respondent's income is:

Description of Income (e.g. social security, pension and insurance) ❑**None.**	**Estimated Amount of Income**
	$
Total	**$**

17. ❑**The following person is currently acting as a** ❑**Guardian and/or** ❑**Conservator in Colorado or elsewhere:**

Name: _____ Relationship to Respondent: _____

Street Address: _____

Mailing Address, if different: _____

City: _____ State: _____ Zip Code: _____ Home Phone #: _____

Email Address: _____ Work Phone #: _____

18. Information about adult children and parents. ❑**None** (If none, list an adult relative that can be found with reasonable efforts, such as a brother, sister, aunt, uncle, etc.):

Name: _____ Relationship: ❑Adult Child or ❑Parent

Street Address: _____

Mailing Address, if different: _____

City: _____ State: _____ Zip Code: _____ Home Phone #: _____

Email Address: _____ Work Phone #: _____

Name: _____ Relationship: ❑Adult Child or ❑Parent

Street Address: _____

Mailing Address, if different: _____

City: _____ State: _____ Zip Code: _____ Home Phone #: _____

Email Address: _____ Work Phone #: _____

Name:_____ Relationship:_____

Street Address:_____

Mailing Address, if different: _____

City:_____ State:_____ Zip Code:_____ Home Phone #:_____

Email Address:_____ Work Phone #:_____

19. ☐The following person had the primary care and custody of Respondent during the 60 days prior to the filing of this Petition:

Name:_____ Relationship:_____

Street Address:_____

Mailing Address, if different: _____

City:_____ State:_____ Zip Code:_____ Home Phone #:_____

Email Address:_____ Work Phone #:_____

Dates of Care:_____

20. Information about each person currently responsible for the primary care and custody of the Respondent, including the Respondent's treating physician: ☐None

Name of Treating Physician: _____ Phone #: _____

Street Address:_____

Mailing Address, if different: _____

City: _____ State: ___ Zip Code: _____ Email Address: _____

Name of Caregiver: _____ Phone #: _____

Street Address:_____

Mailing Address, if different: _____

City: _____ State: ___ Zip Code: _____ Email Address: _____

21. ☐The following person is a Legal Representative for the Respondent not otherwise designated above. (Representative payee, trustee, custodian of a trust, etc. §15-14-102(6), C.R.S.)

Name:_____ Type of Legal Representative:_____

Mailing Address:_____

City:_____ State:_____ Zip Code:_____

Email Address:_____Phone #: _____

The Petitioner requests that appointment of a Conservator be made after notice and hearing.

❑ **In addition, the Petitioner requests the following:**

_____

_____

_____

VERIFICATION AND ACKNOWLEDGMENT

I (Petitioner) verify that the facts set forth in this document are true as far as I know or am informed. I understand that penalties for perjury follow deliberate falsification of the facts stated herein. (§15-10-310, C.R.S.)

_____
Signature of Petitioner Date

The foregoing instrument was acknowledged before me in the County of _____, State of Colorado, this ____day of _____, 20___, by the Petitioner.

My Commission Expires: _____

_____
Notary Public/Deputy Clerk

_____
Signature of Attorney Date

☐District Court ☐Denver Probate Court _____ County, Colorado Court Address: **In the Interest of:** **Protected Person**	**COURT USE ONLY** Case Number: Division: Courtroom:
ORDER APPOINTING SPECIAL CONSERVATOR **☐ADULT ☐MINOR**	

Upon consideration of the Petition for Appointment of Conservator for the above person and hearing on _____ (date),

The Court finds that:

1. Venue is proper and required notices have been given or waived
2. An interested person seeks the appointment of a Special Conservator.
3. The Protected Person's best interest will be served by the appointment of a Special Conservator.

The Court finds by clear and convincing evidence that:

☐For the following reasons, it is necessary to appoint a Special Conservator to preserve and apply the Protected Person's property as may be required for the support of the Protected Person or individuals who are in fact dependent upon the Protected Person, until a hearing can be held on the Petition for Appointment of Conservator:

_____

_____

_____

☐It is necessary to appoint a Special Conservator to assist in the accomplishment of the following protective arrangement or other authorized single transaction. (§15-14-412(3), C.R.S.)

_____

_____

_____

The Court appoints the following person as Special Conservator:

Name: _____

Street Address: _____

Mailing Address, if different: _____

City:_____ State:_____ Zip Code:_____ Home Phone: _____

Email Address: _____ Work Phone:_____

The Court directs the issuance of Letters of Conservatorship as follows:

The Letters shall expire on _____ (date), unless otherwise ordered by the Court.

The Special Conservator is granted only the following authority:

_____

_____

_____

_____

_____

The Court orders the following:

1. The Special Conservator shall notify the Court within 30 days if his/her home address, email address, or phone number changes and/or of any change of address for the Protected Person.

2. Within 30 days of appointment, the Special Conservator shall provide a copy of this Order Appointing Special Conservator to the Protected Person, if 12 years of age or older, and persons given notice of the Petition and shall advise those persons using Notice of Appointment of Guardian and/or Conservator (JDF 812) that they have the right to request termination or modification of the Special Conservatorship.

3. ❑This appointment is for single transactions and protective arrangements. The Special Conservator shall report to the Court by _____ (date). The report shall include the following information:

   _____

   _____

   _____

   _____

4. The Special Conservator

   ❑shall serve without bond for the following reason(s). _____

   _____

   ❑shall serve with bond in the amount of $ _____. The bond must be posted with the Court by _____ (date). If bond is posted by a surety, notice of any proceeding must be provided to the surety.

5. Copies of all future Court filings must be provided to the following:

Name of Interested Person	Relationship to Adult/Minor
	Adult/Minor
	Spouse
	Adult Children
	Parents
	Special Conservator

6. The Court further orders:

_____

_____

_____

_____

Date: _____

_____

❑Judge ❑Magistrate

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address:	
In the Interest of:	▲ COURT USE ONLY ▲ Case Number:
Protected Person	Division Courtroom

ORDER APPOINTING CONSERVATOR FOR ADULT

Upon consideration of the Petition for Appointment of Conservator for the above person and hearing on _____ _____ (date),

The Court finds that:

1. Venue is proper and required notices have been given or waived
2. An interested person seeks the appointment of a Conservator.
3. The Protected Person's best interest will be served by appointment of a Conservator.

The Court finds by clear and convincing evidence that a basis exists for a conservatorship because:

❑The Protected Person is unable to manage property and business affairs because of an inability to effectively receive or evaluate information or both or to make or communicate decisions, even with the use of appropriate and reasonably available technological assistance.

or

❑The Protected Person is missing, detained, or unable to return to the United States;

The Court further finds by a preponderance of evidence that:

❑The Protected Person has property that will be wasted or dissipated unless proper management is provided.

and/or

❑The Protected Person, or persons entitled to the Protected Person's support, require money for support, care, education, health, and welfare; and protection is necessary or desirable to obtain or provide money.

The Court has considered any expressed wishes of the Protected Person concerning the selection of the Conservator. The Court has considered the powers and duties of the Conservator, the scope of the Conservatorship, and the priority and qualifications of the Nominee.

The Court appoints the following person as Conservator of the Protected Person:

Name: _____

Street Address: _____

Mailing Address, if different: _____

City:_____ State:_____ Zip Code:_____ Home Phone #: _____

Email Address: _____ Work Phone #:_____

The Court directs the issuance of Letters of Conservatorship as follows:

❑The powers and duties of the Conservator are unrestricted. The Conservator may exercise all the powers granted in §15-14-425, C.R.S.

❑The powers and duties of the Conservator are limited by the following restrictions:

_____

_____

_____

_____

_____

_____

_____

_____

_____

❑The Conservator shall not, without prior Court order, convey or encumber any real estate owned by the Protected Person.

To insure notice of this prohibition, the Conservator shall record the Letters evidencing appointment with the Clerk & Recorder of the County in which such real estate is located. The Conservator shall provide proof of the recording to the Court.

The Court orders the following:

1. The Conservator shall notify the Court within 30 days if his/her home address, email address, or phone number changes and/or of any change of address for the Protected Person.

2. Within 30 days of appointment, the Conservator shall provide a copy of this Order Appointing Conservator for Adult to the Protected Person and persons given notice of the Petition and shall advise those persons using Notice of Appointment of Guardian and/or Conservator (JDF 812) that they have the right to request termination or modification of the Conservatorship.

3. The Conservator shall file for approval with the Court a Conservator's Inventory with Financial Plan (JDF 882) on or before _____ (date within 60 days from appointment). The value of the assets must be reported as of the date of this Order.

4. The Conservator shall file a Conservator's Report (JDF 885) with the Court each year on or before_____ _____ (date). The time period covered in the report shall begin on _____ (date) and end on _____ (date). The Conservator is required to maintain all supporting documentation, including receipts and disbursements.

5. ❑All financial powers of attorney, whether executed prior to or following the entry of this Order, are terminated, except as follows:

_____

_____

_____

6. The Conservator shall

❑serve without bond for the following reason(s):_____

_____

❑serve with bond in the amount of $ _____. The bond must be posted with the Court by _____ (date). If bond is posted by a surety, notice of any proceeding must be provided to the surety.

7. Copies of all future Court filings must be provided to the following:

Name of Interested Person	Relationship to Protected Person
	The Protected Person
	Spouse
	Adult Children
	Parents
	Conservator

8. **The Court further orders**

_____

_____

_____

_____

_____

Date: _____

_____

❑Judge ❑Magistrate

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Interest of:** **Protected Person**	▲ COURT USE ONLY ▲
Attorney or Party Without Attorney (name and address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom
PETITION FOR APPOINTMENT OF ❑CO-CONSERVATOR ❑SUCCESSOR CONSERVATOR	

This Petition is submitted pursuant to §15-14-112(1) – (3), C.R.S. and the Petitioner makes the following statements:

1. Petitioner, _____ (name), is an interested person. State relationship to Protected Person: _____

2. Letters of Conservatorship were issued on _____ (date).

3. The previously appointed Conservator, _____ (name):
   ❑joins in this petition.
   ❑tendered a resignation approved by the Court on _____ (date).
   ❑died on_____ (date of death).
   ❑been removed by order of the Court issued on _____ (date).
   ❑is the Petitioner and hereby tenders his/her resignation.
   ❑other: _____.

4. ❑Petitioner is, 21 years of age or older, nominates himself/herself and requests to be appointed as ❑Co-Conservator or ❑Successor Conservator.
   or
   ❑Petitioner nominates the following person, who is 21 years of age or older, to be appointed as ❑Co-Conservator or ❑Successor Conservator.

   Name: _____ Relationship to Protected Person: _____
   Street Address:_____
   Mailing Address, if different: _____
   City:_____ State:_____ Zip Code:_____ Home Phone #:_____
   Email Address:_____ Work Phone #:_____

5. The nominated ❑Co-Conservator or ❑Successor Conservator has priority for appointment because he/she is: (§15-14-413, C.R.S.)

❑a Conservator, Guardian or other fiduciary appointed or recognized by a court in another jurisdiction where the Protected Person resides.

❑nominated in writing by Protected Person, including nomination in a durable power of attorney or designated beneficiary.

❑an agent appointed by the Protected Person to manage the Protected Person's property under a durable power of attorney.

❑the spouse of the Protected Person.

❑an adult child of the Protected Person.

❑a parent of the Protected Person.

❑an adult with whom Protected Person has resided for more than six months immediately before the filing of this Petition.

6. The Co-Conservator or Successor Conservator may receive compensation.

❑The hourly rates to be charged, any amounts to be charged pursuant to a published fee schedule, including the rates and basis for charging fees for any extraordinary services, and any other bases upon which a fee charged to the estate will be calculated, are as stated below or in an attachment to this Petition. *

_____

_____

_____

❑The basis of compensation has not yet been determined.

7. The Co-Conservator or Successor Conservator may compensate his, her, or its counsel.

❑The hourly rates to be charged, any amounts to be charged pursuant to a published fee schedule, including the rates and basis for charging fees for any extraordinary services, and any other bases upon which a fee charged to the estate will be calculated, are as stated below or in an attachment to this Petition. *

_____

_____

_____

❑The basis of compensation has not yet been determined.

* There is a continuing obligation to disclose any material changes to the basis for charging fees. (§ 15-10-602 C.R.S.)

8. The Petitioner hereby adopts the statements in the original petition for appointment that led to the appointment of the current Conservator.

9. Petitioner requests that the nominee be appointed as Co-Conservator or Successor Conservator and that Letters of Conservatorship be issued ❑forthwith ❑after the following event:

_____

_____

_____

VERIFICATION AND ACKNOWLEDGMENT

I (Petitioner) verify that the facts set forth in this document are true as far as I know or am informed. I understand that penalties for perjury follow deliberate falsification of the facts stated herein. (§15-10-310, C.R.S.)

_____
Signature of Petitioner Date

The foregoing instrument was acknowledged before me in the County of _____, State of Colorado, this ____day of _____, 20___, by the Petitioner.

My Commission Expires: _____

_____
Notary Public/Deputy Clerk

_____
Signature of Attorney Date

CERTIFICATE OF SERVICE

I certify that on _____ (date) a copy of this Petition for Appointment of Co-Conservator or Successor Conservator was served on each of the following:

Name of Person to Whom you are Sending this Document	Relationship to Protected Person	Address	Manner of Service*
	Protected Person		

*Insert one of the following: Hand Delivery, First-Class Mail, Certified Mail, E-Served or Faxed.

_____
Signature

Note: The Petitioner must contact the Court to set a date and time for a hearing.

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Interest of:** **Protected Person**	**COURT USE ONLY** Case Number: Division Courtroom

LETTERS OF CONSERVATORSHIP - ADULT

_____ (name of Conservator) was appointed by Court Order on _____ (date) as:

- ❑ Conservator pursuant to §15-14-409, C.R.S.
- ❑ Special Conservator pursuant to §15-14-406(7), C.R.S. These letters shall expire on _____ (date), unless otherwise ordered by the Court.
- ❑ Special Conservator pursuant to §15-14-412(3), C.R.S. These letters shall expire upon the completion of the single transaction described in the attached Court Order appointing the Special Conservator.

These Letters of Conservatorship are proof of the Conservator's full authority to act, except for the following restrictions:

_____

_____

_____

_____

_____

_____

Date: _____

_____
Probate Registrar/(Deputy)Clerk of Court

CERTIFICATION

Certified to be a true copy of the original in my custody and to be in full force and effect as of _____.
Date

_____
Probate Registrar/(Deputy)Clerk of Court

☐District Court ☐Denver Probate Court _____ County, Colorado Court Address: **In the Interest of:** **Protected Person**	▲ **COURT USE ONLY** ▲
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom

CONSERVATOR'S INVENTORY WITH FINANCIAL PLAN AND MOTION FOR APPROVAL

DATE OF APPOINTMENT _____ (MM/DD/YYYY)
INVENTORY VALUES AS OF DATE _____ (MM/DD/YYYY)
FILING DUE DATE _____ (MM/DD/YYYY)

I _____ (name of Conservator), move this Court to approve this ☐Initial ☐Amended Conservator's Inventory with Financial Plan.

As grounds therefore, the Conservator states the following:

1. The information contained in the Inventory with Financial Plan is true and complete. The proposed plan is necessary to protect and manage the income and assets of the protected person.
2. The Financial Plan is based on the actual needs and best interest of the Protected Person.

I understand that I am required to maintain supporting documentation for all receipts and disbursements including detailed billing statements from any professional. The Court or any Interested Person as identified in the Order Appointing Conservator may request copies at any time.

I understand that I must provide copies of this Inventory with Financial Plan to the Protected Person and any others as identified in the Order Appointing Conservator, within 10 days of filing with the Court and will indicate having done so by completing the Certificate of Service at the end of this form. (§ 15-14-404(4), C.R.S.)

☐This matter is routine and expected to be unopposed. I will set this matter on the Non-Appearance docket by filing JDF 712.
OR
☐I will set this matter for hearing on the appearance docket.

Notice to Interested Persons. Interested persons have the responsibility to protect their own rights and interests within the time and in the manner provided by the Probate Code, including the appropriateness of disbursements, the compensation of fiduciaries, attorneys, and others, and the distribution of estate assets. Interested persons may file an objection with the Court. The Court may not review or adjudicate these or other matters unless specifically requested to do so by an interested person.

Protected Person's Information: _____ **(Name)**

Current Address: _____
(Include Name of Living Center or Nursing Home)

City: _____ State: _____ Zip Code: _____

Telephone Number: _____ Age: _____

Conservator's Information: _____ **(Name)**

Do you expect to receive any fees for being the Conservator? ❑**Yes** ❑**No** If **Yes,** indicate hourly rate: $_____

Occupation: _____ Your Relationship to Protected Person: _____

Address: _____ Apt. #_____

City: _____ State: _____ Zip Code: _____

Telephone Numbers: Home _____ Work _____ Cell _____

E-Mail Address: _____

If applicable, Co-Conservator's Information: _____ **(Name)**

Do you expect to receive any fees for being the Conservator? ❑**Yes** ❑**No** If **Yes,** indicate hourly rate: $_____

Occupation: _____ Your Relationship to Protected Person: _____

Address: _____ Apt. #_____

City: _____ State: _____ Zip Code: _____

Telephone Numbers: Home _____ Work _____ Cell _____

E-Mail Address: _____

Part I – Summary of Inventory

Summarize the Inventory below after completing the detailed accounting information in Parts III and IV.

(A)	**Total Assets (Total from Part III)**	$_____
(B)	**Total Liabilities/Debt (Total from Part IV)**	$_____
Net Worth: (A) minus (B)		$_____

Part II – Summary of Financial Plan (Receipts/Income Minus Disbursements/Expenses)

Summarize the Financial Plan below after completing the detailed accounting information in Part V.

		Projected Monthly Amount	Projected Annual Amount
(A)	**Receipts/Income (Total from Part V (A) below)**	$_____	$_____
(B)	**Disbursements/Expenses (Total from Part V (B) below)**	$_____	$_____
Net Income: (A) minus (B)		$_____	$_____

Part III – Inventory of Assets

Report the fair market value of each category of asset in the chart below as of the Inventory date. By indicating "None", you are stating affirmatively that the protected person does not have assets in that category.

Note: If additional space is needed, separate sheets may be used. If additional items are discovered after the initial inventory has been completed, a supplemental inventory listing those additional item(s) must be completed.

Cash on Hand, Bank, Checking, Savings, Certificate of Deposits, and Health Accounts (Name of Bank or Financial Institution) ☐None	Type of Account	Account # (last 4-digits only)	Balance
			$
Total			$

Stocks, Bonds, Mutual Funds, Securities and Investment Accounts ☐None	Number of Shares or Identify Account Number (last 4-digits only)	Current Value
		$
Total		$

Life Insurance (Name of Company/Beneficiary) ☐None	Type of Policy	Face Amount of Policy	Cash Value
			$
Total			$

Pension, Profit Sharing, Annuities and Retirement Funds ☐None	Type of Plan (401(k), IRA, 457, PERA, Military, etc.)	Account # (last 4-digits only, if applicable)	Current Account Value (Note: List monthly or annual distributions in Part V, below)
			$
Total			$

Motor Vehicles and Recreation Vehicles (Including Motorcycles, ATV's, Boats, etc.) ❑None	Year	Make and Model	Estimated Value Value = what you could sell it for in its current condition.
			$
Total			$

Real Estate (Indicate address) ❑None	Type of Property (Home, Rental, Land, etc.)	Estimated Value Value = what you could sell it for in its current condition.
		$
Total		$

General Household and Other Personal Property. ❑None	Estimated Value Value = what you could sell it for in its current condition.
General Household and Other Personal Property (Total value except for items listed below.)	$
Separately list and value items of significant value below, for example: Jewelry, Antiques, Collectibles, Artwork, etc.	
Total	$

Miscellaneous Assets (List each one separately and be specific.) ❑None	Estimated Value Value = what you could sell it for in its current condition.
	$
Total	$
Total Assets Enter this amount in Part I.	$

Part IV – Inventory of Liabilities/Debts

Report the value of each liability/debt in the chart below as of the Inventory date.

Description of Liability/Debt ☐None	Name of Creditor	Account Number (last 4-digits only)	Balance
Accrued expenses associated with this proceeding (Total from Part C.)			$
Mortgages (principal due only)			
Car Loans			
Home Improvement Loans			
Student Loans			
Credit Card Debt			
Federal Taxes Owed			
State and Local Taxes Owed			
Other Liabilities/Debt (Please list)			
Other Liabilities/Debt (Please list)			
Total Liabilities/Debt **Enter this amount in Part I.**			$

Part V – Financial Plan

List all expected sources of receipts/income and disbursements/expenses in the charts below. If a specific category is not applicable, indicate "0" in the projected monthly and annual amounts columns. You will use these amounts when you file the initial Conservator's Report.

A. Receipts/Income

Indicate the amount of cash receipts/income received on both a monthly and annual basis. If an income amount (such as wages) is to be received on a monthly basis, multiply the amount by 12 to determine the projected annual amount. If an income amount (such as dividends) is to be received on an annual basis, divide the amount by 12 to determine the projected monthly amount.

Description of Receipt/Income Category	Projected Monthly Amount	Projected Annual Amount
Wages		
Social Security		
Interest / Dividends		
Pensions / Retirement Plan Distributions		
Rental Income		
Gifts from Others		
Disability, Unemployment or Worker's Compensation		
Other Public Assistance		
Other Receipts / Income (Please list)		
Other Receipts / Income (Please list)		
Total Receipts/Income **Enter the total projected monthly and annual amounts in Part II.**		

B. Disbursements/Expenses

Indicate the cash disbursement/expense amount on both a monthly and annual basis. If an expense (such as utilities) is to be paid on a monthly basis, multiply the amount by 12 to determine the projected annual amount. If an expense (such as property taxes) is to be paid on an annual basis, divide the amount by 12 to determine the projected monthly amount.

Description of Disbursement/Expense Category	Projected Monthly Amount	Projected Annual Amount
Total Professional Fees (from Part D)	$	$
Distributions to Protected Person		
Income Taxes		
FICA and Medicare Taxes		
Health Care (including health insurance, prescriptions)		
Other Insurance		
Rent or Mortgage		
Property Taxes and Assessments		
Repairs and Maintenance		
Utilities, including phones		
Home Furnishings		
Food and Household Supplies		
Clothing		
Personal Care		
Auto Expenses		
Education		
Entertainment, Vacations and Travel		
Monthly Debt Repayments (excluding mortgage)		
Other Disbursements/Expenses, e.g. gifts (Please list)		
Other Disbursements/Expenses (Please list)		
Total Disbursements/Expenses **Enter the total projected monthly and annual amounts in Part II.**	$	$

C. Accrued Liabilities to Professionals

❑The Conservator requests that the accrued expenses of this proceeding of $_____ (identified in Part IV – Inventory of Liabilities/Debts) and as detailed below be approved by the Court as a ❑one-time lump sum payment or as ❑payments spread out over ____ months as identified below in Part D:

Type of Professional and Name of Individual	Amount Billed or Paid
Legal Fees for Petitioner -	$
Legal fees for Protected Person -	
Filing fee	
Court Visitor fee -	
Guardian *ad litem* fee -	
Other -	
Total Accrued Expenses – Enter totals in Part IV – Inventory of Liabilities/Debts.	$

D. Projected Payments to Professionals

Do you expect to pay any fees to professionals, including any fees you receive for being the Conservator? ❑**Yes** ❑**No** If **Yes**, list below projected payments to professionals that will serve you, as conservator, the protected person or the estate. Include any fees you plan to receive as the Conservator.

Type of Professional and Name of Individual	Projected Monthly Amount	Projected Annual Amount
Conservator -		
Guardian -		
Guardian *ad litem* -		
Legal fees for Protected Person -		
Legal fees for Conservator -		
Legal fees for Guardian -		
Legal fees for Petitioner -		
Accountant / CPA -		
Case Manager -		
Other -		
Other -		
Total Professional Fees – Enter totals in Part V – Section B Disbursements/Expenses.	$	$

E. Bond

❑Bond has been set in the amount of $ _____. Surety has been posted.

❑The setting of bond was deferred pending filing of this Conservator's Inventory with Financial Plan. The Conservator now requests that bond be set in the amount of $_____. (§15-14-415, C.R.S.)

❑Bond has been waived by the Court.

VERIFICATION

I verify that the facts set forth in this document are true as far as I know or am informed. I understand that penalties for perjury follow deliberate falsification of the facts stated herein. § 15-10-310, C.R.S. I understand that this report is subject to audit and verification.

_____ _____

Conservator's Signature Date Co-Conservator's Signature Date

Certificate of Service

I certify that on _____ (date) a copy of this Conservator's Inventory with Financial Plan was served on each of the following:

Name of Person to Whom You are Sending this Document (Interested Persons)	Relationship to Protected Person	Address	Manner of Service*
	Protected Person		

***Insert hand delivery, first class U.S. Mail, certified U.S. Mail, E-filed, or Fax.**

_____

Signature of Person Certifying Service

Note: A copy of the Conservator's Inventory with Financial Plan must be provided to the Protected Person pursuant to § 15-14-404(4), C.R.S. and interested persons pursuant to the Order Appointing Conservator, unless otherwise ordered.

☐District Court ☐Denver Probate Court _____ County, Colorado Court Address:	
In the Interest of:	▲ **COURT USE ONLY** ▲ Case Number:
Protected Person	Division: Courtroom:

ORDER REGARDING CONSERVATOR'S FINANCIAL PLAN

This matter comes before the Court for approval of the Conservator's Financial Plan. The Court having reviewed the Conservator's Inventory with Financial Plan and any responses or objections received from interested persons enters the following Order:

☐The Financial Plan is **APPROVED.** The Conservator is directed to file an amended Conservator's Inventory with Financial Plan whenever there is a change in the circumstances that requires a substantial deviation from this approved plan. **Approval does not relieve a Conservator from fiduciary standards.**

☐The Financial Plan is **APPROVED** with the following **conditions:**

_____

_____

_____

_____

☐The Financial Plan is **NOT APPROVED** for the following reasons:

_____

_____

_____

☐The Conservator shall file an amended Conservator's Inventory with Financial Plan by _____ _____ (date).

☐ The Conservator is directed to contact the Court by _____ (date) to set this matter for hearing.

☐The setting of bond was deferred when the Conservator was appointed. Pursuant to §15-14-415, C.R.S., bond is now set in the amount of $_____. The bond must be posted with the Court by_____ (date). If bond is posted by a surety, notice of any subsequent proceedings must be provided to the surety.

Date: _____

_____

☐Judge ☐Magistrate

☐District Court ☐Denver Probate Court _____County, Colorado Court Address: **In the Interests of:** **Protected Person**	▲ **COURT USE ONLY** ▲ Case Number: Division Courtroom

ORDER APPOINTING CO-CONSERVATOR OR SUCCESSOR CONSERVATOR

Upon consideration of the Petition for Appointment of Co-Conservator or Successor Conservator filed by _____ (name of petitioner) on _____ (date),

The Court finds:

1. The previously appointed conservator has joined in the petition, resigned, died or has been removed.
2. The best interests of the respondent/minor will be served upon this appointment.
3. Any required notices have been given or waived.

The Court orders the following:

1. The Court appoints _____ (full name) as ☐co-conservator ☐successor conservator and directs the issuance of Letters of Conservatorship. The address, telephone number and e-mail is as follows:

   Address: _____

   Telephone Number: _____ E-mail: _____

2. ☐This appointment is effective forthwith.
   ☐This appointment is effective upon evidence of the following information being filed with the Court:

   _____
   _____
   _____
   _____

3. ☐The provisions of the original order apply.
   ☐The conservator shall file the Conservator's Inventory with Financial Plan (JDF 882) by _____ (date 60 days from appointment).
   ☐The conservator shall file the Annual Conservator's Report (JDF 885) by _____ (date) **and then annually one year from said date unless otherwise ordered by the Court.**
   ☐Other: _____

   _____

4. The conservator shall serve:
   ❑with bond in the amount of $ _____ , pursuant to §15-14-415, C.R.S.
   ❑without bond because of the following reasons pursuant to § 5-14-415, C.R.S.

   _____
   _____
   _____

5. **The Court further orders:**

   _____
   _____
   _____
   _____
   _____
   _____

Date: _____

_____
❑Judge ❑Magistrate

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Interests of:** **Protected Person**	**COURT USE ONLY**
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom

CONSERVATOR'S REPORT

❑**ANNUAL REPORT** ❑**AMENDED REPORT**

CURRENT REPORTING PERIOD FROM _____ **TO** _____
(MM/DD/YYYY) (MM/DD/YYYY)

❑**INTERIM REPORT DUE ON** _____ ❑**FINAL REPORT**

If Final Report, indicate why: ❑**Protected Person deceased** ❑**Minor turned 21** ❑**Judicial Order**

The Conservator's Report pursuant to §15-14-420, C.R.S. must be filed annually and served on all interested persons and the protected person pursuant to §15-14-404(4), C.R.S., unless otherwise ordered. Summarize the financial activity below after completing the detailed accounting information in Parts II and III. Attach additional sheets if necessary.

Notice to Interested Person. Interested persons have the responsibility to protect their own rights and interests within the time and in the manner provided by the Probate Code, including the appropriateness of disbursements, the compensation of fiduciaries, attorneys, and others, and the distribution of estate assets. Interested persons may file an objection with the Court. The Court will not review or adjudicate these or other matters unless specifically requested to do so by an interested person.

Summary of Net Worth - Fair Market Value of Assets Minus Liabilities/Debts

	Last Day of Prior Reporting Period (or Inventory)	Last Day of Current Reporting Period
(A) Total Assets from Part II Item 1	$ _____	$ _____
(B) Total Liabilities/Debts from Part II Item 2	$ _____	$ _____
(A) minus (B) = Net Worth from Part II Item 3	$ _____	$ _____

Summary of Financial Activity

	Prior Reporting Period (or Financial Plan)	Current Reporting Period
(A) Total Receipts/Income from Part III Item 1	$ _____	$ _____
(B) Total Disbursements/Expenses from Part III Item 2	$ _____	$ _____
(A) minus (B) = Net Income from Part III Item 3	$ _____	$ _____

Protected Person's Information: _____ **(Name)**

Current Address: _____
(Include Name of Living Center or Nursing Home)

City: _____ State: _____ Zip Code: _____

Telephone Number: _____ Age: _____

Conservator's Information: _____ **(Name)**

Did you receive any fees for being the Conservator during this reporting period?
❑**Yes** ❑**No** If **Yes,** indicate hourly rate: $_____

Occupation: _____ Your Relationship to Protected Person: _____

Address: _____ Apt. #_____

City: _____ State: _____ Zip Code: _____

Telephone Numbers: Home _____ Work _____ Cell _____

E-Mail Address: _____

If applicable, Co-Conservator's Information: _____ **(Name)**

Did you receive any fees for being the Conservator during this reporting period?
❑**Yes** ❑**No** If **Yes,** indicate hourly rate: $_____

Occupation: _____ Your Relationship to Protected Person: _____

Address: _____ Apt. #_____

City: _____ State: _____ Zip Code: _____

Telephone Numbers: Home _____ Work _____ Cell _____

E-Mail Address: _____

Part I – Conservatorship Issues

1. Is there a continued need for the Conservatorship? ❑**Yes** ❑**No** If **No**, describe why and what steps should be taken. If you would like the Court to take action, you must file a motion with the Court.

_____

_____

2. Are the remaining assets in the estate sufficient to provide for the present and future care of the protected person? ❑**Yes** ❑**No** If **No**, describe why and what steps should be taken. If you would like the Court to take action, you must file a motion with the Court.

_____

_____

3. **Attach a copy of the Bond to this Report, unless the Bond was waived or not required by the Court.** What is the amount of the Bond? $ _____. Is the amount of the Bond sufficient to cover all unrestricted assets? ❑**Yes** ❑**No** If **No**, describe why and what steps should be taken. If you are requesting a change to the Bond, you must file a motion with the Court.

_____

_____

Part II – Assets and Liabilities/Debts

Is this the first Conservator's Report filed? ❑**Yes** ❑**No** If **Yes**, use the amounts from the Inventory with Financial Plan (JDF 882) to complete the column marked with an asterisk (*) in Items 1 and 2 below. If **No**, use the amounts from the prior Conservator's Report filed to complete the column marked with an asterisk (*) in Items 1 and 2 below.

1. Assets

Description of Asset (Identify all accounts)	**Account Number** (last 4-digits only)	**Name of Financial Institution**	* **Fair Market Value** ❑as of Last Day of Prior Reporting Period or ❑Inventory	**Fair Market Value** (as of Last Day of Current Reporting Period)	**Change in Value of Asset**
Checking Accounts					
Savings Accounts					
Other Cash Accounts (e.g. Money Markets and CD's)					
Stocks					
Bonds					
Mutual Funds					
Other Financial Investments					
Life Insurance (Cash Value)					
Pension and Retirement Funds (Vested portion)					
IRA's					
Annuities					
Motor Vehicles					
Real Estate (report mortgage in liability/debt section)					
Home Furnishings					
Collections (e.g., stamps or coins)					
Other Assets (Please list)					
Total Assets Enter these amounts on page 1.					

Have Total Assets changed from the last day of the Prior Reporting Period or Inventory? ❑**Yes** ❑**No**
If **Yes,** briefly explain the changes below. Please include a description of any significant or unanticipated transactions.

_____

_____

_____

2. Liabilities/Debts

Description of Liability/Debt (Identify all accounts)	Account Number (last 4-digits only)	Name of Financial Institution	*Value on Last day of ❑Prior Reporting Period or ❑Inventory	Last Day of Current Reporting Period	Change in Amount of Liability
Mortgages (principal due only)					
Car Loans					
Home Improvement Loans					
Student Loans					
Credit Card Debt					
Federal Taxes Owed					
State and Local Taxes Owed					
Other Liabilities/Debts (Please list)					
Total Liabilities/Debts Enter these amounts on page 1.					

Have Total Liabilities/Debts changed from the last day of the Prior Reporting Period or Inventory?

❑Yes ❑No If **Yes,** briefly explain the changes below. Please include a description of any significant or unanticipated transactions.

_____

_____

_____

3. Net Worth – Fair Market Value of Assets Minus Liabilities/Debts

Net Worth	Last Day of Prior Reporting Period or Inventory	Last Day of Current Reporting Period
Assets minus Liabilities/Debts (Item 1 Total minus Item 2 Total) Enter these amounts on page 1.		

Part III – Receipts/Income and Disbursements/Expenses

Is this the Initial Conservator's Report filed? ❑**Yes** ❑**No** If **Yes**, use the amounts from the Inventory with Financial Plan (JDF 882) to complete the column marked with an asterisk (*) in items 1 and 2, below. If **No**, use the amounts from the prior Conservator's Report filed to complete the column marked with an asterisk (*) in items 1 and 2, below.

1. Total Receipts/Income

Description of Receipt/Income Category	*Total Amount of Receipts / Income from ❑Prior Reporting Period or ❑Financial Plan	Total Amount of Receipts / Income for Current Reporting Period	Change in Amount of Receipt/ Income
Wages			
Social Security			
Interest / Dividends			
Pensions / Retirement Plan Distributions			
Tax Refunds			
Proceeds from Sales of Assets			
Rental Income			
Gifts from Others			
Disability, Unemployment or Worker's Compensation			
Other Public Assistance			
Other Receipts / Income (Please list)			
Total Receipts/Income Enter these amounts on page 1.			

Have Total Receipts/Income changed from the Prior Reporting Period or Financial Plan? ❑**Yes** ❑**No**
If **Yes,** briefly explain the changes below. Please include a description of any significant or unanticipated transactions.

_____

_____

_____

_____

2. Disbursements/Expenses

Description of Disbursement / Expense Category	*Total Amount of Disbursement / Expense from ❑Prior Reporting Period or ❑Financial Plan	Total Amount of Disbursement / Expense for Current Reporting Period	Change in amount of Disbursement/ Expense
Total Professional Fees Paid (from Part IV. Item 1 – Payment to Professionals)			
Distributions to Protected Person			
Income Taxes			
FICA and Medicare Taxes			
Health Care (including health insurance and prescriptions)			
Other Insurance			
Rent or Mortgage			
Property Taxes and Assessments			
Repairs and Maintenance			
Utilities, including phones			
Home Furnishings			
Food and Household Supplies			
Clothing			
Personal Care			
Auto Expenses			
Education			
Entertainment, Vacations and Travel			
Other Disbursements/Expenses, e.g. gifts (Please list)			
Total Disbursements/Expenses Enter these amounts on page 1.			

Have Total Disbursements/Expenses changed from the Prior Reporting Period or Financial Plan?
❑**Yes** ❑**No** If **Yes,** briefly explain the changes below. Please include a description of any significant or unanticipated transactions.

_____

_____

_____

_____

3. Net Income – Total Receipts/Income Minus Total Disbursements/Expenses

Net Income	Prior Reporting Period or Financial Plan	Current Reporting Period
Receipts/Income minus Disbursements/Expenses (Item 1 Total minus Item 2 Total) Enter these amounts on page 1.		

Part IV – Payments to Professionals

1. List below payments to professionals that you are employing to serve you, as conservator, the protected person or the estate; and the amounts paid to such professionals during this reporting period. Include any fees you received as the Conservator.

Type of Professional and Name of Individual	Total Amount Paid in Current Reporting Period
Conservator -	
Guardian -	
Guardian ad litem-	
Legal fees for Protected Person -	
Legal fees for Conservator -	
Legal fees for Guardian -	
Legal fees for Petitioner -	
Accountant/CPA -	
Case Manager -	
Other: Describe	
Other: Describe	
Other: Describe	
Other: Describe	
Total Professional Fees Paid Enter total in Part III, Item 2.	

2. For each professional listed above, provide the following for the current reporting period: Name, hourly rate charged (may include range of hourly rates, if applicable), number of hours worked, total hourly fees, other costs charged and a brief description of the services provided and benefit to the estate.

The sum of the total hourly fees and other costs charged for each professional listed in the chart below, should equal the total amount paid in the current reporting period in Item 1, above for that professional.

Name of Professional	Hourly Rate (Range)	No. of Hours Worked	Total Hourly Fees	Other Costs Charged	Brief Description of Services Provided and Benefit to the Estate

Part V – Detail Listing of Receipts/Income and Disbursements/Expenses

For each bank account included in Part II, Item 1, list below each individual item of Receipts/Income or Disbursements/Expenses for the entire reporting period. If applicable, add additional pages and/or a separate listing if more than one bank account. Each Receipt/Income should be listed in the Amount Received column and each Disbursement/Expense should be listed in the Amount Disbursed column. Note: **This report should resemble a check register for each bank account.**

Name of Bank: _____ **Account Number** (last 4-digits only): _____

Beginning Cash Balance $ _____ (This should match the ending balance from the last report)

Add: Total Amount Received $ _____ (Enter total from listing below)

Less: Total Amount Disbursed $ _____ (Enter total from listing below)

Ending Cash Balance $ _____ (This will be the beginning balance on next year's report)

Date	Check or I.D. No.	Description of item Received or Disbursed, include Name of Payee (if Disbursement)	Amount Received	Amount Disbursed
Page _____ of _____			$	$
			$	$

I state under penalty of perjury that this is a true and complete report of the administration of this estate, during the period shown, both dates inclusive, to the best of my knowledge, information and belief. I understand that this report is subject to audit and verification.

I understand that I am required to maintain supporting documentation for all receipts and disbursements including detailed billing statements from any professional. The Court or any Interested Persons as identified in the Order Appointing Conservator may request copies at any time.

Date: _____ _____
Signature of Conservator

Date: _____ _____
Signature of Co-Conservator (if applicable)

Certificate of Service

I certify that on _____ (date) the original was e-filed/filed with the Court and a copy of this Conservator's Report was served on each of the following:

Name of Person You are Sending this Document To (Interested Persons)	Relationship to Protected Person	Address	Manner of Service*

*Insert hand delivery, first class U.S. Mail, certified U.S. Mail, E-filed, or Fax.

_____
Signature of Person Certifying Service

Note:
The Conservator's Report must be filed annually and served on the protected person pursuant to §15-14-404(4), C.R.S. and interested persons pursuant to the Order Appointing Conservator, unless otherwise ordered.

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Interest of:** **Protected Person**	**COURT USE ONLY**
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom
PETITION FOR TERMINATION OF CONSERVATORSHIP **❑ADULT ❑MINOR**	

1. **The Petitioner is:**
   - ❑the Conservator for the Protected Person.
   - ❑the Protected Person.
   - ❑a person interested in the Protected Person's welfare as follows:_____

2. **Information about the Petitioner:**

   Name:_____

   Street Address: _____

   Mailing Address, if different: _____

   City:_____ State:_____ Zip Code:_____ Home Phone #: _____

   Email Address: _____ Work Phone #:_____

3. **Petitioner requests that this conservatorship be terminated for the following reasons:**

   ❑The conservatorship was created solely due to the minority of the Protected Person. The Protected Person was born on _____ (date), and has attained the age of 21.

   ❑The Protected Person died on _____ (date).

   ❑An estate has been opened in _____ (name of County) in _____ (case number) and _____ (name of Personal Representative) has been appointed. Note: The probate assets of the conservatorship must pass to the Personal Representative of the estate unless ordered by the Court.

   ❑An estate action is not being opened for the following reasons:

   _____

   _____

   _____

   _____

❑The Protected Person's inability to manage property and business affairs has been resolved as follows:

_____

_____

_____

Note: If this option is selected, the Petitioner must contact the Court to set a date and time for a hearing or file a request to waive the hearing.

❑The assets of the conservatorship are insufficient to warrant continued administration. Identify current value: Assets: $ _____, Liabilities: $ _____ Net Value $ _____.

❑Other: _____

_____

4. The following persons were designated to receive notice of subsequent actions in the Order Appointing Conservator.

Name	Address	Relationship to Protected Person

5. The Conservator has collected and managed the assets of this estate, filed the required Conservator's Inventory with Financial Plan and Conservator Reports, paid all lawful claims against this estate, and performed all other acts required of a Conservator by law.

6. **Schedule of Distribution.**

The assets of the conservatorship are as follows:

Description of Assets	Value
	$

All of the assets of the conservatorship will be distributed to the:

❑Protected Person

❑Personal Representative

❑Other: _____

Unless an evidentiary hearing is required by law or by the Court, the Petitioner requests, after notice of non-appearance hearing pursuant to C.R.P.P. 8.8, that the

1. Court terminate the conservatorship.
2. Conservator's Final Report (including the payment of all fees, costs and expenses of administration as set forth therein) be:
   - ❑ Dispensed with (all required waivers (JDF 889) must accompany this Petition); **or**
   - ❑ Allowed (accepted as filed without audit); **or**
   - ❑ Approved after audit; **or**
   - ❑ Other:

     _____

     _____
3. Court enter an order directing the Conservator to distribute all assets of the conservatorship as set forth in the Schedule of Distribution, section 6, above.

Petitioner further requests that, upon filing final receipts, appropriate instruments evidencing transfer of title, or evidence confirming the ordered distribution pursuant to the Schedule of Distribution in section 6, the Court issue a Decree of Final Discharge, whereupon the Conservator and any surety on the Conservator's bond shall be released and discharged from all liability arising in connection with the performance of the Conservator's duties, and that the administration of this conservatorship be terminated.

VERIFICATION

I (Petitioner) verify that the facts set forth in this document are true as far as I know or am informed. I understand that penalties for perjury follow deliberate falsification of the facts stated herein. (§15-10-310, C.R.S.)

_____

Signature of Petitioner or Attorney for Petitioner Date

CERTIFICATE OF SERVICE

I certify that on _____ (date) a copy of this Petition was served on each of the following:

Name of Person to Whom you are Sending this Document	Relationship to Protected Person	Address	Manner of Service*

*Insert one of the following: Hand Delivery, First-Class Mail, Certified Mail, E-Served or Faxed.

_____

Signature

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Interest of:** **Protected Person**	**COURT USE ONLY**
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom

WAIVER OF HEARING, WAIVER OF FINAL CONSERVATOR'S REPORT, WAIVER OF AUDIT, AND APPROVAL OF SCHEDULE OF DISTRIBUTION

I,_____ (name), am

❑the Protected Person.

❑Personal Representative of the estate of the Protected Person.

❑Successor of the Protected Person. (§15-12-1201, C.R.S.)

❑other: _____ .

I am 21 years of age or older. I waive receipt, filing and/or audit of the Final Conservator's Report and court hearing on the Petition for Termination of this conservatorship.

I approve all acts of the Conservator, including all claims paid, fees paid to the Conservator, attorney and others, if any, and the distribution of all assets of the conservatorship in the amount and manner set forth in the Schedule of Distribution.

WARNING: Pursuant to §15-14-431(2), C.R.S., and Colorado Rules of Probate Procedure 30.1, a Conservator is required to file a Final Conservator's Report, unless otherwise directed by the Court. By signing this form, you give up your right to require that the Conservator file a Final Conservator's Report.

If you do not understand this form, you should seek legal or tax advice.

VERIFICATION AND ACKNOWLEDGMENT

I, verify that the facts set forth in this document are true as far as I know or am informed. I understand that penalties for perjury follow deliberate falsification of the facts stated herein. (§15-10-310, C.R.S.)

_____
Signature of Person Waiving Notice Date

The foregoing instrument was acknowledged before me in the County of _____, State of Colorado, this ____day of _____, 20__.

My Commission Expires: _____

_____
Notary Public/Deputy Clerk

_____
Signature of Attorney Date

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Interests of:** **Protected Person**	**COURT USE ONLY** Case Number: Division Courtroom

ORDER TERMINATING CONSERVATORSHIP

Upon consideration of the Petition for Termination of Conservatorship and ❑evidentiary hearing **or** ❑non-appearance hearing;

The Court finds

1. that the statements in the Petition are true and correct; that notice has been properly given or waived; that this conservatorship has been administered according to law and should be terminated because:

❑ The Protected Person has attained the age of 21.
❑ The Protected Person died on _____ (date).
❑ The Protected Person's inability to manage property and business affairs has been resolved.
❑ The assets of the conservatorship are insufficient to warrant continued administration.
❑ Other: _____

It is Ordered that the Conservator's Final Report (including the payment of all fees, costs and expenses of administration as set forth therein) is:

❑ Dispensed with (all required waivers (JDF 889) were filed); **or**
❑ Allowed (accepted as filed without audit); **or**
❑ Approved after audit; **or**
❑ Other: _____

It is Ordered that the Conservator distribute all assets of the conservatorship as set forth in the Petition for Termination of Conservatorship.

The Court further Orders

_____
_____
_____

Date: _____ _____
❑Judge ❑Magistrate

Note:

Upon filing final receipts, appropriate instruments evidencing transfer of title, or evidence confirming the ordered distribution, the Court shall issue a Decree of Final Discharge, whereupon the Conservator and any surety on the Conservator's bond shall be released and discharged from all liability arising in connection with the performance of the Conservator's duties, and the administration of this conservatorship shall be terminated.

☐District Court ☐Denver Probate Court _____ County, Colorado Court Address: **In the Interests of:** **Protected Person**	▲ **COURT USE ONLY** ▲
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #::	Case Number: Division Courtroom

FOREIGN CONSERVATOR'S SWORN STATEMENT

I, _____, as the foreign conservator (§15-14-433, C.R.S.), state that a conservator has not been appointed in this state and no petition in a protective proceeding is pending in Colorado for the protected person. I hereby file with this Court the following documents:

- ☐ Certified, exemplified, or authenticated copies of the foreign court's order appointing me as conservator;
- ☐ Certified, exemplified, or authenticated copies of the foreign court's letters or other documents evidencing or affecting my authority to act as conservator;
- ☐ Certified, exemplified, or authenticated copies of any bonds filed with the appointing foreign court;
- ☐ Other: _____.

As the foreign conservator and being sworn, I verify that the facts set forth in this statement are true to the best of my knowledge, information, and belief.

Date: _____

_____
Signature of Foreign Conservator

_____
Street

_____
City/State/Zip Code

_____
Daytime Phone Number

Subscribed and affirmed, or sworn to before me in the County of _____, State of _____, this _____ day of _____, 20_____.

My Commission Expires: _____

_____
Notary Public/Deputy Clerk

JDF 891 11/07 FOREIGN CONSERVATOR'S SWORN STATEMENT

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Interest of:** **Protected Person**	**COURT USE ONLY** Case Number: Division Courtroom

CERTIFICATE OF ANCILLARY FILING - CONSERVATORSHIP

The foreign conservator's sworn statement stating that no administration, application, or petition for administration is pending in Colorado, has been filed with this Court.

The following documents regarding _____, as the foreign conservator, have been filed with this Court:

- ❑ Certified, exemplified, or authenticated copy of the foreign court's order appointing the foreign conservator.
- ❑ Certified, exemplified, or authenticated copy of the foreign court's letters or other documents evidencing or affecting the foreign conservator's authority to act.
- ❑ Certified, exemplified, or authenticated copy of any bond of the foreign conservator.
- ❑ Other: _____

The attached documents(s) is/are certified to be a true copy of the ❑certified ❑exemplified ❑authenticated copy of the document(s) referenced above that is/are in my custody.

Date: _____

_____
(Deputy) Clerk or Registrar of Court

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Matter of the Estate of:** **Deceased**	**COURT USE ONLY**
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom

DEMAND FOR NOTICE OF FILINGS OR ORDERS PURSUANT TO §15-12-204, C.R.S. AND RULE 8.7 COLORADO RULES OF PROBATE PROCEDURES

INSTRUCTIONS TO THE DEMANDANT

- File the original with the Court.
- If a Personal Representative has already been appointed, the Court shall mail a copy of the Demand to the Personal Representative **or** you can mail a copy of the Demand to the Personal Representative and complete the Certificate of Service stating that a copy has been mailed or delivered.
- The Court will require any future filings or orders to which this Demand relates to be accompanied by a Certificate of Service stating that a copy has been mailed or delivered to you.

I have the following financial or property interest in this estate as a

- ❑ Creditor
- ❑ Devisee
- ❑ Heir _____ (Identity relationship to the Decedent §15-10-201(24), C.R.S.)
- ❑ Other: _____ (State interest)

1. Information about the Demandant:

Name: _____

Address: _____

City: _____ State: _____ Zip Code: _____ Home Phone #: _____

Email Address: _____ Work Phone #: _____

2. I demand notice of the opening of an estate concerning the above-named Decedent.

- ❑ I demand notice with respect to all filings and orders in this matter.
- ❑ I demand notice with respect to the following:
  - ❑ Application or Petition for Appointment of Special Administrator
  - ❑ Application or Petition for Probate of Will and Appointment of Personal Representative
  - ❑ Application or Petition for Intestacy Proceedings and Appointment of Personal Representative

- ❑ Inventory (§15-12-706(2), C.R.S.)
- ❑ Any filing for the purpose of closing this estate.
- ❑ Other: _____

3. Notice shall be given to ❑me **or** ❑my attorney.

_____ _____

Signature of Attorney for Demandant Date Signature of Demandant Date

CERTIFICATE OF SERVICE

I certify that on _____ (date) a copy of this Demand for Notice of Filings or Orders was served on each of the following:

Full Name	Relationship	Address	Manner of Service*

***Insert one of the following: Hand Delivery, First-Class Mail, Certified Mail, E-Served or Faxed.**

_____

Signature

INSTRUCTIONS TO THE PERSONAL REPRESENTATIVE

- A copy of any filing or order to which this Demand relates must be mailed or delivered to the person indicated on this Demand. A Certificate of Service must accompany the filing or order when it is filed with the Court.
- The Clerk or Registrar may thereafter take any authorized action, including accepting and acting upon an Application for Informal Appointment of Personal Representative.
- Advance notice shall be required only for actions or hearings for which advance notice would otherwise be required.

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Matter of the Estate of:** **Deceased**	**COURT USE ONLY**
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom
WITHDRAWAL OF DEMAND FOR NOTICE OF FILINGS OR ORDERS PURSUANT TO §15-12-204, C.R.S.	

I, _____ (name of Demandant), hereby withdraw my Demand for Notice of Filings or Orders filed on _____ (date).

_____ _____
Signature of Attorney for Demandant Date Signature of Demandant Date

CERTIFICATE OF SERVICE

I certify that on _____ (date) a copy of this Withdrawal of Demand for Notice of Filings and Orders was served on each of the following:

Full Name	Relationship	Address	Manner of Service*

***Insert one of the following: Hand Delivery, First-Class Mail, Certified Mail, E-Served or Faxed.**

_____
Signature

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Matter of the Estate of:** **Deceased**	▲ **COURT USE ONLY** ▲
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom
APPLICATION FOR INFORMAL PROBATE OF WILL AND INFORMAL APPOINTMENT OF PERSONAL REPRESENTATIVE	

******** Use this form if the Decedent left a will *********

The Applicant, an interested person pursuant to §15-10-201(27), C.R.S., makes the following statements:

1. **Information about the Applicant:**

   Name: _____ Relationship to Decedent: _____

   Street Address: _____

   Mailing Address, if different: _____

   City: _____ State: _____ Zip Code: _____ Home Phone #: _____

   Email Address: _____ Work Phone #: _____

2. The Decedent died on _____ (date) at the age of ____ years. The Decedent was domiciled or resided in the City of _____ County of _____, the State of _____.

3. Venue for this proceeding is proper in this county because the Decedent:

   ❑had his or her domicile or residence in this county on the date of death.

   ❑did not have his or her domicile or residence in Colorado, but had property located in this county on the date of death.

4. This Application is filed within the time period permitted by law. Three years or less have passed since the Decedent's death, or circumstances described in §15-12-108, C.R.S. authorize tardy probate or appointment.

5. The Applicant:

   ❑has not received a Demand for Notice of Filings or Orders and is unaware of any Demand for Notice of Filings or Orders concerning the Decedent.

   ❑has received or is aware of a Demand for Notice of Filings or Orders concerning the Decedent. See attached Demand for Notice of Filings or Orders or explanation.

6. ❑No court has appointed a Personal Representative and no such appointment proceeding is pending in this state or elsewhere.

❑A court has appointed a Personal Representative or an appointment proceeding is pending in the State of _____. (Attach a statement explaining the circumstances and indicating the name and address of the Personal Representative. Attach a certified copy of the appointing document if the appointment has been finalized.)

7. The date of the Decedent's last Will is _____.
The dates of all codicils are _____.
The Will and any codicils are referred to as the Will. The Applicant believes that it is the Decedent's last Will and that it was validly executed.

Except as may be disclosed in an attached explanation and after the exercise of reasonable diligence, the Applicant is unaware of any instrument revoking the Will and is unaware of any prior Wills relating to property in Colorado that have not been expressly revoked by a later instrument.

❑The original Will

❑was deposited with this Court before the Decedent's death. (§15-11-515, C.R.S.)

❑has been delivered to this Court since the Decedent's death. (§15-11-516, C.R.S.)

❑is filed with this Application.

❑An e-filed copy of the Will is filed with this Application.

❑The original will be delivered to the Court forthwith.

❑The Will has been probated in the State of _____. Authenticated copies of the Will and of the statement probating it are filed with this Application. (§15-12-402, C.R.S.)

8. **The names and addresses of the Decedent's spouse, children, other heirs and devisees are as follows:**
- ◆ If a guardian or conservator has been appointed for one of the persons listed below, also provide the name and address of the guardian or conservator.
- ◆ If a minor child is listed, list the child's parent(s), guardian or conservator.
- ◆ If a spouse or child has predeceased the Decedent, include the date of death.
- ◆ A sample of this section is included in the Instructions - JDF 906.

Name	Address (or date of death)	Age, only if Minor	Relationship (e.g. spouse, child, brother, guardian for spouse, etc.)

9. ❑Applicant is 21 years of age or older and nominates himself/herself to be appointed as Personal Representative.
or

❑Applicant nominates the following person be appointed as Personal Representative.

Name: _____ The Nominee is 21 years of age or older.

Street Address: _____

Mailing Address, if different: _____

City: _____ State: _____ Zip Code: _____ Home Phone #: _____

Email Address: _____Work Phone #: _____

10. The Nominee has priority for appointment because of:

❑statutory priority. (§15-12-203, C.R.S.)

❑reasons stated in the attached explanation.

Persons with prior or equal rights to appointment are as follows:

_____

_____

They have each renounced their rights to appointment or have been given notice of these proceedings. **Any required renouncements accompany this Application.**

11. The Personal Representative may receive compensation.

❑The hourly rates to be charged, any amounts to be charged pursuant to a published fee schedule, including the rates and basis for charging fees for any extraordinary services, and any other bases upon which a fee charged to the estate will be calculated, are as stated below or in an attachment to this Application. *

_____

_____

_____

❑The basis of compensation has not yet been determined.

12. The Personal Representative may compensate his, her, or its counsel.

❑The hourly rates to be charged, any amounts to be charged pursuant to a published fee schedule, including the rates and basis for charging fees for any extraordinary services, and any other bases upon which a fee charged to the estate will be calculated, are as stated below or in an attachment to this Application. *

_____

_____

_____

❑The basis of compensation has not yet been determined.

* There is a continuing obligation to disclose any material changes to the basis for charging fees. (§ 15-10-602 C.R.S.)

13. ❑ Bond is not required by the Will nor has any interested person demanded that bond be filed.
❑ Bond in the amount of $_____ has been demanded.

The Applicant requests that the Registrar informally admit the Decedent's Will to probate and that the Nominee be informally appointed as Personal Representative in unsupervised administration to serve:

❑without bond ❑with bond in the amount of $_____

and that Letters Testamentary be issued.

VERIFICATION AND ACKNOWLEDGMENT

I (Applicant) verify that the facts set forth in this document are true as far as I know or am informed. I understand that penalties for perjury follow deliberate falsification of the facts stated herein. (§15-10-310, C.R.S.)

_____
Signature of Applicant Date

The foregoing instrument was acknowledged before me in the County of _____, State of Colorado, this ____day of _____, 20___, by the Applicant.

My Commission Expires: _____

_____
Notary Public/Deputy Clerk

_____
Signature of Attorney Date

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Matter of the Estate of:** **Deceased**	**COURT USE ONLY**
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom
ACCEPTANCE OF APPOINTMENT	

I accept appointment to, and agree to perform the duties and discharge the trust of, the office of:

- ❑ Personal Representative.
- ❑ Special Administrator.
- ❑ _____.

I submit personally to the jurisdiction of this Court in any proceeding relating to this matter.

Date: _____

_____
Signature

_____
Print Name

_____
Address

_____
City, State, Zip Code

_____
(Area Code) Home Telephone Number

Note: This form is for Decedent Estate matters only. For Guardianships and Conservatorships matters use the Acceptance of Office (JDF 805).

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Matter of the Estate of:** **Deceased**	▲ **COURT USE ONLY** ▲
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom

RENUNCIATION AND/OR NOMINATION OF PERSONAL REPRESENTATIVE

I, _____ (name), make the following statements to this Court.

1. ❑I have priority for appointment as Personal Representative of this estate because I am nominated by the Decedent's Will or under a power conferred by the Will. I renounce my right to appointment.

2. I have priority for appointment as Personal Representative of this estate pursuant to paragraphs (b) to (e) of §15-12-203(1), C.R.S.*
   ❑Having the right to nominate a qualified person to act as Personal Representative, I nominate _____ _____.
   ❑I renounce my right to appointment. .

3. ❑I am between the age of 18 and 21 and would be entitled to appointment as Personal Representative but for my age.
   ❑Having the right to nominate a qualified person to act as Personal Representative, I nominate _____ _____.
   ❑I renounce my right to nominate a Personal Representative.

4. ❑Other: _____

VERIFICATION AND ACKNOWLEDGMENT

I verify that the facts set forth in this document are true as far as I know or am informed. I understand that penalties for perjury follow deliberate falsification of the facts stated herein. (§15-10-310, C.R.S.)

_____ _____
Signature of Attorney Date

_____ _____
Signature Date

_____
Type or Print name

_____
Address

_____
City, State, Zip Code

_____
Phone Number

_____
E-Mail Address

The foregoing instrument was acknowledged before me in the County of _____, State of Colorado, this _____ day of _____, 20____, by _____.

My Commission Expires: _____

_____
Notary Public/Deputy Clerk

***Note:** Persons with priority for appointment as Personal Representative who also have the right to nominate a Personal Representative are set forth §15-12-203(1), C.R.S. and have priority in the following order: (b) The surviving spouse of the Decedent who is a devisee of the Decedent; (c) other devisees of the Decedent; (d) the surviving spouse of the Decedent; (e) other heirs of the Decedent.

☐District Court ☐Denver Probate Court _____ County, Colorado Court Address: **In the Matter of the Estate of:** **Deceased**	**COURT USE ONLY** Case Number: Division: Courtroom:

ORDER FOR INFORMAL PROBATE OF WILL AND INFORMAL APPOINTMENT OF PERSONAL REPRESENTATIVE

Upon consideration of the Application for Informal Probate of Will and Informal Appointment of Personal Representative filed by _____ (Applicant), on _____ (date),

THE REGISTRAR FINDS, DETERMINES AND ORDERS:

1. The Applicant is an interested person and has filed a complete and verified application.

2. The Decedent died on _____ (date) and 120 hours have elapsed since the Decedent's death. If the Decedent was not a resident of Colorado, 30 days have elapsed since the Decedent's death, or the Personal Representative appointed at the Decedent's domicile or residence is the Applicant. (§15-12-307, C.R.S.)

3. The Decedent was domiciled or resided in the City of _____ County of _____, State of_____.

4. Venue is proper in this county.

5. The Application was filed within the time period permitted by law.

6. Any required notices have been received or waived.

7. The Decedent left a Will dated _____.
The dates of all codicils are _____. The Will and any codicils are referred to as the Will. The original or e-filed copy of the duly executed, unrevoked Will is in the Registrar's possession. There are no known prior Wills which have not been expressly revoked by a later instrument. The Will is admitted to informal probate.

8. The following person is qualified to serve and is appointed as Personal Representative:
   Name: _____ The Nominee is 21 years of age or older.
   Street Address: _____
   Mailing Address, if different: _____
   City: _____ State: _____ Zip Code: _____ Home Phone #: _____
   Email Address: _____Work Phone #: _____

9. Appointment is made without bond in unsupervised administration

10. Letters Testamentary shall be issued.

Date: _____ _____
Registrar

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Matter of the Estate of:** **Deceased**	**COURT USE ONLY** Case Number: Division Courtroom
LETTERS ❑TESTAMENTARY ❑OF ADMINISTRATION	

_____ (name) was appointed or qualified by this Court or its Registrar on _____ (date) as:

- ❑ Personal Representative.
- ❑ Successor Personal Representative.

The Decedent died on _____(date).

These Letters are proof of the Personal Representative's authority to act pursuant to §15-12-701, et.seq, C.R.S. except for the following restrictions, if any:

_____

_____

_____

_____

Date: _____

_____
Probate Registrar/(Deputy)Clerk of Court

CERTIFICATION

Certified to be a true copy of the original in my custody and to be in full force and effect as of _____.
Date

_____
Probate Registrar/(Deputy)Clerk of Court

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Matter of the Estate of:** **Deceased**	▲ **COURT USE ONLY** ▲
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom

APPLICATION FOR INFORMAL APPOINTMENT OF PERSONAL REPRESENTATIVE

******** Use this form if the Decedent did not leave a will *********

The Applicant, an interested person pursuant to §15-10-201(27), C.R.S., makes the following statements:

1. **Information about the Applicant:**

   Name:_____ Relationship to Decedent:_____

   Street Address:_____

   Mailing Address, if different:_____

   City:_____ State:_____ Zip Code:_____ Home Phone #:_____

   Email Address:_____Work Phone #:_____

2. The Decedent died on _____ (date) at the age of ____ years. The Decedent was domiciled or resided in the City of_____County of _____, the State of_____.

3. Venue for this proceeding is proper in this county because the Decedent:

   ❑had his or her domicile or residence in this county on the date of death.

   ❑did not have his or her domicile or residence in Colorado, but had property located in this county on the date of death.

4. This Application is filed within the time period permitted by law. Three years or less have passed since the Decedent's death, or circumstances described in §15-12-108, C.R.S. authorize tardy probate or appointment.

5. The Applicant:

   ❑has not received a Demand for Notice of Filings or Orders and is unaware of any Demand for Notice of Filings or Orders concerning the Decedent.

   ❑has received or is aware of a Demand for Notice of Filings or Orders concerning the Decedent. See attached Demand for Notice of Filings or Orders or explanation.

6. ❑No court has appointed a Personal Representative and no such appointment proceeding is pending in this state or elsewhere.
❑A court has appointed a Personal Representative or an appointment proceeding is pending in the State of _____. (Attach a statement explaining the circumstances and indicating the name and address of the Personal Representative. Attach a certified copy of the appointing document if the appointment has been finalized.)

7. Except as may be disclosed in an attached explanation and after the exercise of reasonable diligence, the Applicant is unaware of any unrevoked will relating to property in Colorado.

8. **The names and addresses of the Decedent's spouse, children and other heirs are as follows:**
- ◆ If a guardian or conservator has been appointed for one of the persons listed below, also provide the name and address of the guardian or conservator.
- ◆ If a minor child is listed, list the child's parent(s), guardian or conservator.
- ◆ If a spouse or child has predeceased the Decedent, include the date of death.
- ◆ A sample of this section is included in the Instructions - JDF 907.

Name	Address (or date of death)	Age, only if Minor	Relationship (e.g. spouse, child, brother, guardian for spouse, etc.)

9. ❑Applicant is 21 years of age or older and nominates himself/herself to be appointed as Personal Representative.
or
❑Applicant nominates the following person be appointed as Personal Representative.

Name:_____ The Nominee is 21 years of age or older.

Street Address:_____

Mailing Address, if different:_____

City:_____ State:_____ Zip Code:_____ Home Phone #:_____

Email Address:_____Work Phone #: _____

10. The Nominee has priority for appointment because of:
❑statutory priority. (§15-12-203, C.R.S.)
❑reasons stated in the attached explanation.

Persons with prior or equal rights to appointment are as follows:

_____

_____

They have each renounced their rights to appointment or have been given notice of these proceedings. **Any required renouncements accompany this Application.**

11. The Personal Representative may receive compensation.

❑The hourly rates to be charged, any amounts to be charged pursuant to a published fee schedule, including the rates and basis for charging fees for any extraordinary services, and any other bases upon which a fee charged to the estate will be calculated, are as stated below or in an attachment to this Application. *

_____

_____

_____

❑The basis of compensation has not yet been determined.

12. The Personal Representative may compensate his, her or its counsel.

❑The hourly rates to be charged, any amounts to be charged pursuant to a published fee schedule, including the rates and basis for charging fees for any extraordinary services, and any other bases upon which a fee charged to the estate will be calculated, are as stated below or in an attachment to this Application. *

_____

_____

_____

❑The basis of compensation has not yet been determined.

* There is a continuing obligation to disclose any material changes to the basis for charging fees. (§ 15-10-602 C.R.S.)

13. ❑No interested person demanded that bond be filed.
❑Bond in the amount of $_____ has been demanded.

The Applicant requests that the Registrar informally appoint the Nominee as Personal Representative in unsupervised administration to serve:

❑without bond ❑with bond in the amount of $_____

and that Letters of Administration be issued.

VERIFICATION AND ACKNOWLEDGMENT

I (Applicant) verify that the facts set forth in this document are true as far as I know or am informed. I understand that penalties for perjury follow deliberate falsification of the facts stated herein. (§15-10-310, C.R.S.)

_____
Signature of Applicant Date

The foregoing instrument was acknowledged before me in the County of _____, State of Colorado, this ____day of _____, 20___, by the Applicant.

My Commission Expires: _____

_____
Notary Public/Deputy Clerk

_____
Signature of Attorney Date

☐District Court ☐Denver Probate Court _____ County, Colorado Court Address: **In the Matter of the Estate of:** **Deceased**	**COURT USE ONLY** Case Number: Division: Courtroom:
ORDER FOR INFORMAL APPOINTMENT OF PERSONAL REPRESENTATIVE	

Upon consideration of the Application for Informal Appointment of Personal Representative filed by _____ _____ (Applicant) on _____ (date),

THE REGISTRAR FINDS, DETERMINES AND ORDERS:

1. The Applicant is an interested person and has filed a complete and verified application.
2. The Decedent died on _____ (date) and 120 hours have elapsed since the Decedent's death. If the Decedent was not a resident of Colorado, 30 days have elapsed since the Decedent's death, or the Personal Representative appointed at the Decedent's domicile or residence is the Applicant. (§15-12-307, C.R.S.)
3. The Decedent was domiciled or resided in the City of _____ County of _____, State of_____.
4. Venue is proper in this county.
5. The Application was filed within the time period permitted by law.
6. Any required notices have been received or waived.
7. The Decedent did not leave a Will.
8. The following person is qualified to serve and is appointed as Personal Representative:

   Name: _____ The Nominee is 21 years of age or older.

   Street Address: _____

   Mailing Address, if different: _____

   City: _____ State: _____ Zip Code: _____ Home Phone #: _____

   Email Address: _____Work Phone #: _____
9. Appointment is made without bond in unsupervised administration
10. Letters of Administration shall be issued.

Date: _____ _____
Registrar

☐District Court ☐Denver Probate Court _____ County, Colorado Court Address: **In the Matter of the Estate of:** **Deceased**	▲ **COURT USE ONLY** ▲
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom

PETITION FOR FORMAL PROBATE OF WILL AND FORMAL APPOINTMENT OF PERSONAL REPRESENTATIVE

******** Use this form if the Decedent left a will *********

The Petitioner, an interested person pursuant to §15-10-201(27), C.R.S., makes the following statements:

1. **Information about the Petitioner:**
   Name: _____ Relationship to Decedent _____
   Street Address: _____
   Mailing Address, if different: _____
   City:_____ State:_____ Zip Code:_____ Home Phone #: _____
   Email Address: _____ Work Phone #:_____

2. The Decedent died on _____ (date) at the age of ____ years. The Decedent was domiciled or resided in the City of _____ County of _____, State of_____.

3. Venue for this proceeding is proper in this county because the Decedent:
   ☐had his or her domicile or residence in this county on the date of death.
   ☐did not have his or her domicile or residence in Colorado, but had property located in this county on the date of death.

4. This Petition is filed within the time period permitted by law. Three years or less have passed since the Decedent's death, or circumstances described in §15-12-108, C.R.S. authorize tardy probate or appointment.

5. The Petitioner:
   ☐has not received a Demand for Notice of Filings or Orders and is unaware of any Demand for Notice of Filings or Orders concerning Decedent.
   ☐has received or is aware of a Demand for Notice of Filings or Orders concerning Decedent. See attached Demand for Notice of Filings or Orders or explanation.

6. ❑No court has appointed a Personal Representative and no such appointment proceeding is pending in this state or elsewhere.

❑A court has appointed a Personal Representative or an appointment proceeding is pending in the State of _____. (Attach a statement explaining the circumstances and indicating the name and address of the Personal Representative. Attach a certified copy of the appointing document if the appointment has been finalized.)

7. The date of the Decedent's last Will is _____.
The dates of all codicils are _____.
The Will and any codicils are referred to as the Will. The Petitioner believes that it is the Decedent's last Will and that it was validly executed.

Except as may be disclosed in an attached explanation and after the exercise of reasonable diligence, the Petitioner is unaware of any instrument revoking the Will and is unaware of any prior Wills relating to property in Colorado that have not been expressly revoked by a later instrument.

❑The original Will

❑was deposited with this Court before the Decedent's death. (§15-11-515, C.R.S.)

❑has been delivered to this Court since the Decedent's death. (§15-11-516, C.R.S.)

❑is filed with this Petition.

❑Other: _____

❑An e-filed copy of the Will is filed with this Petition. The original document ❑will be delivered to the Court forthwith or ❑has been delivered to the Court.

❑The Will has been probated in the State of _____. Authenticated copies of the Will and of the statement probating it are filed with this Petition. (§15-12-402, C.R.S.)

8. Decedent's marital and family status:

a) Did a spouse survive the Decedent? ❑Yes ❑No

If the answer to a) is Yes, also answer the following questions:

b) Did the Decedent have a surviving parent? ❑Yes ❑No

c) Did the Decedent have surviving children or other descendants? ❑Yes ❑No

If the answer to c) is Yes, also answer the following questions:

d) Does the Decedent's surviving spouse have surviving descendants who are not descendants of the Decedent? ❑Yes ❑No

e) Are all of the Decedent's surviving descendants also descendants of the surviving spouse? ❑Yes ❑No

If the answer to e) is No, also answer the following question:

f) Are any of the Decedent's children minors? ❑Yes ❑No

9. **The names and addresses of the Decedent's spouse, children, other heirs, and devisees are as follows:**
   - If a guardian or conservator has been appointed for one of the persons listed below, also provide the name and address of the guardian or conservator.
   - If a minor child is listed, list the child's parent(s), guardian, or conservator.
   - If a spouse or child has predeceased the Decedent, include the date of death.
   - A sample of this section is included in the Instructions - JDF 906.

Name	Address (or date of death)	Age, only if Minor	Relationship (e.g. spouse, child, brother, guardian for spouse, etc.)

10. ❑Petitioner is 21 years of age or older and nominates himself/herself to be appointed as Personal Representative.
or
❑Petitioner nominates the following person be appointed as Personal Representative.

Name: _____ The Nominee is 21 years of age or older.

Street Address: _____

Mailing Address, if different: _____

City: _____ State: _____ Zip Code: _____ Home Phone #: _____

Email Address: _____ Work Phone #: _____

The Nominee has priority for appointment because of:

❑statutory priority. (§15-12-203, C.R.S.)

❑reasons stated in the attached explanation.

Persons with prior or equal rights to appointment are as follows:

_____

_____

They have each renounced their rights to appointment or have been given notice of these proceedings. **Any required renouncements accompany this Petition.**

11. The Personal Representative may receive compensation.

❑The hourly rates to be charged, any amounts to be charged pursuant to a published fee schedule, including the rates and basis for charging fees for any extraordinary services, and any other bases upon which a fee charged to the estate will be calculated, are as stated below or in an attachment to this Petition. *

_____

_____

_____

❑The basis of compensation has not yet been determined.

12. The Personal Representative may compensate his, her or its counsel.

❑The hourly rates to be charged, any amounts to be charged pursuant to a published fee schedule, including the rates and basis for charging fees for any extraordinary services, and any other bases upon which a fee charged to the estate will be calculated, are as stated below or in an attachment to this Petition. *

_____

_____

_____

❑The basis of compensation has not yet been determined.

* There is a continuing obligation to disclose any material changes to the basis for charging fees. (§ 15-10-602 C.R.S.)

13. ❑Bond is not required by the Will nor has any interested person demanded that bond be filed.
❑Bond in the amount of $_____ has been demanded.

14. ❑Unsupervised administration is requested.
❑Supervised administration is requested (additional filing fee required). Terms of the requested supervision are as follows:

_____

_____

_____

_____

After notice and hearing, the Petitioner requests that the Court formally admit the Decedent's Will to probate, determine the heirs of the Decedent and formally appoint the Nominee as Personal Representative to serve:

❑without bond ❑with bond in the amount of _____.

❑in unsupervised administration ❑in supervised administration (additional filing fee required)

and that Letters Testamentary be issued to the Personal Representative or that previously issued Letters be confirmed. The Petitioner also requests:

❑a setting aside of prior informal findings as to testacy.

❑a setting aside of prior informal appointment of personal representative.

❑other: _____

VERIFICATION AND ACKNOWLEDGMENT

I (Petitioner) verify that the facts set forth in this document are true as far as I know or am informed. I understand that penalties for perjury follow deliberate falsification of the facts stated herein. (§15-10-310, C.R.S.)

_____
Signature of Petitioner Date

The foregoing instrument was acknowledged before me in the County of _____, State of Colorado, this ____day of _____, 20___, by the Petitioner.

My Commission Expires: _____

_____
Notary Public/Deputy Clerk

_____
Signature of Attorney Date

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Matter of the Estate of:** **Deceased**	**COURT USE ONLY** Case Number: Division: Courtroom:

ORDER ADMITTING WILL TO FORMAL PROBATE AND FORMAL APPOINTMENT OF PERSONAL REPRESENTATIVE

Upon consideration of the Petition for Formal Probate of Will and Formal Appointment of Personal Representative filed by _____ (Petitioner) on _____ (date),

THE COURT FINDS, DETERMINES AND ORDERS:

1. The Petitioner is an interested person and has filed a complete and verified petition.

2. The Decedent died on _____ (date) and 120 hours have elapsed since the Decedent's death.

3. The Decedent was domiciled or resided in the City of _____ County of _____, State of_____.

4. Venue is proper in this county.

5. The Petition was filed within the time period permitted by law.

6. Any required notices have been given or waived.

7. The Decedent left a will dated _____.
The dates of all codicils are_____.
The Will and any codicils are referred to as the Will. There are no known wills that have not been expressly revoked by a later instrument. The Will is the Decedent's last will and it is admitted to formal probate.

❑ The prior informal finding as to testacy is set aside.

8. The heirs of the Decedent are:

Name	Relationship (e.g. spouse, child, brother, guardian for spouse, etc.)

9. The following person is qualified to serve and is appointed or confirmed as Personal Representative:

Name: _____ The Nominee is 21 years of age or older.

Street Address: _____

Mailing Address, if different: _____

City: _____ State: _____ Zip Code: _____ Home Phone #: _____

Email Address: _____ Work Phone #: _____

❑ The prior informal appointment of _____ (name) is set aside and the Letters are revoked.

10. The Personal Representative shall serve

- ❑ without bond.
- ❑ with bond in the amount of $_____.
- ❑ in unsupervised administration.
- ❑ in supervised administration as described in an attachment to this Order.

11. Letters Testamentary shall be issued or previously issued Letters are confirmed.

Date: _____

_____

❑Judge ❑Magistrate

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Matter of the Estate of:** **Deceased**	▲ **COURT USE ONLY** ▲
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom
PETITION FOR ADJUDICATION OF INTESTACY AND FORMAL APPOINTMENT OF PERSONAL REPRESENTATIVE	

******** Use this form if the Decedent did not leave a will *********

The Petitioner, an interested person pursuant to §15-10-201(27), C.R.S., makes the following statements:

1. **Information about the Petitioner:**
   Name: _____ Relationship to Decedent _____
   Street Address: _____
   Mailing Address, if different: _____
   City: _____ State: _____ Zip Code: _____ Home Phone #: _____
   Email Address: _____Work Phone #: _____

2. The Decedent died on _____ (date) at the age of ____ years. The Decedent was domiciled or resided in the City of _____ County of _____, State of_____.

3. Venue for this proceeding is proper in this county because the Decedent:
   ❑had his or her domicile or residence in this county on the date of death.
   ❑did not have his or her domicile or residence in Colorado, but had property located in this county on the date of death.

4. This Petition is filed within the time period permitted by law. Three years or less have passed since the Decedent's death, or circumstances described in §15-12-108, C.R.S. authorize tardy probate or appointment.

5. The Petitioner:
   ❑has not received a Demand for Notice of Filings or Orders and is unaware of any Demand for Notice of Filings or Orders concerning Decedent.
   ❑has received or is aware of a Demand for Notice of Filings or Orders concerning Decedent. See attached Demand for Notice of Filings or Orders or explanation.

6. ❑No court has appointed a Personal Representative and no such appointment proceeding is pending in this state or elsewhere.
❑A court has appointed a Personal Representative or an appointment proceeding is pending in the State of _____. (Attach a statement explaining the circumstances and indicating the name and address of the Personal Representative. Attach a certified copy of the appointing document if the appointment has been finalized.)

7. Except as may be disclosed on an attached explanation and after the exercise of reasonable diligence, the Petitioner is unaware of any unrevoked will relating to property located in Colorado.

8. Decedent's marital and family status:
a) Did a spouse survive the Decedent? ❑Yes ❑No

If the answer to a) is Yes, also answer the following questions:
b) Did the Decedent have a surviving parent? ❑Yes ❑No
c) Did the Decedent have surviving children or other descendants? ❑Yes ❑No

If the answer to c) is Yes, also answer the following questions:
d) Does the Decedent's surviving spouse have surviving descendants who are not descendants of the Decedent? ❑Yes ❑No
e) Are all of the Decedent's surviving descendants also descendants of the surviving spouse? ❑Yes ❑No

If the answer to e) is No, also answer the following question:
f) Are any of the Decedent's children minors? ❑Yes ❑No

9. **List names and addresses of the Decedent's spouse, children, and other heirs as defined by the Colorado law of intestate succession.** (§15-11-101, C.R.S. through §15-11-114, C.R.S.)
- If a guardian or conservator has been appointed for one of the persons listed below, also provide the name and address of the guardian or conservator.
- If a minor child is listed, list the child's parent(s), guardian or conservator.
- If a spouse or child has predeceased the Decedent, include the date of death.
- A sample of this section is included in the Instructions - JDF 907.

Name	Address (or date of death)	Age, only if Minor	Relationship (e.g. spouse, child, brother, guardian for spouse, etc.)

10. ❑Petitioner is 21 years of age or older and nominates himself/herself to be appointed as Personal Representative.
or
❑Petitioner nominates the following person be appointed as Personal Representative.

Name: _____ The Nominee is 21 years of age or older.

Street Address: _____

Mailing Address, if different: _____

City: _____ State: _____ Zip Code: _____ Home Phone #: _____

Email Address: _____Work Phone #: _____

The Nominee has priority for appointment because of:
❑statutory priority. (§15-12-203, C.R.S.)
❑reasons stated in the attached explanation.

Persons with prior or equal rights to appointment are as follows:

_____

_____

They have each renounced their rights to appointment or have been given notice of these proceedings. **Any required renouncements accompany this Petition.**

11. The Personal Representative may receive compensation.

❑The hourly rates to be charged, any amounts to be charged pursuant to a published fee schedule, including the rates and basis for charging fees for any extraordinary services, and any other bases upon which a fee charged to the estate will be calculated, are as stated below or in an attachment to this Petition. *

_____

_____

_____

❑The basis of compensation has not yet been determined.

12. The Personal Representative may compensate his, her or its counsel.

❑The hourly rates to be charged, any amounts to be charged pursuant to a published fee schedule, including the rates and basis for charging fees for any extraordinary services, and any other bases upon which a fee charged to the estate will be calculated, are as stated below or in an attachment to this Petition. *

_____

_____

_____

❑The basis of compensation has not yet been determined.

* There is a continuing obligation to disclose any material changes to the basis for charging fees. (§ 15-10-602 C.R.S.)

13. ❑No interested person demanded that bond be filed.
❑Bond in the amount of $ _____ has been demanded.

14. ❑Unsupervised administration is requested.
❑Supervised administration is requested (additional filing fee required). Terms of the requested supervision are as follows:

_____

_____

_____

After notice and hearing, the Petitioner requests that the Court determine that the Decedent died without a will, determine the heirs of the Decedent and formally appoint the Nominee as Personal Representative to serve:

❑without bond ❑with bond in the amount of $ _____
❑in unsupervised administration ❑in supervised administration (additional filing fee required)

and that Letters of Administration be issued or that previously issued Letters be confirmed. Petitioner also requests:

❑a setting aside of prior informal findings as to testacy.
❑a setting aside of prior informal appointment of Personal Representative.
❑other: _____

VERIFICATION AND ACKNOWLEDGMENT

I (Petitioner) verify that the facts set forth in this document are true as far as I know or am informed. I understand that penalties for perjury follow deliberate falsification of the facts stated herein. (§15-10-310, C.R.S.)

_____
Signature of Petitioner Date

The foregoing instrument was acknowledged before me in the County of _____, State of Colorado, this ____day of _____, 20___, by the Petitioner.

My Commission Expires: _____

_____
Notary Public/Deputy Clerk

_____
Signature of Attorney Date

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Matter of the Estate of:** **Deceased**	**COURT USE ONLY** Case Number: Division: Courtroom:

ORDER OF INTESTACY, DETERMINATION OF HEIRS AND FORMAL APPOINTMENT OF PERSONAL REPRESENTATIVE

Upon consideration of the Petition for Adjudication of Intestacy and Formal Appointment of Personal Representative filed by _____ (Petitioner) on _____ (date),

THE COURT FINDS, DETERMINES AND ORDERS:

1. The Petitioner is an interested person and has filed a complete and verified petition.

2. The Decedent died on _____ (date) and 120 hours have elapsed since the Decedent's death.

3. The Decedent was domiciled or resided in the City of _____ County of _____, State of_____.

4. Venue is proper in this county.

5. The Petition was filed within the time period permitted by law.

6. Any required notices have been given or waived.

7. The Decedent did not leave a Will.
   ❑ The prior informal finding as to testacy is set aside.

8. The heirs of the Decedent are:

Name	Relationship (e.g. spouse, child, brother, guardian for spouse, etc.)	Share/Percentage of Estate

9. The following person is qualified to serve and is appointed or confirmed as Personal Representative:

Name: _____ The Nominee is 21 years of age or older.

Street Address: _____

Mailing Address, if different: _____

City: _____ State: _____ Zip Code: _____ Home Phone #: _____

Email Address: _____ Work Phone #: _____

❑ The prior informal appointment of _____ (name) is set aside and the Letters are revoked.

10. The Personal Representative shall serve

❑ without bond.
❑ with bond in the amount of $_____.
❑ in unsupervised administration.
❑ in supervised administration as described in an attachment to this Order.

11. Letters of Administration shall be issued or previously issued Letters are confirmed.

Date: _____

_____
❑Judge ❑Magistrate

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Matter of the Estate of:** **Deceased**	▲ **COURT USE ONLY** ▲
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom

APPLICATION FOR INFORMAL APPOINTMENT OF SPECIAL ADMINISTRATOR PURSUANT TO §15-12-614, C.R.S.

The Applicant, an interested person pursuant to §15-10-201(27), C.R.S., makes the following statements:

1. **Information about the Applicant:**

   Name: _____ Relationship to Decedent _____

   Street Address: _____

   Mailing Address, if different: _____

   City: _____ State: _____ Zip Code: _____ Home Phone #: _____

   Email Address: _____Work Phone #: _____

2. The Decedent died on _____ (date) at the age of ____ years. The Decedent was domiciled or resided in the City of _____ County of _____, the State of_____.

3. Venue for this proceeding is proper in this county because the Decedent:

   ❑had his or her domicile or residence in this county on the date of death.

   ❑did not have his or her domicile or residence in Colorado, but had property located in this county on the date of death.

4. This Application is filed within the time period permitted by law. Three years or less have passed since the Decedent's death, or circumstances described in §15-12-108, C.R.S. authorize tardy probate or appointment.

5. The Applicant:

   ❑has not received a Demand for Notice of Filings or Orders and is unaware of any Demand for Notice of Filings or Orders concerning Decedent.

   ❑has received or is aware of a Demand for Notice of Filings or Orders concerning decedent. See attached Demand for Notice of Filings or Orders or explanation.

6. ❑No court has appointed a Personal Representative and no such appointment proceeding is pending in this state or elsewhere.

❑A court has appointed a Personal Representative or an appointment proceeding is pending in the State of _____. (Attach a statement explaining the circumstances and indicating the name and address of the Personal Representative. Attach a certified copy of the appointing document if the appointment has been finalized.)

7. ❑Except as may be disclosed in an attached explanation and after the exercise of reasonable diligence, the Applicant is unaware of any unrevoked Will relating to property in Colorado.
or
❑The date of the Decedent's last Will is _____.
The dates of all codicils are _____.
The Will and any codicils are referred to as the Will. The Applicant believes that it is the Decedent's last Will and that it was validly executed.

Except as may be disclosed in an attached explanation and after the exercise of reasonable diligence, the Applicant is unaware of any instrument revoking the Will and is unaware of any prior Wills relating to property in Colorado that have not been expressly revoked by a later instrument.

❑The original Will
- ❑was deposited with this Court before the Decedent's death. (§15-11-515, C.R.S.)
- ❑has been delivered to this Court since the Decedent's death. (§15-11-516, C.R.S.)
- ❑is filed with this Application.

❑An e-filed copy of the Will is filed with this Application. The original document ❑will be delivered to the Court forthwith or ❑has been delivered to the Court.

❑The Will has been probated in the State of _____. Authenticated copies of the Will and of the statement probating it are filed with this Application. (§15-12-402, C.R.S.)

8. Decedent's marital and family status:

a) Did a spouse survive the Decedent? ❑Yes ❑No

If the answer to a) is Yes, also answer the following questions:

b) Did the Decedent have a surviving parent? ❑Yes ❑No

c) Did the Decedent have surviving children or other descendants? ❑Yes ❑No

If the answer to c) is Yes, also answer the following questions:

d) Does the Decedent's surviving spouse have surviving descendants who are not descendants of the Decedent? ❑Yes ❑No

e) Are all of the Decedent's surviving descendants also descendants of the surviving spouse? ❑Yes ❑No

If the answer to e) is No, also answer the following question:

f) Are any of the Decedent's children minors? ❑Yes ❑No

9. List names and addresses of Decedent's spouse, children, other heirs and devisees are as follows:

- If a guardian or conservator has been appointed for one of the persons listed below, also provide the name and address of the guardian or conservator.
- If a minor child is listed, list the child's parent(s), guardian or conservator.
- If a spouse or child has predeceased the Decedent, include the date of death.

Name	Address (or date of death)	Age, only if Minor	Relationship (e.g. spouse, child, brother, guardian for spouse, etc.)

10. Applicant requests appointment of a Special Administrator:

☐ to protect the Decedent's estate prior to the appointment of a Personal Representative for the following reasons:

_____

_____

_____

☐ because a prior appointment has been terminated as provided in §15-12-614(1)(a), C.R.S.

☐ to address claims as a Public Administrator. (§15-12-621(9), C.R.S.)

11. ☐ Applicant is 21 years of age or older and nominates himself/herself to be appointed as Special Administrator.

or

☐ Applicant nominates the following person be appointed as Special Administrator.

Name: _____ The Nominee is 21 years of age or older.

Street Address: _____

Mailing Address, if different: _____

City: _____ State: _____ Zip Code: _____ Home Phone #: _____

Email Address: _____ Work Phone #: _____

The Nominee has priority for appointment because of:

☐ statutory priority (§15-12-203, 15-12-615 and 15-12-621(9), C.R.S.)

☐ reasons stated in the attached explanation.

Persons with prior or equal rights to appointment are as follows:

_____

_____

❑They have each renounced their rights to appointment or have been given notice of these proceedings. **Any required renouncements accompany this Application.**

❑No notice has been given because an emergency exists and appointment should be made forthwith.

12. Applicant states the following regarding the Decedent's estate.

Estimated value of real estate	$
Estimated value of personal property	$
Annual income expected from all sources	$
TOTAL	$

13. The Special Administrator may receive compensation.

❑The hourly rates to be charged, any amounts to be charged pursuant to a published fee schedule, including the rates and basis for charging fees for any extraordinary services, and any other bases upon which a fee charged to the estate will be calculated, are as stated below or in an attachment to this Application. *

_____

_____

_____

❑The basis of compensation has not yet been determined.

14. The Special Administrator may compensate his, her or its counsel.

❑The hourly rates to be charged, any amounts to be charged pursuant to a published fee schedule, including the rates and basis for charging fees for any extraordinary services, and any other bases upon which a fee charged to the estate will be calculated, are as stated below or in an attachment to this Application. *

_____

_____

_____

❑The basis of compensation has not yet been determined.

* There is a continuing obligation to disclose any material changes to the basis for charging fees. (§ 15-10-602 C.R.S.)

15. Bond in the amount of $ _____ is requested. (§15-12-603(1)(a), C.R.S.)

The Applicant requests that the Registrar informally appoint the Nominee as Special Administrator to serve with bond and that Letters of Special Administration be issued.

VERIFICATION AND ACKNOWLEDGMENT

I (Applicant) verify that the facts set forth in this document are true as far as I know or am informed. I understand that penalties for perjury follow deliberate falsification of the facts stated herein. (§15-10-310, C.R.S.)

_____
Signature of Applicant Date

The foregoing instrument was acknowledged before me in the County of _____, State of Colorado, this ____day of _____, 20___, by the Applicant.

My Commission Expires: _____

_____
Notary Public/Deputy Clerk

_____
Signature of Attorney Date

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Matter of the Estate of:** **Deceased**	**COURT USE ONLY** Case Number: Division Courtroom

ORDER FOR INFORMAL APPOINTMENT OF SPECIAL ADMINISTRATOR

Upon consideration of the Application for Informal Appointment of Special Administrator filed by _____ (Applicant) on _____ (date),

THE COURT FINDS, DETERMINES AND ORDERS:

1. The Applicant is an interested person and has filed a complete and verified application.
2. The Decedent died on _____ (date).
3. The Decedent was domiciled or resided in the City of _____ County of _____, State of_____.
4. Venue is proper in this county.
5. The Application was filed within the time period permitted by law.
6. Any required notices have been received or waived.
7. The following person is qualified to serve and is appointed as Special Administrator:
   Name: _____ The Nominee is 21 years of age or older.
   Street Address: _____
   Mailing Address, if different: _____
   City: _____ State: _____ Zip Code: _____ Home Phone #: _____
   Email Address: _____Work Phone #: _____
8. Bond is set in the amount of $_____.
9. Upon the filing of bond, Letters of Special Administration shall be issued and shall expire on _____ (date), unless otherwise ordered by the Court. The powers and duties of the Special Administrator are limited. The Special Administration has the duty to collect and manage the assets of the estate, to preserve them, to account for them, and to deliver them to the Personal Representative.
   ❑ Additional restrictions:

   _____

   _____

Date: _____ _____

❑Judge ❑Magistrate ❑Registrar

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Matter of the Estate of:** **Deceased**	▲ **COURT USE ONLY** ▲
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom

PETITION FOR FORMAL APPOINTMENT OF SPECIAL ADMINISTRATOR PURSUANT TO §15-12-614, C.R.S.

The Petitioner, an interested person pursuant to §15-10-201(27), C.R.S., makes the following statements:

1. **Information about the Petitioner:**

   Name: _____ Relationship to Decedent _____

   Street Address: _____

   Mailing Address, if different: _____

   City: _____ State: _____ Zip Code: _____ Home Phone #: _____

   Email Address: _____ Work Phone #: _____

2. The Decedent died on _____ (date) at the age of ____ years. The Decedent was domiciled or resided in the City of _____ County of _____, State of_____.

3. Venue for this proceeding is proper in this county because the Decedent:

   ❑had his or her domicile or residence in this county on the date of death.

   ❑did not have his or her domicile or residence in Colorado, but had property located in this county on the date of death.

4. This Petition is filed within the time period permitted by law. Three years or less have passed since the Decedent's death, or circumstances described in §15-12-108, C.R.S. authorize tardy probate or appointment.

5. The Petitioner:

   ❑has not received a Demand for Notice of Filings or Orders and is unaware of any Demand for Notice of Filings or Orders concerning Decedent.

   ❑has received or is aware of a Demand for Notice of Filings or Orders concerning Decedent. See attached Demand for Notice of Filings or Orders or explanation.

6. ❑No court has appointed a Personal Representative and no such appointment proceeding is pending in this state or elsewhere.
❑A court has appointed a Personal Representative or an appointment proceeding is pending in the State of _____. (Attach a statement explaining the circumstances and indicating the name and address of the Personal Representative. Attach a certified copy of the appointing document if the appointment has been finalized.)

7. ❑Except as may be disclosed in an attached explanation and after the exercise of reasonable diligence, the Petitioner is unaware of any unrevoked Will relating to property in Colorado.
or
❑ The date of the Decedent's last Will is _____.
The dates of all codicils are _____.
The Will and any codicils are referred to as the Will. The Petitioner believes that it is the Decedent's last Will and that it was validly executed.

Except as may be disclosed in an attached explanation and after the exercise of reasonable diligence, the Petitioner is unaware of any instrument revoking the Will and is unaware of any prior Wills relating to property in Colorado that have not been expressly revoked by a later instrument.

❑The original Will
❑was deposited with this Court before the Decedent's death. (§15-11-515, C.R.S.)
❑has been delivered to this Court since the Decedent's death. (§15-11-516, C.R.S.)
❑is filed with this Petition.
❑An e-filed copy of the Will is filed with this Petition. The original document ❑will be delivered to the Court forthwith or ❑has been delivered to the Court.
❑The Will has been probated in the State of _____. Authenticated copies of the Will and of the statement probating it are filed with this Petition. (§15-12-402, C.R.S.)

8. Decedent's marital and family status:
a) Did a spouse survive the Decedent? ❑Yes ❑No

If the answer to a) is Yes, also answer the following questions:
b) Did the Decedent have a surviving parent? ❑Yes ❑No
c) Did the Decedent have surviving children or other descendants? ❑Yes ❑No

If the answer to c) is Yes, also answer the following questions:
d) Does the Decedent's surviving spouse have surviving descendants who are not descendants of the Decedent? ❑Yes ❑No
e) Are all of the Decedent's surviving descendants also descendants of the surviving spouse? ❑Yes ❑No

If the answer to e) is No, also answer the following question:
f) Are any of the Decedent's children minors? ❑Yes ❑No

9. List names and addresses of Decedent's spouse, children, heirs and devisees.

- If a guardian or conservator has been appointed for one of the persons listed below, also provide the name and address of the guardian or conservator.
- If a minor child is listed, list the child's parent(s), guardian or conservator.
- If a spouse or child has predeceased the Decedent, include the date of death.

Name	Address (or date of death)	Age, only if Minor	Relationship (e.g. spouse, child, brother, guardian for spouse, etc.)

10. Petitioner requests appointment of a Special Administrator to preserve the estate or to secure its proper administration for the following reasons: (§15-12-614(1)(b), C.R.S.)

_____

_____

_____

_____

11. ☐Petitioner is 21 years of age or older and nominates himself/herself to be appointed as Special Administrator.

or

☐Petitioner nominates the following person be appointed as Special Administrator.

Name: _____ The Nominee is 21 years of age or older.

Street Address: _____

Mailing Address, if different: _____

City: _____ State: _____ Zip Code: _____ Home Phone #: _____

Email Address: _____ Work Phone #: _____

The Nominee has priority for appointment because of:

☐statutory priority (§15-12-203, 15-12-615 and 15-12-621(9), C.R.S.)

☐reasons stated in the attached explanation

Persons with prior or equal rights to appointment are as follows:

_____

_____

❑They have each renounced their rights to appointment or have been given notice of these proceedings. **Any required renouncements accompany this Petition.**

❑No notice has been given because an emergency exists and appointment should be made forthwith.

12. Petitioner states the following regarding the Decedent's estate. (§15-12-604, C.R.S.):

Estimated value of real estate	$
Estimated value of personal property	$
Annual income expected from all sources	$
TOTAL	$

13. The Special Administrator may receive compensation.

❑The hourly rates to be charged, any amounts to be charged pursuant to a published fee schedule, including the rates and basis for charging fees for any extraordinary services, and any other bases upon which a fee charged to the estate will be calculated, are as stated below or in an attachment to this Petition. *

_____

_____

_____

❑The basis of compensation has not yet been determined.

14. The Special Administrator may compensate his, her or its counsel.

❑The hourly rates to be charged, any amounts to be charged pursuant to a published fee schedule, including the rates and basis for charging fees for any extraordinary services, and any other bases upon which a fee charged to the estate will be calculated, are as stated below or in an attachment to this Petition. *

_____

_____

_____

❑The basis of compensation has not yet been determined.

* There is a continuing obligation to disclose any material changes to the basis for charging fees. (§ 15-10-602 C.R.S.)

15. ❑Bond is not required by the Will (if any) nor has any interested person demanded that bond be filed.

❑Bond in the amount of $_____ has been demanded.

After notice and hearing, the Petitioner requests that the Court formally appoint the Nominee as Special Administrator to serve:

❑without bond. ❑with bond in the amount of $ _____

and that Letters of Special Administration be issued.

VERIFICATION AND ACKNOWLEDGMENT

I, (Petitioner) verify that the facts set forth in this document are true as far as I know or am informed. I understand that penalties for perjury follow deliberate falsification of the facts stated herein. (§15-10-310, C.R.S.)

_____
Signature of Petitioner Date

The foregoing instrument was acknowledged before me in the County of _____, State of Colorado, this ____day of _____, 20___, by the Petitioner.

My Commission Expires: _____

_____
Notary Public/Deputy Clerk

_____
Signature of Attorney Date

☐District Court ☐Denver Probate Court _____ County, Colorado Court Address: **In the Matter of the Estate of:** **Deceased**	**COURT USE ONLY** Case Number: Division Courtroom

ORDER FOR FORMAL APPOINTMENT OF SPECIAL ADMINISTRATOR

Upon consideration of the Petition for Formal Appointment of Special Administrator filed by _____ (Petitioner) on _____ (date),

THE COURT FINDS, DETERMINES AND ORDERS:

1. The Petitioner is an interested person and has filed a complete and verified Petition.

2. The Decedent died on _____ (date).

3. The Decedent was domiciled or resided in the City of _____ County of _____, State of_____.

4. Venue is proper in this county.

5. The Petition was filed within the time period permitted by law.

6. ☐ Any required notices have been given or waived.
   ☐ Notice is not required because the following emergency exists:
   _____
   _____

7. Appointment of a Special Administrator is necessary to preserve the estate or to secure its proper administration.

8. The following person is qualified to serve and is appointed as Special Administrator:
   Name: _____ The Nominee is 21 years of age or older.
   Street Address: _____
   Mailing Address, if different: _____
   City: _____ State: _____ Zip Code: _____ Home Phone #: _____
   Email Address: _____ Work Phone #: _____

9. ❑ Bond is set in the amount of $_____. ❑ Bond is waived.

10. Upon the filing of any required bond, Letters of Special Administration shall be issued and shall expire on _____ (date), unless otherwise ordered by the Court. The Special Administrator has the power of a Personal Representative, except as identified below.

❑ Restrictions:

_____

_____

_____

_____

Date: _____

_____

❑ Judge ❑ Magistrate

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Matter of the Estate of:** **Deceased**	**COURT USE ONLY** Case Number: Division Courtroom

LETTERS OF SPECIAL ADMINISTRATION

_____ (name) was appointed or qualified by this Court or its Registrar on _____ (date) as Special Administrator.

The Decedent died on _____(date).

These Letters of Special Administration are proof of the Special Administrator's authority to act pursuant to §15-12-616, C.R.S. or §15-12-617, C.R.S., as follows

- ❑ Upon informal appointment, the Special Administrator has the duty to collect and manage the assets of the estate, to preserve them, to account for them and to deliver them to the Personal Representative upon qualification by the Court. The Special Administrator has the power of a Personal Representative necessary to perform these duties.
- ❑ Upon formal appointment, the Special Administrator has the duty to preserve the estate or to secure its proper administration. The Special Administrator has the power of a Personal Representative necessary to perform these duties.
- ❑ Additional restrictions, if any.

_____

_____

_____

❑ The appointment shall expire on: _____.

Date: _____

_____
Probate Registrar/(Deputy)Clerk of Court

CERTIFICATION

Certified to be a true copy of the original in my custody and to be in full force and effect as of _____.
Date

_____
Probate Registrar/(Deputy)Clerk of Court

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Matter of the Estate of:** **Deceased**	▲ **COURT USE ONLY** ▲
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #::	Case Number: Division Courtroom

DOMICILIARY FOREIGN PERSONAL REPRESENTATIVE'S SWORN STATEMENT

I, _____, as the domiciliary foreign personal representative (§15-10-201(16.5) C.R.S.), state that no administration, or application or petition for administration, is pending in Colorado. I hereby file with this Court the following documents:

- ❑ Certified, exemplified or authenticated copies of the foreign court's order appointing me as personal representative;
- ❑ Certified, exemplified or authenticated copies of the foreign court's letters or other documents evidencing or affecting my authority to act as personal representative;
- ❑ Other: _____

As the domiciliary foreign personal representative and being sworn, I verify that the facts set forth in this statement are true to the best of my knowledge, information, and belief.

Date: _____

_____
Signature of Domiciliary Foreign Personal Representative

_____
Street

_____
City/State/Zip Code

_____
Daytime Phone Number

Subscribed and affirmed, or sworn to before me in the County of _____, State of _____, this _____ day of _____, 20_____.

My Commission Expires: _____

_____
Notary Public/Deputy Clerk

☐District Court ☐Denver Probate Court _____ County, Colorado Court Address: **In the Matter of the Estate of:** **Deceased**	**COURT USE ONLY** Case Number: Division: Courtroom:
CERTIFICATE OF ANCILLARY FILING – DECEDENT'S ESTATE	

The domiciliary foreign personal representative's sworn statement stating that no administration, or application, or petition for administration, is pending in Colorado, has been filed with this Court.

The following documents regarding _____, as the domiciliary foreign personal representative, have been filed with this Court:

☐Certified, exemplified, or authenticated copy of the foreign court's order appointing the domiciliary foreign personal representative.

☐Certified, exemplified, or authenticated copy of the foreign court's letters or other documents evidencing or affecting the domiciliary foreign personal representative's authority to act.

☐Other:_____

The attached document(s) is/are certified to be a true copy of the ☐certified ☐exemplified ☐authenticated copy of the document(s) referenced above that is/are in my custody.

Date: _____ _____
(Deputy) Clerk or Registrar of Court

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Matter of the Estate of:** **Deceased**	▲ COURT USE ONLY ▲
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom

INFORMATION OF APPOINTMENT

Important Notice

The Court will not routinely review or adjudicate matters unless it is specifically requested to do so by a beneficiary, creditor, or other interested person. All interested persons, including beneficiaries and creditors, have the responsibility to protect their own rights and interests in the estate in the manner provided by the provisions of this code by filing an appropriate pleading with the Court by which the estate is being administered and serving it on all interested persons pursuant to §15-10-401, C.R.S. All interested persons have the right to obtain information about the estate by filing a Demand for Notice pursuant to §15-12-204, C.R.S.

To the heirs and devisees who have or may have an interest in this estate:

1. The Decedent died on _____ (date).

2. ❑The Decedent left no Will.
   ❑The Decedent left a Will dated _____. The dates of all codicils are
   _____.
   The Will and any codicils were admitted to probate on _____ (date).

3. ❑Proceedings in this matter are informal.
   ❑Proceedings in this matter are formal.

4. _____ was appointed as Personal Representative on _____ (date).

5. ❑No bond has been filed with this Court.
   ❑Bond has been filed with this Court in the amount of $ _____.

6. ❑Administration of this estate is unsupervised. The Court will consider ordering supervised administration if requested by an interested person. (§§15-12-501, et. seq., C.R.S.)
   ❑Administration of this estate is supervised.

7. This Information of Appointment is being sent to persons who have or may have some interest in the estate being administered.

8. Papers relating to this estate, including an inventory of estate assets, are on file with this Court or if not may be obtained by interested persons from the personal representative. (§15-12-705, C.R.S. and §15-12-706(2), C.R.S.)

9. Interested persons are entitled to receive an accounting. (§§15-12-1001 to 15-12-1003, C.R.S.)

10. The surviving spouse, children under twenty-one years of age and dependent children may be entitled to exempt property and a family allowance if a request for payment is made in the manner and within the time limits prescribed by statutes. (§§15-11-401, et. seq., C.R.S.)

11. The surviving spouse may have a right of election to take a portion of the augmented estate if a petition is filed within the time limits prescribed by statute. (§§15-11-201, et seq., C.R.S.)

12. Any individual who has knowledge that there is or may be an intention to use an individual's genetic material to create a child and that the birth of the child could affect the distribution of the Decedent's estate should give written notice of such knowledge to the Personal Representative of the Decedent's estate.

_____
Signature of Attorney for/or Personal Representative Date

_____
Name of Personal Representative

_____
Address

_____
City, State, Zip Code

_____
(Area Code) Telephone Number

_____
E-mail Address

INSTRUCTIONS: This Information of Appointment must be given within 30 days of appointment of the Personal Representative. In the event a Will exists but there has been no formal testacy proceeding and the Personal Representative was appointed on the assumption of intestacy, this Information of Appointment must also be given to the devisees named in any existing Wills. A copy of this Information of Appointment and Certificate of Service (below) must be promptly filed with the Court. (Rule 8.4 of the Colorado Rules of Probate Procedure)

CERTIFICATE OF SERVICE

I certify that on _____ (date) a copy of this Information of Appointment was served on each of the following:

Name of Person to Whom you are Sending this Document	Relationship to Decedent	Address	Manner of Service*

***Insert one of the following: Hand Delivery, First-Class Mail, Certified Mail, E-Served or Faxed.**

_____
Signature

☐District Court ☐Denver Probate Court _____ County, Colorado Court Address: **In the Matter of the Estate of:** **Deceased**	▲ **COURT USE ONLY** ▲
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom

DECEDENT'S ESTATE INVENTORY

Within three months after appointment, a Personal Representative shall prepare an Inventory of property owned by the Decedent that is subject to disposition by Will or intestate succession. The Inventory must list the property with reasonable detail, indicate the Decedent's interest in the property, and include the fair market value as of the Decedent's date of death. The type and amount of any liens and encumbrances on the property must also be listed. If additional property is discovered after the initial inventory has been completed, a supplemental inventory listing the newly discovered property shall be completed.

If additional space is needed, separate sheets may be used. The Inventory shall be sent to interested persons who request it or it may be filed with the Court.

INVENTORY SUMMARY		
Schedule	**Asset Category**	**Value**
1	Real Estate	
2	Stocks, Bonds, Mutual Funds, Securities and Investment Accounts	
3	Mortgage, Notes and Cash	
4	Life Insurance	
5	Pensions, Profit Sharing Plans, Annuities and Retirement Funds	
6	Motor and Recreation Vehicles	
7	Other Assets	
Total Gross Value		
8	Liens and Encumbrances on Inventoried Assets	
Total Net Value		

Schedule 1 – Real Estate (List complete addresses.) ❑None	**Type of Property (Home, Rental, Land, etc.)**	**Estimated Value** (what you could sell it for in its current condition)
		$
Total (also enter this total on the Inventory Summary on page 1)		$

Schedule 2 – Stocks, Bonds, Mutual Funds, Securities and Investment Accounts ❑None	**Number of Shares or Account Number** (last 4-digits only)	**Value**
		$
Total (also enter this total on the Inventory Summary on page 1)		$

Schedule 3 – Mortgages, Notes and Cash (Mortgages and notes payable to the Decedent, cash on hand, checking and savings accounts and certificates of deposit.) ❑None	**Type of Account**	**Account Number** (last 4-digits only)	**Balance**
			$
Total (also enter this total on the Inventory Summary on page 1)			$

Schedule 4 – Life Insurance (Include only those items payable to the estate.) ❑None	**Type of Policy**	**Face Amount of Policy**	**Cash Value**
			$
Total (also enter this total on the Inventory Summary on page 1)			$

Schedule 5 – Pensions, Profit Sharing Plans, Annuities and Retirement Funds (Include only those items payable to the estate.) ❑**None**	**Type of Plan** (401(k), IRA, 457, PERA, Military, etc.)	**Account #** (last 4-digits only, if applicable)	**Value**
			$
Total (also enter this total on the Inventory Summary on page 1)			$

Schedule 6 – Motor and Recreation Vehicles (Including motorcycles, ATV's, boats, etc.) ❑**None**	**Year**	**Make and Model**	**Estimated Value** (what you could sell it for in its current condition)
			$
Total (also enter this total on the Inventory Summary on page 1)			$

Schedule 7 – Other Assets ❑**None**	**Estimated Value** (what you could sell it for in its current condition)
	$
Total (also enter this total on the Inventory Summary on page 1)	$
Total Assets (also enter this total on the Inventory Summary on page 1)	$

Liens and Encumbrances on Inventoried Assets

If any asset listed in this Inventory has a secured associated debt, such as a mortgage or a car loan, indicate below.

Schedule 8 – Description of Liability/Debt	Name of Financial Institution	Account Number (last 4-digits only)	Balance
Mortgages			$
Mortgages			
Motor Vehicle Loans			
Other Secured Debt			
Other Secured Debt			
Total Encumbrances on Inventoried Assets (also enter this total on the Inventory Summary on page 1)			$

I state under penalty of perjury that this is a true and complete Inventory of this estate to the best of my knowledge, information and belief. I understand that this Inventory is subject to audit and verification.

Date: _____

_____
Signature of Personal Representative

_____
Address

_____
City, State and Zip Code

CERTIFICATE OF SERVICE

The Inventory shall be sent to interested persons who request it or the original Inventory may be filed with the Court.

I certify that on _____ (date) a copy of this Inventory was served on each of the following:

Name of Person to Whom you are Sending this Document	Relationship to Decedent	Address	Manner of Service*

*Insert one of the following: Hand Delivery, First-Class Mail, Certified Mail, E-Served or Faxed.

_____
Signature

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Matter of the Estate of:** **Deceased**	**COURT USE ONLY**
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg.#:	Case Number: Division Courtroom
❑INTERIM ❑FINAL ACCOUNTING **FOR PERIOD: FROM _____ TO _____** **PURSUANT TO COLORADO RULES OF PROBATE PROCEDURE RULE 31**	

This Accounting shall be typed or prepared by automated data processing.

SUMMARY OF RECEIPTS AND EXPENDITURES ONLY

Balance on hand at the beginning of this accounting period $_____

Add: Total funds received or collected during this accounting period from page 2 $_____

Less: Total payments during this accounting period from page 3 $_____

Balance on hand at the end of this accounting period $_____

SUMMARY OF ASSETS REMAINING AT END OF ACCOUNTING PERIOD

Asset Category	Value
Cash, Bank, Checking, Savings, Certificates of Deposit and Health Accounts	
Stocks, Bonds, Mutual Funds, Securities and Investment Accounts	
Life Insurance	
Pension, Profit Sharing, Annuities and Retirement Funds	
Motor Vehicles and Recreation Vehicles	
Real Estate	
General Household and Other Personal Property	
Miscellaneous Assets	
Total Assets	

Detail Listing of Funds Received or Collected During Accounting Period

List below each individual item of funds received or collected for this accounting period. Attach additional pages, if needed.

Date	Description of Funds Received or Collected	Amount
Page __ of __		$
Total		$

Detail Listing of Payments During Accounting Period

List below each item of payments during this accounting period. Attach additional pages, if needed.

Date	Description of Payments	Amount
Page __ of __		$
Total		$

I state under penalty of perjury that this is a true and complete Accounting of this estate, during the period shown, both dates inclusive, to the best of my knowledge, information and belief. I understand that this Accounting is subject to audit and verification and that I am required to maintain supporting documentation for the duration of my appointment as Personal Representative.

Date: _____

_____
Signature of Personal Representative

_____
Address

_____
City, State and Zip Code

☐District Court ☐Denver Probate Court _____ County, Colorado Court Address: **In the Matter of the Estate of** **Deceased**	**COURT USE ONLY**
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom
NOTICE TO CREDITORS BY PUBLICATION PURSUANT TO §15-12-801, C.R.S.	

NOTICE TO CREDITORS

Estate of _____, Deceased Case Number _____

All persons having claims against the above-named estate are required to present them to the Personal Representative or to

- ☐ District Court of _____, County, Colorado or
- ☐ Denver Probate Court of the City and County of Denver, Colorado

on or before _____(date)*, or the claims may be forever barred.

_____
Type or Print name of Person Giving Notice

_____
Address

_____
City, State, Zip Code

Publish only this portion of form.

Instructions to Newspaper: _____

_____ _____
Name of Newspaper Signature of Person Giving Notice or Attorney for Person Giving Notice

Publish the above Notice once a week for three consecutive calendar weeks.

_____
Type or Print name of Attorney for Person Giving Notice

***Insert date not earlier than four months from the date of first publication or the date one year from date of Decedent's death, whichever occurs first.**

Note:

- Unless one year or more has elapsed since the death of the Decedent, a personal representative shall cause a notice to creditors to be published in some daily or weekly newspaper published in the county in which the estate is being administered.
- If there is no such newspaper, then in some newspaper of general circulation in an adjoining county.
- A copy of this form and the Proof of Publication should be filed with the Clerk of the Court.

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Matter of the Estate of** **Deceased**	**COURT USE ONLY**
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom
NOTICE TO CREDITORS BY MAIL OR DELIVERY PURSUANT TO §15-12-801, C.R.S.	

NOTICE TO CREDITORS

All persons having claims against the above-named estate are required to present them to the Personal Representative or to the Court identified above on or before _____(date)*, or the claims may be forever barred.

Date: _____

_____
Signature of Personal Representative

_____
Print Name of Personal Representative

_____
Address

_____
City, State and Zip Code

_____
Signature of Attorney Date

CERTIFICATE OF SERVICE

I certify that on _____ (date) a copy of this Notice was served on each of the following:

Full Name	Relationship to Decedent	Address	Manner of Service*

***Insert one of the following: Hand Delivery, First-Class Mail, Certified Mail, E-Served or Faxed.**

_____
Signature

***Insert the later of the following two dates:**

- The date set in the published Notice to Creditors by Publication (Form JDF 943).
- The date sixty days from the mailing or other delivery of this Notice, but not later than the date one year following the Decedent's death (§15-12-801, C.R.S.).

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Matter of the Estate of** **Deceased**	▲ **COURT USE ONLY** ▲
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom
NOTICE OF DISALLOWANCE OF CLAIMS PURSUANT TO §15-12-806, C.R.S.	

To: _____ (name of Claimant):

The Personal Representative of this estate disallows the claim presented on _____ (date) as follows:

❑all of your claim.

❑$_____ of your claim in the amount of $_____.

Failure to protest any disallowance by filing a Petition for Allowance of Claims or commencing a proceeding within 63 days after the mailing of this Notice shall result in your claim or the disallowed portion being forever barred.

Date. _____

_____
Signature of Personal Representative

_____
Print Name of Personal Representative

_____
Address

_____
City, State and Zip Code

_____
Phone Number

CERTIFICATE OF SERVICE

I certify that on _____ (date) a copy of this Notice was served on each of the following:

Full Name	Relationship to Decedent	Address	Manner of Service*

***Insert one of the following: Hand Delivery, First-Class Mail, Certified Mail, E-Served or Faxed.**

_____
Signature

JDF 945 R7-12 NOTICE OF DISALLOWANCE OF CLAIMS

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Matter of the Estate of** **Deceased**	**COURT USE ONLY**
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom
PETITION FOR ALLOWANCE OF CLAIM(S) PURSUANT TO §15-12-806, C.R.S.	

The Petitioner makes the following statements to allow the claim(s) in the amount(s) set forth in this Petition:

1. **Information about the Petitioner:** ❑Claimant ❑Personal Representative

   Name: _____

   Street Address: _____

   Mailing Address, if different: _____

   City: _____ State: _____ Zip Code: _____ Home Phone #: _____

   Email Address: _____ Work Phone #: _____

2. Each claim listed below is valid, was presented within the time for presenting claims as provided by law, and has not been paid.

Claim	Amount

3. A copy of each written Claim is attached to this Petition.

Date: _____ _____
Signature of Petitioner

CERTIFICATE OF SERVICE

I certify that on _____ (date) a copy of this Petition was served on each of the following:

Full Name	Relationship to Decedent	Address	Manner of Service*

***Insert one of the following: Hand Delivery, First-Class Mail, Certified Mail, E-Served or Faxed.**

_____
Signature

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Matter of the Estate of:** **Deceased**	**COURT USE ONLY**
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom

PETITION FOR THE DETERMINATION OF HEIRS OR DEVISEES OR BOTH, AND OF INTERESTS IN PROPERTY

The Petitioner, an interested person pursuant to §15-12-1301(1), C.R.S., makes the following statements:

1. **Information about the Petitioner:**

   Name: _____ Relationship to Decedent _____

   Street Address: _____

   Mailing Address, if different: _____

   City: _____ State: _____ Zip Code: _____ Home Phone #: _____

   Email Address: _____ Work Phone #: _____

2. The Petitioner has an interest in the property that is the subject of this Petition. The interest is as follows:

   ❑Petitioner is an owner by inheritance as defined by §15-12-1301(2), C.R.S.

   ❑Other: _____.

3. The Decedent died on _____ (date) at _____ (place of death) domiciled or resided in the City of _____ County of _____, State of_____.

   (Note: Use additional pages if this Petition concerns more than one Decedent related by successive interests in the property.)

4. Jurisdiction is proper because the Decedent died leaving an interest in real property in Colorado or died domiciled in Colorado leaving an interest in personal property, wherever located.

5. Venue for this proceeding is proper in this county because the Decedent was domiciled or resided in this county on the date of death or left property situated in this county.

6. One year or more has passed since the date of the Decedent's death.

7. ❑Administration of the Decedent's estate has not been granted in Colorado.

❑Administration of the Decedent's estate has been granted in Colorado, but the estate has been settled without a determination of the descent or succession of all or a portion of the Decedent's property.

8. ❑The Decedent died without a Will.

❑The Decedent's died with a Will. Information regarding the Will is as follows:
The date of the Decedent's last Will is _____.
The dates of all codicils are _____.
The Will and any codicils are referred to as the Will. The will was admitted to probate in _____ _____ (county and Court) in Case No. _____ on _____ (date).
A certified Copy of the will and the order admitting the will to probate are attached.

9. This Petition concerns the descent or succession of the Decedent's interest in the following property:

Description of Property	Location of Property	Decedent's Interest

10. **List names, addresses, and relationship of all interested persons, including Decedent's spouse, children, owners by inheritance, heirs and devisees.**
- ◆ If a Guardian or Conservator has been appointed for one of the persons listed below, also provide the name and address of the Guardian or Conservator.
- ◆ If a minor child is listed, list the child's parent(s), Guardian or Conservator.
- ◆ If a spouse or child has predeceased the Decedent, include the date of death.
- ◆ See additional instructions below.

Name	Address (or date of death)	Age, only if Minor	Relationship (e.g. spouse, child, brother, guardian for spouse, etc.)

Petitioner requests that after notice and any required hearing, the Court enter judgment and decree determining that the Petitioner has standing to bring this action and determining the heirs or devisees of the Decedent, or both, the owners by inheritance of the property, a description of the property and any other pertinent facts.

VERIFICATION AND ACKNOWLEDGMENT

I, (Petitioner) verify that the facts set forth in this document are true as far as I know or am informed. I understand that penalties for perjury follow deliberate falsification of the facts stated herein. (§15-10-310, C.R.S.)

_____
Signature of Petitioner Date

The foregoing instrument was acknowledged before me in the County of _____, State of Colorado, this ____day of _____, 20___, by the Petitioner.

My Commission Expires: _____

_____
Notary Public/Deputy Clerk

_____
Signature of Attorney Date

Instructions for paragraph 10:

Include any statements regarding legal disability or other incapacity required by Rule 10, C.R.P.P. and Section 15-12-1302(2)(c) C.R.S. List the names and dates of death of any deceased heirs or devisees. (See applicable antilapse statute, Sections 15-11-601 and 603, C.R.S.) Where a listed person is an heir, detail the relationship with the decedent that creates heirship. Examples: son, daughter of pre-deceased son. (Sections 15-11-101 to 114, C.R.S.) Attach additional pages if necessary.

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Matter of the Estate of:** **Deceased**	▲ **COURT USE ONLY** ▲
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom

NOTICE OF HEARING TO INTERESTED PERSONS AND OWNERS BY INHERITANCE PURSUANT TO §15-12-1303, C.R.S.

To All Interested Persons and Owners by Inheritance (List all names of interested persons and owners by inheritance):

_____

_____

_____

_____

A Petition, a copy of which accompanies this Notice, has been filed alleging that the above Decedent died leaving the following property:

_____

_____

_____

_____

The hearing on the Petition will be held at the following time and location or at a later date to which the hearing may be continued:

Date:_____ **Time:** _____ **Courtroom or Division:**_____

Address:_____

The hearing will take approximately _____ ❑days ❑hours ❑minutes.

Date: _____

_____
Signature of Person Giving Notice of Attorney

CERTIFICATE OF SERVICE

I certify that on _____ (date) a copy of this Notice along with the pleading identified above was served on each of the following: (All interested persons must be served)

Name of Person to Whom you are Sending this Document	Relationship	Address	Manner of Service*

*Insert one of the following: Hand Delivery, First-Class Mail, Certified Mail, E-Served or Faxed.

_____
Signature of Person Giving Notice

Note:

- You must answer the Petition within 21 days after receipt of the Notice if service occurs within Colorado or within 35 days after receipt of the Notice if service occurs outside Colorado or if service occurs by mail.
- Within the time required for answering the Petition, all objections to the Petition must be in writing and filed with the Court.
- The hearing shall be limited to the Petition, the objections timely filed and the parties answering the Petition in a timely manner.

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Matter of the Estate of:** **Deceased**	▲ **COURT USE ONLY** ▲
Attorney or Party Without Attorney (Name and Address): Phone Number E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom

NOTICE OF HEARING BY PUBLICATION
INTERESTED PERSONS AND OWNERS BY INHERITANCE
PURSUANT TO § 15-12-1303, C.R.S.

To All Interested Persons and Owners by Inheritance (List all names of interested persons and owners by inheritance):

_____

_____

_____

A Petition has been filed alleging that the above Decedent died leaving the following property:

_____

_____

_____

The hearing on the Petition will be held at the following time and location or at a later date to which the hearing may be continued:

Date:_____ **Time:**_____ **Courtroom or Division:**_____

Address:_____

The hearing will take approximately _____ ❑days ❑hours ❑minutes.

Note:

- You must answer the Petition within 35 days after the last publication of this Notice.
- Within the time required for answering the Petition, all objections to the Petition must be in writing and filed with the Court.
- The hearing shall be limited to the Petition, the objections timely filed and the parties answering the Petition in a timely manner.

Date: _____

_____
Signature of Person Giving Notice

Publish only this portion of form.

_____
Type or Print name of Person Giving Notice

_____
Address

_____
City, State, Zip Code

Instructions to Newspaper: _____

_____ _____
Name of Newspaper Signature of Person Giving Notice or Attorney for Person Giving Notice

Publish the above Notice once a week for three consecutive calendar weeks.

_____
Type or Print name of Attorney for Person Giving Notice

Note:

- This Notice must be published in a newspaper having general circulation in the county where the hearing is to be held once during each week of three consecutive weeks with the last date of the publication being at least 14 days before the date of the hearing pursuant to § 15-10-401(1)(c), C.R.S.
- The contents of the Petition or other pleading which is the subject of the hearing need not be published as a part of this Notice, but this Notice must briefly state the nature of the relief requested pursuant to Colorado Rules of Probate Procedure, Rule 8.

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Matter of the Estate of:** **Deceased**	▲ **COURT USE ONLY** ▲
Attorney or Party Without Attorney (name and address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom

APPLICATION FOR INFORMAL APPOINTMENT OF SUCCESSOR PERSONAL REPRESENTATIVE

(THIS FORM MAY NOT BE USED WITH SUPERVISED ADMINISTRATION)

Applicant makes the following statements:

1. **Information about the Applicant:**

   Name: _____ Relationship to Decedent _____

   Street Address: _____

   Mailing Address, if different: _____

   City: _____ State: _____ Zip Code: _____ Home Phone #: _____

   Email Address: _____ Work Phone #: _____

2. Letters ❑Testamentary ❑of Administration were issued on _____ (date).

3. Administration is unsupervised.

4. The previously appointed personal representative, _____ (name) has:

   ❑tendered a resignation.

   ❑died _____ (date of death).

   ❑been removed by order of the Court issued on _____ (date).

   ❑other: _____ .

5. Applicant:

   ❑has not received a demand for notice and is unaware of any demand for notice of any probate or appointment proceeding concerning the decedent that may have been filed in this state or elsewhere.

   ❑has received, or is aware of, a demand for notice. See attached demand or explanation.

6. Name, address, and telephone number of the nominee for successor personal representative is:

_____

_____

The nominee is 21 years of age or older and has priority for appointment because of:

❑ nomination by will.

❑ nomination by person(s) with priority.

❑ statutory priority.

❑ other: _____

Those persons having prior or equal rights to appointment have renounced their rights to appointment or have received notice of these proceedings, pursuant to §15-12-310, C.R.S. Any required renouncements accompany this application.

7. The Successor Personal Representative may receive compensation.

❑ The hourly rates to be charged, any amounts to be charged pursuant to a published fee schedule, including the rates and basis for charging fees for any extraordinary services, and any other bases upon which a fee charged to the estate will be calculated, are as stated below or in an attachment to this Application. *

_____

_____

_____

❑ The basis of compensation has not yet been determined.

8. The Successor Personal Representative may compensate his, her or its counsel.

❑ The hourly rates to be charged, any amounts to be charged pursuant to a published fee schedule, including the rates and basis for charging fees for any extraordinary services, and any other bases upon which a fee charged to the estate will be calculated, are as stated below or in an attachment to this Application. *

_____

_____

_____

❑ The basis of compensation has not yet been determined.

* There is a continuing obligation to disclose any material changes to the basis for charging fees. (§ 15-10-602 C.R.S.)

9. The Applicant hereby adopts the statements in the application or petition for appointment that led to the appointment of the person being succeeded, except for the following changes or corrections:

_____

_____

_____

_____

10. Applicant requests that the nominee be informally appointed as successor personal representative to serve without bond in unsupervised administration and that Letters be issued to the successor personal representative.

VERIFICATION AND ACKNOWLEDGMENT

I (Applicant) verify that the facts set forth in this document are true as far as I know or am informed. I understand that penalties for perjury follow deliberate falsification of the facts stated herein. (§15-10-310, C.R.S.)

_____

Signature of Applicant Date

The foregoing instrument was acknowledged before me in the County of _____, State of Colorado, this ____day of _____, 20___, by the Applicant.

My Commission Expires: _____

_____

Notary Public/Deputy Clerk

_____

Signature of Attorney Date

☐District Court ☐Denver Probate Court _____ County, Colorado Court Address: **In the Matter of the Estate of:** **Deceased**	**COURT USE ONLY**
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom

PETITION FOR FINAL SETTLEMENT PURSUANT TO 15-12-1001, C.R.S.

1. The Personal Representative of this estate has collected and managed the assets, filed the inventory and accounting, and completed all other acts required by law.

2. All timely filed claims have been resolved or notice has been given to the claimants with unresolved claims.

3. ☐Heirship has been determined or determination of heirship is not requested.
☐Petitioner requests that heirship be determined at this time. Complete Schedule of Heirship below.

Schedule of Heirship. (attach additional pages if needed)

Name of Heir	Age if minor	Address of Heir	Share of Intestate Estate*	Relationship to Decedent

***Complete this column only if there is intestate property.**

4. **Schedule of Distribution (attach additional pages if needed)**

Name of Person Receiving Distribution	Address of Person Receiving Distribution	Description of Distribution

Unless an evidentiary hearing is required by law or by the Court, the Personal Representative requests, after notice of non-appearance hearing pursuant to Colorado Rules of Probate Procedure Rule. 8.8, that the Court

1. ☐Determine heirship.
2. ☐To adjudicate the final settlement and distribution of the estate.
3. Enter an order directing the Personal Representative to distribute all remaining assets of the estate as set forth in the Schedule of Distribution, Section 4, above.
4. Accept the accounting as presented.

Petitioner further requests that upon filing final receipts or evidence of distribution, that the Court discharge the Personal Representative and any surety on the Personal Representative's bond.

VERIFICATION

I (Petitioner) verify that the facts set forth in this document are true as far as I know or am informed. I understand that penalties for perjury follow deliberate falsification of the facts stated herein. (§15-10-310, C.R.S.)

Signature of Petitioner Date

Signature of Attorney Date

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Matter of the Estate of:** **Deceased**	**COURT USE ONLY**
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom

NOTICE OF HEARING ON PETITION FOR FINAL SETTLEMENT

Interested persons have the responsibility to protect their own rights and interests within the time and in the manner provided by the Colorado Probate Code, including the appropriateness of claims paid, the compensation of personal representatives, attorneys and others, and the distribution of estate assets. The Court will not review or adjudicate these or other matters unless a specific written objection is filed by an interested person.

If any interested person desires to object, such person shall file specific written objections and shall furnish the Personal Representative with a copy at or before the hearing.

Attendance at this hearing is not mandatory. Actual distribution of estate assets normally does not occur at the hearing.

To All Interested Persons:

A hearing on the Petition for Final Settlement (JDF 960), a copy of which is attached to this Notice, will be held at the following time and location or at a later date to which the hearing may be continued.

Date: _____ **Time:** _____ **Courtroom or Division:** _____

Address: _____

The hearing will take approximately _____ ❑days ❑hours ❑minutes.

Date: _____

_____
(Your Signature)

CERTIFICATE OF SERVICE

I certify that on _____ (date) a copy of this Notice and Petition (JDF 960) was served on each of the following:

Full Name	Relationship to Decedent	Address	Manner of Service*

*Insert one of the following: Hand Delivery, First-Class Mail, Certified Mail, E-Served or Faxed.

_____
Signature

Note:

- This form or JDF 963 must be used in formal proceedings terminating an estate, pursuant to §15-12-1001, C.R.S. or §15-12-1002, C.R.S., and Colorado Rules of Probate Procedure Rule 8.3.
- Use of this form is limited to an appearance hearing.

☐District Court ☐Denver Probate Court _____ County, Colorado Court Address: **In the Matter of the Estate of:** **Deceased**	**COURT USE ONLY**
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom

NOTICE OF NON-APPEARANCE HEARING ON PETITION FOR FINAL SETTLEMENT
******** Attendance at this hearing is not required or expected. *********

To All Interested Persons:

A non-appearance hearing on the Petition for Final Settlement and proposed Order is set at the following date, time and location or at a later date to which the hearing may be continued.

Date: _____ (Select a future date - 10 calendar days plus 3 calendar days for mailing.)

Time: 8:00 a.m.

Address: _____

Date: _____ _____
(Your Signature)

***** IMPORTANT NOTICE*****

Interested persons have the responsibility to protect their own rights and interests within the time and in the manner provided by the Colorado Probate Code, including the appropriateness of claims paid, the compensation of personal representatives, attorneys and others, and the distribution of estate assets. The Court will not review or adjudicate these or other matters unless specifically requested to do so by an interested person.

Any interested person wishing to object to the Petition must file a specific written Objection with the Court on or before the hearing and must furnish a copy of the Objection to the person requesting the court order and the personal representative. JDF 722 (Objection form) is available on the Colorado Judicial Branch website (www.courts.state.co.us). If no objection is filed, the Court may take action on the Petition without further notice or hearing. If any objection is filed, the objecting party must, within ten days after filing the objection, set the objection for an appearance hearing. Failure to timely set the objection for an appearance hearing as required shall result in the dismissal of the objection with prejudice without further hearing.

Actual distribution of estate assets normally does not occur at the hearing.

CERTIFICATE OF SERVICE

I certify that on _____ (date) a copy of this Notice along with the Petition and proposed Order identified above was served on each of the following:

Name of Person to Whom you are Sending this Document	Relationship	Address	Manner of Service*

*Insert one of the following: Hand Delivery, First-Class Mail, Certified Mail, E-Served or Faxed.

_____
Signature

Note: Do not set matters on the non-appearance docket, unless they are expected to be routine and unopposed.

☐District Court ☐Denver Probate Court _____ County, Colorado Court Address: **In the Matter of the Estate of:** **Deceased**	**COURT USE ONLY** Case Number: Division: Courtroom:

ORDER FOR FINAL SETTLEMENT

Upon consideration of the Petition for Final Settlement, the Court finds and determines that the statements in the Petition are true and correct; notice has been properly given or waived; the time for presenting claims which arose prior to the death of the Decedent has expired; and the Decedent died

- ☐ intestate
- ☐ testate.
  - ☐ The Decedent's will previously informally admitted to probate by the Registrar of this Court is valid and unrevoked.
  - ☐ The Decedent's will was previously formally admitted to probate.

The Court further finds

☐ that heirship has been previously determined or is incorporated as set forth in the Petition; and written objections to the proposed final settlement, if any, have been resolved.

☐ Other: _____

It is Ordered that final settlement is ☐approved ☐accepted without audit; heirship has been previously determined or is incorporated as set forth in the Petition; and the Personal Representative is directed to distribute the assets of the estate in the amount and manner set forth in the schedule of distribution contained in the Petition.

Upon filing receipts or evidence of distribution, the Personal Representative and any surety on the Personal Representative's bond shall be released and discharged from all liability arising in connection with the performance of the Personal Representative's duties and the administration of this estate shall be terminated.

The Court further Orders:

_____

_____

_____

Date: _____

_____

☐Judge ☐Magistrate ☐Registrar

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: _____ **In the Matter of the Estate of:** **Deceased**	**COURT USE ONLY**
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom

STATEMENT OF PERSONAL REPRESENTATIVE
CLOSING ADMINISTRATION PURSUANT TO §15-12-1003, C.R.S.

I, _____ (Personal Representative of this estate) state the following:

1. Six months have passed since the original appointment of a general Personal Representative for this estate or at least one year has passed since the Decedent's death.

2. The date of the original appointment was _____.

3. Except as may be disclosed on an attached explanation, the undersigned or a prior Personal Representative has fully administered this estate by making payment, settlement, or other disposition of: all lawful claims; expenses of administration; federal and state estate taxes; inheritance taxes and other death taxes; and the Decedent's estate's federal and state income taxes. The assets of the estate have been distributed to the persons entitled to receive such assets in the amount and in the manner to which they were entitled. If any claims are listed on an attached explanation as remaining undischarged, the explanation states whether the distributions were made subject to possible liability with the agreement of the distributees or shall state in detail other arrangements to accommodate outstanding liabilities.

4. The undersigned has sent a copy of this Statement to all distributees of this estate and to all creditors or other claimants whose claims are neither paid nor barred, and has furnished a full account in writing of the undersigned's administration to the distributees whose interests are affected.

5. No Court order prohibits the informal closing of this estate. Administration of this estate is not supervised.

This Statement is filed for the purpose of closing this estate. The appointment of the Personal Representative will terminate one year after this Statement is filed with the Court if no proceedings involving the undersigned are then pending.

VERIFICATION

I (Personal Representative) verify that the facts set forth in this document are true as far as I know or am informed. I understand that penalties for perjury follow deliberate falsification of the facts stated herein. (§15-10-310, C.R.S.)

_____
Signature of Personal Representative Date

_____
Signature of Attorney Date

CERTIFICATE OF SERVICE

I certify that on _____ (date) a copy of this Statement was served on each of the following:

Full Name	Relationship to Decedent	Address	Manner of Service*

***Insert one of the following: Hand Delivery, First-Class Mail, Certified Mail, E-Served or Faxed.**

_____
Signature

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Matter of the Estate of:** **Deceased**	**COURT USE ONLY**
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom

STATEMENT OF PERSONAL REPRESENTATIVE CLOSING SMALL ESTATE PURSUANT TO §15-12-1204, C.R.S

I,_____ (Personal Representative of this estate) state the following:

1. The value of the entire estate of the Decedent, less liens and encumbrances, did not exceed the value of personal property held by or in the possession of the Decedent as fiduciary or trustee, exempt property, family allowance, costs and expenses of administration, reasonable funeral expenses, and reasonable and necessary medical and hospital expenses of the last illness of the Decedent.

2. The undersigned has fully administered this estate by disbursing and distributing it to the persons entitled.

3. The undersigned has sent a copy of this Statement to all distributees of this estate and to all creditors or other claimants to whom the undersigned is aware whose claims are neither paid nor barred and has furnished a full account in writing of the undersigned's administration to the distributees whose interests are affected.

4. No Court order prohibits the informal closing of this estate. Administration of this estate is not supervised.

This Statement is filed for the purpose of closing this estate. The appointment of the Personal Representative will terminate one year after this Statement is filed with the Court if no proceedings involving the undersigned are then pending.

VERIFICATION

I (Personal Representative) verify that the facts set forth in this document are true as far as I know or am informed. I understand that penalties for perjury follow deliberate falsification of the facts stated herein. (§15-10-310, C.R.S.)

_____
Signature of Personal Representative Date

_____
Signature of Attorney Date

NOTE:
This form is to be used only if a probate estate has been opened and a Personal Representative has been appointed.

CERTIFICATE OF SERVICE

I certify that on _____ (date) a copy of this Statement was served on each of the following:

Full Name	Relationship to Decedent	Address	Manner of Service*

*Insert one of the following: Hand Delivery, First-Class Mail, Certified Mail, E-Served or Faxed.

_____
Signature

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Matter of the Estate of:** **Deceased**	**COURT USE ONLY**
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	Case Number: Division Courtroom
VERIFIED APPLICATION FOR CERTIFICATE FROM REGISTRAR PURSUANT TO §15-12-1007, C.R.S.	

I, _____, as the ❑Personal Representative ❑Surety state:

1. The appointment of _____ (name) as Personal Representative of this estate has terminated.
2. The Personal Representative has fully administered this estate according to law.
3. No action concerning this estate is pending in any court.

I request that the Registrar issue a Certificate stating that this estate appears to have been fully administered and evidencing discharge of any lien on any property given to secure the obligation of the Personal Representative in lieu of bond or any surety.

VERIFICATION AND ACKNOWLEDGMENT

I swear/affirm under oath that I have read the foregoing Application and that the statements set forth therein are true and correct to the best of my knowledge.

Date: _____ _____
Signature

Subscribed and affirmed, or sworn to before me in the County of _____, State of _____, this _____ day of _____, 20 _____.

My Commission Expires: _____ _____
Notary Public/Clerk

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Matter of the Estate of:** **Deceased**	**COURT USE ONLY** Case Number: Division: Courtroom:

CERTIFICATE OF REGISTRAR

I certify that _____ (name), Personal Representative of this estate, appears to have fully administered this estate, and therefore, any lien on any property given to secure the obligation of the Personal Representative in lieu of bond or any surety is hereby discharged, subject to the condition that the issuance of this Certificate does not preclude action against the personal representative or the surety.

WITNESS my signature and the seal of this Court

Date: _____

_____
Probate Registrar/(Deputy)Clerk of Court

(SEAL OF COURT)

☐District Court ☐Denver Probate Court _____ County, Colorado Court Address: **In the Matter of the Estate of:** **Deceased**	**COURT USE ONLY**
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #.:	Case Number: Division Courtroom
RESPONSE TO NOTICE AND ORDER CLOSING ESTATE AFTER THREE YEARS	

Less than 30 days have passed since issuance of the Notice and Order Closing Estate After Three Years. The Personal Representative requests that the estate remain open because administration of the estate is not complete.

Date: _____

_____
Signature of Personal Representative or Attorney

CERTIFICATE OF SERVICE

I certify that on _____ (date) a copy of this Response was served on each of the following:

Name of Person to Whom you are Sending this Document	Relationship	Address	Manner of Service*

***Insert one of the following: Hand Delivery, First-Class Mail, Certified Mail, E-Served or Faxed.**

_____
Signature

NOTE: Upon the filing of this document, unless otherwise ordered by the Court, the Court's Notice and Order Closing Estate After Three years will be set aside without further action by the Court.

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address:	
In the Matter of the Estate of: **Deceased**	**COURT USE ONLY** Case Number: Division Courtroom

NOTICE AND ORDER CLOSING ESTATE AFTER THREE YEARS OR MORE

To: _____ (Name of Attorney or Personal Representative)

This matter is before the Court on the Court's own motion.

It appears to the Court that no action has been taken in the above-captioned estate for three years or more. Unless you show good cause why the Court should not do so within 30 days from the date of this Order, the Court will close this estate and terminate the Personal Representative's appointment without further accounting, notice, report, hearing or order. (§15-12-1009, C.R.S.)

If the administration of the estate is complete, no response is required. If the administration of the estate is not complete, the Personal Representative or attorney may file a Response (JDF 970) with the Court.

Neither the Personal Representative nor any other person is discharged from any liability to this estate, the Court or any other person, except that sureties upon any bond posted in these proceedings shall be released as to any claim arising after closure of this estate pursuant to this Order.

Date: _____

_____
❑Judge ❑Magistrate ❑Registrar

☐District Court ☐Denver Probate Court _____ County, Colorado Court Address: **In the Matter of the Estate of:** **Deceased**	**COURT USE ONLY**
Attorney or Party Without Attorney (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg.#:	Case Number: Division Courtroom
PETITION TO RE-OPEN ESTATE PURSUANT TO §15-12-1008, C.R.S.	

The Petitioner makes the following statements:

1. **Information about the Petitioner:**

   Name: _____ Relationship to Decedent _____

   Street Address: _____

   Mailing Address, if different: _____

   City: _____ State: _____ Zip Code: _____ Home Phone #: _____

   Email Address: _____ Work Phone #: _____

2. The estate has been settled and the Personal Representative has been discharged or one year has passed since the closing statement has been filed with the Court.

3. Petitioner desires to re-open the estate to:

   ☐ distribute property briefly described as:

   _____

   _____

   _____

   _____

   ☐ other:

   _____

   _____

   _____

4. Petitioner nominates the following person to be appointed as Personal Representative:

   Name: _____

   Street Address: _____

   Mailing Address, if different: _____

   City: _____ State: _____ Zip Code: _____ Home Phone #: _____

   Email Address: _____ Work Phone #: _____

- ☐ The Nominee is the previously appointed Personal Representative.
- ☐ The previously appointed Personal Representative is unable or unwilling to serve and the Nominee is 21 years of age or older, and the Nominee has priority for appointment because of:
  - ☐ Nomination by the will.
  - ☐ Statutory priority. (§15-12-203, C.R.S.)
  - ☐ reasons stated below:

_____

_____

Persons with prior or equal rights to appointment have renounced their rights to appointment or have been given notice of these proceedings. **Any required renouncements accompany this Petition.**

5. ☐ The persons to receive distribution have changed, as identified below:

Name	Address (or date of death)	Age, only if Minor	Relationship (e.g. spouse, child, brother, guardian for spouse, etc.)

☐ The persons to receive distribution have not changed from the original proceedings. Distribution is as follows:

Name of Person Receiving Distribution	Address of Person Receiving Distribution	Description of Distribution

Petitioner requests that the Court, after such notice as it may direct, re-open the estate and appoint the Personal Representative identified in section 4 above. In addition, the Petitioner requests the Court:

- ☐ issue Letters of Administration.
- ☐ issue Letters Testamentary.
- ☐ upon reporting to the Court that the above purposes have been accomplished, discharge the Personal Representative and re-close the estate.
- ☐ Other: _____

VERIFICATION

I (Petitioner) verify that the facts set forth in this document are true as far as I know or am informed. I understand that penalties for perjury follow deliberate falsification of the facts stated herein. (§15-10-310, C.R.S.)

_____
Signature of Petitioner Date

_____
Signature of Attorney Date

Note: This form may not be used to re-open an estate closed pursuant to §15-12-1009, C.R.S.

❑District Court ❑Denver Probate Court _____ County, Colorado Court Address: **In the Matter of the Estate of:** **Deceased**	**COURT USE ONLY** Case Number: Division Courtroom

ORDER RE-OPENING ESTATE PURSUANT TO §15-12-1008, C.R.S.

Upon consideration of the Petition to Re-Open Estate, the Court finds:

1. Petitioner is an interested person as defined by §15-10-201(27), C.R.S.
2. Any required notices have been given or waived.
3. It is necessary and proper to re-open the estate for the following purposes:
   - ❑ to distribute property.
   - ❑ other:_____.

The Court determines that the following individual is entitled to be appointed as Personal Representative and Letters shall be issued:

Name: _____

Street Address: _____

Mailing Address, if different: _____

City: _____ State: _____ Zip Code: _____ Home Phone #: _____

Email Address: _____ Work Phone #:_____

The powers and duties of the Personal Representative are limited by the following restrictions:

_____

_____

_____

_____

The Court orders the following

1. The Personal Representative shall serve
   - ❑ without bond.
   - ❑ with bond in the amount of $ _____.
   - ❑ in unsupervised administration.
   - ❑ in supervised administration as described in an attachment to this Order.

2. It is further ordered that the Personal Representative send an Information of Appointment – JDF 940 to the following parties:

❑The same as for the initial appointment of Personal Representative in this case.

Name	Relationship to Decedent

3. Upon reporting to this Court that the Personal Representative has accomplished the above purposes, the Personal Representative shall be discharged and this estate be closed.

4. Other: _____

_____

_____

Date: _____

_____

❑Judge ❑Magistrate ❑Registrar

STATE OF COLORADO
COUNTY OF _____

COLLECTION OF PERSONAL PROPERTY BY AFFIDAVIT PURSUANT TO §15-12-1201, C.R.S.

1. I, _____, affirm under oath that the following statements are true and correct:

2. I am a Successor of the Decedent and I am 18 years of age or older.

3. At least ten days have elapsed since the death of _____(Decedent).

4. The total fair market value of all property owned by the Decedent and subject to disposition by Will or intestate succession at the time of the Decedent's death, wherever that property is located, less liens and encumbrances, does not exceed $60,000.00.

5. No Application or Petition for the appointment of a personal representative is pending or has been granted in any jurisdiction.

6. The Successor(s), listed below, is/are entitled to the payment of any sums of money due and owing to the Decedent, and to the delivery of all tangible personal property belonging to the Decedent and in the possession of another, and to the delivery of all instruments evidencing a debt, obligation, stock or chose in action (right to bring legal action) belonging to the Decedent. The proportion/percentage that each Successor will receive is listed below:

Name of Successor	Proportion or Percentage

7. I understand that I am answerable and accountable to any subsequently appointed personal representative of the estate or any other person having a superior right to the estate.

_____
Signature of Successor Date

Subscribed and affirmed, or sworn to before me in the County of _____, State of _____, this ____day of _____, 20___, by the Successor.

My Commission Expires: _____

_____
Notary Public

Note: The person or entity paying, delivering, transferring, or issuing personal property pursuant to this affidavit is discharged and released to the same extent as if he/she/it dealt with a personal representative of the Decedent. (§15-12-1201, C.R.S.)

APPENDIX B TO CHAPTER 27

The Colorado Rules of Probate Procedure

APPENDIX B TO CHAPTER 27

MENTAL ILLNESS FORMS

ORDER

WHEREAS, the statewide committee for the implementation of the Colorado statute for the care and treatment of the mentally ill has formulated forms for use in mental matters, necessitated by the enactment by the General Assembly of the Colorado statute on the Care and Treatment of the Mentally Ill (Article 10 of Title 27, C.R.S.); and

WHEREAS, the Court has considered the aforesaid forms prepared by the said committee;

NOW, THEREFORE, IT IS ORDERED that the forms are approved in principle by this Court for use in mental health matters in the State of Colorado, subject to the following:

These forms are intended as guidelines and should be used in cases where they are applicable. The Court does not specifically approve any of the forms since they have not been tested in an adversary proceeding. They are not intended to be an exhaustive or complete set of forms for use in any particular case and additional or different forms may be required depending on the issues of fact and law presented in a particular proceeding.

Except where otherwise indicated, each form shown in this chapter should have a caption similar to the samples shown below. Each caption shall contain a document name and party designation that may vary depending on the type of form being used. See the applicable form shown below to determine the correct title and party designation for that particular form. Documents initiated by a party shall use a form of caption shown in sample caption A. Documents issued by the court under the signature of the clerk or judge should omit the attorney section as shown in sample caption B.

An addendum should be used for identifying additional parties or attorneys when the space provided on a pre-printed or computer-generated form is not adequate.

Forms of captions are to be consistent with Rule 10, C.R.C.P.

Sample Caption A for documents initiated by a party

☐ District Court ☐ Denver Probate Court _____County, Colorado Court Address:	
THE PEOPLE OF THE STATE OF COLORADO **IN THE INTEREST OF:** *[Substitute appropriate party designations & names]* **Respondent**	
Attorney or Party Without Party (Name and Address): Phone Number: E-mail: FAX Number: Atty. Reg. #:	▲ **COURT USE ONLY** ▲ Case Number: Division: Courtroom:
NAME OF DOCUMENT	

Sample Caption B for documents issued by the court under the signature of the clerk or judge

☐ District Court ☐ Denver Probate Court _____County, Colorado Court Address:	
THE PEOPLE OF THE STATE OF COLORADO **IN THE INTEREST OF:** *[Substitute appropriate party designations & names]* **Respondent**	▲ **COURT USE ONLY** ▲ Case Number: Division: Courtroom:
NAME OF DOCUMENT	

SPECIAL FORM INDEX

Form M-1. (8/75)

EMERGENCY MENTAL ILLNESS REPORT AND APPLICATION

Date _____ Time _____

NAME _____, hereafter referred to as respondent.

Address _____ Date of Birth _____

Place of contact _____,

_____, Colorado.

Previous Psychiatric Care_____

Where When

Who brought respondent's condition to the attention of the undersigned

_____

Nearest relative_____

Name Address Phone

APPEARANCE AND GENERAL BEHAVIOR (Circle Items That Apply):

DRESS — Neat, Untidy, Dirty, Eccentric. POSTURE — Erect, Tense, Relaxed, Lying down. FACIAL EXPRESSION — Fixed, Changing, Angry, Perplexed, Sad, Happy, Suspicious. PHYSICAL ACTIVITY — Normal, Underactive, Overactive.

EMOTIONAL REACTION (Circle Items That Apply):

ATTITUDE — Composed, Polite, Cooperative, Reserved, Indifferent, Silent, Scared, Sad, Happy, Carefree, Cocky, Hilarious, Excited, Angry, Sarcastic, Antagonistic, Suspicious, Insulting, Profane, Combative, Sleepy.

TALK: FORM — Logical, Conversational, Illogical, Rambling, Nonsensical. RATE — Normal, Over-talkative, Under-talkative. QUALITY — Controlled, Humorous, Dramatic, Forceful, Shouting, Screaming, Mumbling.

EXPRESSIONS: Ideas of Being Persecuted. Feels People Are Watching Him — Talking about Him. Ideas of Grandeur. Strange or Bizarre Physical Complaints. Very Self-Critical. Hearing Voices. Seeing Things. Homicidal Thoughts. Suicidal Thoughts. Unusual Sexual Ideas.

DOES PATIENT KNOW — Who he is? (Yes. No.) Where he is? (Yes. No.) Date? (Yes. No.) How he feels? (Yes. No.)

Counting from 20 to 1 Backwards — Result: Good. Fair. Poor.

GENERAL KNOWLEDGE — President? (Yes. No.) Governor? (Yes. No.) Mayor? (Yes. No.)

Pursuant to the provisions of Section 27-10-105, C.R.S., as amended, the respondent was taken into custody by the undersigned and detained for seventy-two hour treatment and evaluation at

(designated or approved facility).

The respondent appears to be mentally ill and, as a result of such mental illness, appears to be *an imminent danger to others or to himself* *gravely disabled*. The circumstances under which the undersigned believes there is probable cause leading to the above action are as follows:

_____

_____

_____

_____

_____

_____

_____

_____

List any property owned by subject which may be jeopardized by his detention:

_____ Location:_____

_____ Location:_____

Signature _____ Ser./Colo. License No. _____

Officer *Professional Person*

Signature _____ Ser./Colo. License No. _____

Officer *Professional Person*

*Strike between asterisks if inapplicable.

NOTICE TO RESPONDENT

Section 27-10-105 (3), C.R.S., provides that if the evaluation and treatment facility to which you are admitted does not have evaluation and treatment services available on Saturdays, Sundays, or holidays, then the facility may exclude those days in calculating the seventy-two hour detention period.

Original to facility Copy to respondent Copy to records

Form M-2. (6/79)
RIGHTS OF PATIENTS BEING EXAMINED
WITH REGARD TO THEIR MENTAL CONDITION

TO: _____, patient:

You are advised that you are to be examined with regard to your mental condition and you may sign in voluntary at any time.

(NOTICE: Form 2.1 is to be read if respondent accepts treatment voluntarily)

We believe that if you understand and participate in your evaluation, care, and treatment, you may achieve better results. Staff has a responsibility to give you the best care and treatment possible and available, and to respect your rights.

You have the right to consideration and treatment regardless of race, creed, color, age, sex, or political affiliation.

You have the right to receive and send sealed correspondence. No incoming or outgoing correspondence shall be opened, delayed, held, or censored by staff.

You have the right to access to letter writing materials, including postage, and to have staff assist you if you are unable to write, prepare, and mail correspondence.

You have the right to ready access to telephones, both to make and to receive calls in privacy.

You have a right to receive or refuse visitors.

You have a right to see your clergyman, or physician at any time.

You have a right to retain and consult with an attorney at any time. If you cannot afford an attorney, the court will provide an attorney for you.

You have the right to wear your own clothing, keep and use your own personal possessions, and keep and be allowed to spend a reasonable sum of your own money.

If a right as listed above is abused by you, that right may be restricted but you must be given an explanation as to why the right is to be restricted.

_____ _____

Name of Facility Facility Director

Certificate of Service

I certify that on _____, 20 _____, I delivered a copy and read aloud the contents of the foregoing to the above named patient.

_____

Signature

DISTRIBUTION:
To the person
To the chart

Form M-2. (6/79)
DERECHOS DEL PACIENTE

_____ Paciente:

Se le avisa que usted sera examinado en relacion a su estado mental.

Estamos persuadidos de que si usted comprenda y participe en su evaluacion, cuidado y tratamiento, usted puede alcanzar mejores resultados. Todo el personal tiene la responsibilidad de darle el mejor cuidado y tratamiento accesible, y de respetar sus derechos como persona.

Usted tiene derecho a la misma consideracion y trate, asi como cualquier otra persona sin improtar la raza, credo, color, edad, sexo, o afiliacion politica.

Usted tiene derecho a recibir o enviar cartas. Su correspondencia no sera abierta, retenida, retrasada, o censurada por el personal.

Usted tendra derecho al acceso de papel y sobre para escribir, incluyendo estampillas del correo. Si usted no puede escribir, una persona del personal le ayudara a preparar su correspondencia, asi como ponerla en el correo.

Usted tiene derecho a usar el telefono, asi como recibir llamadas en privado.

Usted tiene derecho de recibir asi como rehusar visitantes.

Usted tiene derecho a ver al sacerdote, pastor o rabi, o doctor, en cualquier tiempo.

Usted tiene derecho de consultar con un abogado en cualquier tiempo. Si usted no puede pagar un abogado, la corte le puede proveer uno.

Usted tiene derecho de usar su propia ropa, tener y usar sus posesiones personales, tener dinero. Se le permitira gastar sumas razonables de su propio dinero.

Si usted abusa de estos derechos ya mencionados arriba, sus derechos pueden ser quitados o restringidos, y se la dara una explicacion del porque se la quitan sus derechos y privilegios.

Nombre de Facilidad

Director o Representante de la Facilidad

Certificado de Servicio

Yo certifico que en el _____ de _____, 20 _____, le mostre' y le lei' oralmente el contenido de lo precedente al paciente nombrado arriba.

Firma

Distribucion:
Al paciente
Al recuerdo

Form M-2.1. (6/79)
ADVISEMENT TO PERSON ON 72-HOUR HOLD FOR EVALUATION OR CERTIFIED FOR TREATMENT

NOTICE TO PROFESSIONAL PERSON:

If at any time during evaluation or treatment under certification you request the person to sign in voluntarily and he/she elects to do so, the following advisement shall be given orally and in writing:

NOTICE

The decision to sign in voluntarily should be made by you alone and should be free from any force or pressure implied or otherwise. If you do not feel that you are able to make a truly voluntary decision, you may continue to be held at the hospital involuntarily. As an involuntary patient, you will have the right to protest your confinement and request a hearing before a judge.

Certificate of Service

I certify that on _____, 20 _____, I delivered a copy and read aloud the contents of the foregoing to _____ (Name of Patient).

Signature of Professional Person

Distribution:
To the person
To the chart

Form M-3. (8/75)
AFFIDAVIT, MOTION, AND ORDER FOR EVALUATION AND TREATMENT (27-10-105 (1), C.R.S.)

[Insert caption A from page 1596 with the following designation of parties]

THE PEOPLE OF THE STATE OF COLORADO
IN THE INTEREST OF:

Respondent

AFFIDAVIT

COMES NOW THE AFFIANT pursuant to Section 27-10-105, C.R.S., as amended, and respectfully alleges and represents to this Honorable Court as follows:

1. That attached hereto is a statement from your affiant relating sufficient facts to establish that the above named respondent appears to be *mentally ill and, as a result of such mental illness, appears to be an imminent danger to others or to himself.* *gravely disabled.*

2. That it would be in respondent's best interest to be taken into custody and placed in a suitable facility for seventy-two hour treatment and evaluation.

_____ is recommended.
(facility)

3. Other information known about respondent is as follows:
   (a) Respondent's name and address _____
   _____
   (b) Respondent's present whereabouts _____
   _____
   (c) Respondent's age _____, date of birth_____ , sex_____ , marital status _____, occupation _____
   (d) Name and address of respondent's
   Spouse _____
   Father _____
   Mother _____
   Conservator _____
   (e) Name, address, and telephone number of the attorney who has most recently represented respondent _____
   _____

_____
Signature of Affiant

_____
Relationship to respondent

_____
Address

_____
Phone

*Strike between asterisks if inapplicable.

The above information was *sworn to* *affirmed* before me this _____ day of _____, 20_____ .

_____
Judge of the _____ Court

MOTION

COMES NOW the _____ Attorney of the _____ County of _____, and alleges to this Honorable Court that the above affidavit, sworn to before this court, relates sufficient facts to establish that the above named respondent appears to be *mentally ill and, as a result of such mental illness appears to be an imminent danger to others or to himself.* *gravely disabled.*

It is further shown that the requirements of Section 27-10-105, C.R.S., as amended, have been met, and that the respondent should be taken into custody and placed in a suitable facility for seventy-two hour evaluation and treatment.

WHEREFORE, the _____ Attorney of the_____ County of _____ moves that Orders be issued herein:

1. Placing respondent in _____

which is a facility designated or approved for seventy-two hour evaluation and treatment.

2. Directing the Sheriff of the _____ County of _____

_____

_____

_____

_____

_____

_____ Attorney

ORDER

The above motion is granted and

IT IS SO ORDERED:

DONE IN OPEN COURT THIS_____ (Date).

_____

Judge

I, the Clerk of the _____ Court, do certify that the foregoing is a true copy of the Order entered by the Court on _____. (Date)

_____

Clerk of the _____ Court

By _____

Deputy Clerk

NOTICE TO RESPONDENT

Section 27-10-105 (3), C.R.S., provides that if the evaluation and treatment facility to which you are admitted does not have evaluation and treatment services available on Saturdays, Sundays, or holidays, then the facility may exclude those days in calculating the seventy-two hour detention period.

Form M-3.1. (8/75)

Screening Facility's or Professional Person's Letterhead

TO

(Name and address of judge and court)

NOTICE OF DISPOSITION
(TO BE USED WHEN RESPONDENT IS NOT CERTIFIED)

Respondent's name _____

Court No. _____

Date _____

The above named respondent was evaluated pursuant to your court order dated _____ .

There *is* *is not* probable cause to believe that the respondent is *mentally ill and, as a result of mental illness, is a danger to others, or to himself.* *gravely disabled.*

Pertinent observations about the respondent's condition are as follows: _____

_____

_____

_____

_____

_____

The respondent has *been released.* *accepted treatment on a voluntary basis and was referred to _____ for further care and treatment.*

_____

Professional person/evaluator

_____

_____

_____

Address and telephone number

*Strike between asterisks if inapplicable.

Distribution:

Original to Court
Copies to:
person being evaluated
person's attorney and personal representative, if any
person's chart

Form M-4. (8/75)
PETITION FOR EVALUATION AND MOTION AND ORDER FOR SCREENING
(27-10-106, C.R.S.)

[Insert caption A from page 1596 with the following designation of parties]

_____

THE PEOPLE OF THE STATE OF COLORADO
IN THE INTEREST OF:

Respondent

_____

PETITION

COMES NOW the petitioner pursuant to Section 27-10-106, C.R.S., as amended, and respectfully alleges and represents to this Honorable Court as follows:

1. Petitioner's interest in this case is _____

_____

_____

2. The above named respondent *resides* *is physically present* in the _____ County of _____, State of Colorado.

3. That the respondent appears to be *mentally ill and, as a result of such mental illness, appears to be a danger to others or to himself* *gravely disabled*, and that an evaluation of the respondent's condition should be made.

4. Other information known about respondent is as follows:

(a) Respondent's name, address and phone number _____

_____

Present whereabouts _____

_____

(b) Respondent's age _____, date of birth _____, sex _____, marital status _____, occupation _____, employer _____

(c) The name and address of every person known or believed to be legally responsible for the care, support, and maintenance of the respondent are:

Spouse _____

Father _____

Mother _____

Conservator _____

(d) The name, address, and telephone number of the attorney who has most recently represented the respondent is _____

_____

_____, and, if none, the petitioner states that, to the petitioner's best knowledge, the respondent *meets* *does not meet* the criteria established by the legal services agency operating in the _____ County of _____ for it to represent a client.

5. The following allegations indicate that the respondent may be *mentally ill and, as a result, a danger to others or to himself* *gravely disabled*:

_____

_____

_____

WHEREFORE, your petitioner requests that an evaluation of the respondent's condition be made.

State of _____)

) ss.

_____ County of _____)

_____, the affiant, being first duly sworn, says: that affiant is the petitioner in the above matter, and that the facts therein set forth are true to the best knowledge, information, and belief of affiant.

_____

Signature of Petitioner

_____

Address

_____

Telephone Number

Subscribed and sworn to before me this _____ day of _____, 20 _____.

My Commission expires: _____, 20_____ .

(SEAL)

_____

Notary Public

_____

Clerk of _____ Court

by _____

Deputy Clerk

MOTION FOR SCREENING

WHEREFORE, the _____ Attorney of the _____ County of _____ State of Colorado moves that Orders be entered herein:

1. Finding that the above petition for evaluation satisfies the requirements of section 27-10-106 (3), C.R.S.;

2. Designating _____ *a facility approved by the executive director of the Department of Institutions* *a professional person* to provide screening of the respondent to determine whether there is probable cause to believe the allegations of the petition; and

3. Directing the above designated facility or professional person to file his report with this Court immediately following screening.

_____

_____ Attorney

ORDER

The above motion for screening is granted and it is so ordered.

DONE IN OPEN COURT this _____ (Date).

_____

Judge

*Strike between asterisks if inapplicable.

Form M-5. (8/75)

_____

Screening Facility's or Professional Person's Letterhead

TO:

(Name and address
of patient)

Notification of Screening

Date: _____

You are hereby notified pursuant to the provisions of Section 27-10-106, Colorado Revised Statutes, as amended, that a petition has been filed with the _____ Court for an evaluation of your mental condition.

Attached hereto is a copy of the petition and Court Order directing that you be screened to determine whether there is probable cause to believe the allegations in the petition. The Court has designated

_____

(facility or professional person)

to conduct the screening.

Your cooperation is solicited in order to avoid the possibility of your involuntary detention for evaluation.

_____

Professional Person

Form M-6.

_____

Screening Facility's or Professional Person's Letterhead

TO:

(Name and address
of judge and court)

Screening Report

Respondent's name _____

Court Number _____

Date _____

The above named respondent was screened pursuant to your Court order dated _____ .

The undersigned caused a letter to be delivered personally to the respondent notifying respondent that a petition has been filed for an order for seventy-two hour evaluation and respondent's cooperation was solicited. *(Personal delivery of said letter was not made for the following reasons:

_____

_____

_____ .)*

Screening consisted of the following:

Yes____ No____ Review of petition

Yes____ No____ Interview with petitioner

Date of interview _____

Yes____ No____ Interview with respondent

Yes____ No____ Explanation of petition to respondent

As a result of this screening the undersigned reports that there *is* *is not* probable cause to believe that the respondent is *mentally ill and, as a result of mental illness, is a danger to others, or to himself.* *gravely disabled.*

Pertinent observations about the respondent's screening are as follows:

_____

_____

_____

_____

_____

It is therefore respectfully recommended that:

____ the court take no action with regard to the petition.

____ the respondent be permitted to receive evaluation and treatment on a voluntary basis.

____ the court act upon the petition and order respondent be brought to _____ (facility) for seventy-two hour evaluation and treatment.

_____

Professional Person

_____

Telephone Number

Distribution:

Original to court

Copy to respondent's chart

*Strike between asterisks if inapplicable.

Form M-7.
MOTION AND ORDER FOR EVALUATION AND TREATMENT (27-10-106, C.R.S.)

[Insert caption A from page 1596 with the following designation of parties]

THE PEOPLE OF THE STATE OF COLORADO
IN THE INTEREST OF:

Respondent

MOTION

It is respectfully shown to this Honorable Court that the requirements of Section 27-10-106, C.R.S., as amended, have been met through the filing of a Petition for Evaluation and the attached Screening Report. It appears that probable cause exists to believe that the respondent is *mentally ill and, as a result of such mental illness, is a danger to others or to himself* *gravely disabled* and that efforts have been made to secure the cooperation of the respondent, who has refused or failed to accept evaluation and treatment voluntarily.

WHEREFORE, the _____ Attorney of the _____ County of _____ moves that Orders be issued herein:

1. Placing respondent in _____, which is a facility designated or approved for seventy-two hour evaluation and treatment.

2. Directing the Sheriff of the _____ County of _____ to _____
_____
_____.

_____
_____ Attorney

ORDER

The above motion is granted and

IT IS SO ORDERED:

DONE IN OPEN COURT THIS_____ (Date)

_____
Judge

I, the Clerk of the _____ Court, do certify that the foregoing is a true copy of the said Order entered by the Court on _____ (Date).

_____
Clerk of the _____ Court

by _____
Deputy Clerk

NOTICE TO RESPONDENT

Section 27-10-106 (7), Colorado Revised Statutes, provides that if the evaluation and treatment facility to which you are admitted does not have evaluation and treatment services available on Saturdays, Sundays, or holidays, then the facility may exclude those days in calculating the seventy-two hour detention period.

*Strike between asterisks if inapplicable.

Form M-8. (6/79)
NOTICE OF CERTIFICATION AND CERTIFICATION FOR SHORT-TERM TREATMENT
(27-10-107, C.R.S.)

[Insert caption A from page 1596 with the following designation of parties]

IN THE INTEREST OF:

(Name) _____

Respondent

Date:_____

The respondent is hereby notified that the following action has been taken pursuant to Section 27-10-107, C.R.S., as amended.

The respondent has been *detained for seventy-two hour evaluation under the provisions of Section 27-10-105, C.R.S., as amended.* *evaluated under court order pursuant to Section 27-10-106, C.R.S., as amended.*

The respondent's condition has been analyzed and he has been found to be mentally ill, and, as a result of mental illness, *a danger to others or to himself.* *gravely disabled.*

The respondent has been advised of the availability of, but has not accepted, voluntary treatment. *The respondent has accepted voluntary treatment; however, reasonable grounds exist to believe (s)he will not remain in a voluntary program.*

Attached hereto is a statement from _____, who is on the staff of_____ (facility), setting forth the findings for short-term treatment under certification.

As a result of the finding for short-term treatment under certification the respondent is hereby certified to _____ (facility) for short-term treatment as of the date first above written and for a period not to exceed three months.

_____
Professional Person

_____
Address and Telephone Number

NOTICE TO RESPONDENT

You are advised that the law gives you a right to a hearing upon your certification for short-term treatment before a court or jury. In addition to the right to review of this certification you have the right to review by the court, of your treatment or that your treatment be on an out-patient basis. If you wish to take advantage of any of these rights, you should direct a written request to the _____ Court of_____ County, specifying the type of hearing. You may make this request any time that this certification for short-term is in effect.

Strike between asterisks if inapplicable.

INSTRUCTIONS ON USE

A copy of the certification within twenty-four hours, must be delivered personally to the respondent, a copy sent to the respondent's attorney, if any, and a copy sent to a person designated by respondent, if any, and the original certification, showing proper delivery and mailing, must be filed with the _____ Court of _____ County, in which county the respondent resided or

was physically present immediately prior to being taken into custody. Said filing with the court must be within forty-eight hours, excluding Saturdays, Sundays, and Court Holidays, of the date of certification.

Respondent's Acceptance:

I, the respondent herein, received a copy of the within certification this _____ day of _____, 20_____ .

_____
Respondent

In the event the respondent will not sign, or cannot sign, the above receipt then give the respondent a copy and acknowledge service as follows:

I, _____, (print) personally handed to and delivered a true and correct copy of the within certification to the respondent,_____ , this _____ day of _____, 20_____ .

_____
Signature

I hereby certify that I have sent this day by regular mail, postage prepaid, true and correct copies of the within certification of each of the following persons at the addresses set opposite their respective names:

1. Department of Institutions — 4150 South Lowell Boulevard, Denver, Colorado 80236
2. _____ Respondent's Attorney
3. _____ Person designated by respondent

_____
_____
Address

Dated this _____

_____
Signature of person certifying to the mailing

NOTE: If an attorney has not already been appointed, Form M-19 must accompany the Certification submitted to the Court.

Form M-9. (8/75)

_____
Facility's Letterhead

TO:

(Name and address of judge and court)

Notice of Transfer

Respondent's name _____

Court No. _____

Date: _____

The above named respondent who was certified for _____ _____ treatment on _____ (date) by _____ (facility/professional person) has been transferred to _____ for continuing treatment for the following reasons: _____

_____

_____

_____

_____

_____
Professional person in charge of treatment

Address: _____

Telephone: _____

Distribution:
Court
Respondent
Respondent's attorney
Chart
Receiving facility

Form M-10. (8/75)

_____

Facility's Letterhead

TO:

(Name and address
of judge and court)

Notice of Termination of Involuntary Treatment

Respondent's name _____

Court No. _____

Date: _____

The above named respondent who was certified for _____ by _____ (facility/professional person) on _____, (date) has been discharged and released from care and treatment for the following reasons:

_____

_____

_____

_____

_____

_____
Professional person in charge of treatment

Address: _____

Telephone: _____

Distribution:
Court — Original
Respondent
Respondent's chart
Respondent's attorney

Form M-11. (8/75)
EXTENDED CERTIFICATION
FOR SHORT-TERM TREATMENT
(27-10-108, C.R.S.)

[Insert caption A from page 1596 with the following designation of parties]

IN THE INTEREST OF:

(Name) _____

Respondent:

Date _____

The respondent was certified for short-term treatment by _____ _____ (facility/professional person) on _____, (date) and respondent is currently in treatment at _____ (facility).

The respondent's condition has been analyzed and he has been found to continue to be *mentally ill, and, as a result of such mental illness, a danger to others or to himself.* *gravely disabled.* *The respondent has been advised of the availability of, but has not accepted voluntary treatment.* *The respondent has accepted voluntary treatment; however, reasonable grounds exist to believe (s)he will not remain in a voluntary program.*

Attached hereto is a statement from _____, the professional person in charge of respondent's evaluation and treatment, setting forth the need for an extension of the certification for short-term treatment.

As a result of the finding of need for continued treatment under certification, the original certification is hereby extended for an additional three months to expire no later than _____ .

_____
Professional person in charge of evaluation and treatment

_____
Address and Telephone Number

*Strike between asterisks if inapplicable.

NOTICE TO RESPONDENT

You are advised that the law gives you a right to a hearing upon your extended certification for short-term treatment before a court or jury. In addition to the right of review of this extended certification you have the right to review by the court, of your treatment or that your treatment be on an out-patient basis. If you wish to take advantage of any of these rights, you should direct a written request to the _____ Court of _____ County specifying the type of hearing. You may make this request at any time that this extended certification for short-term treatment is in effect.

Distribution:
Original to Court
Copies to: Respondent, Department of Institutions, Respondent's chart, Respondent's attorney

Form M-12. (8/75)
PETITION FOR LONG-TERM CARE AND TREATMENT
(27-10-109, C.R.S.)

[Insert caption A from page 1596 with the following designation of parties]

THE PEOPLE OF THE STATE OF COLORADO
IN THE INTEREST OF:

Respondent

DATE _____

The above named respondent was originally certified for short-term treatment by _____ _____ (facility/professional person) on _____; (date) and said certification was extended by _____ (facility/professional person) on , (date) and will expire on _____. The respondent has received short-term treatment continuously for five consecutive months under the provisions of Sections 27-10-107 and 27-10-108, C.R.S., as amended. The respondent is now being treated at _____ (facility).

The respondent continues to be *mentally ill, and, as a result of mental illness, a danger to others or to himself.* *gravely disabled.*

The respondent has been advised of the availability of, but has not accepted, voluntary treatment. *The respondent has accepted voluntary treatment; however, reasonable grounds exist to believe (s)he will not remain in a voluntary program.*

That _____ (facility) has been designated or approved by the executive director of the department of institutions to provide respondent with long-term care and treatment.

Attached hereto is a statement from _____, the professional person in charge of the evaluation and treatment of the respondent, setting forth respondent's need for long-term care and treatment.

*Strike between asterisks if inapplicable.

As result of the finding of respondent's need for long-term care and treatment, your petitioner prays for a hearing before the court for an order for long-term treatment prior to the above expiration date.

_____
Professional person in charge of
evaluation and treatment.

Address _____

Telephone Number _____

NOTICE TO RESPONDENT

You are advised that the law gives you a right to a hearing concerning the within Petition For Long-Term Treatment. The hearing will be before the court unless you request a jury. If you wish to take advantage of your right to a jury you or your attorney must within ten days after receipt of this petition request said jury trial by filing a written request therefor with the _____ Court,

_____ .

(address of court)

Respondent's Acceptance:

I, the respondent herein, received a copy of the within certification this _____ day of _____, 20_____ .

_____
Respondent

In the event the respondent will not sign, or cannot sign the above receipt, then give the respondent a copy and acknowledge service as follows:

I, _____, (print) personally handed to and delivered a true and correct copy of the within certification to the respondent, _____, this _____ day of _____, 20_____ .

_____
Signature

Distribution:
Original to Court
Copies to: Respondent, Department of Institutions, Respondent's chart, Respondent's attorney

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Form M-13. (8/75)
ORDER FOR LONG-TERM CARE AND TREATMENT
(27-10-109, C.R.S.)

[Insert caption B from page 1596 with the following designation of parties]

THE PEOPLE OF THE STATE OF COLORADO
IN THE INTEREST OF:

Respondent

The Court, *having heard the testimony in this case*, *having the findings of the jury in this case*, determines that the respondent who is currently receiving treatment at _____ _____ (facility) is *mentally ill and, as a result of mental illness, a danger to others or to himself*, *gravely disabled,* and in need of long-term care and treatment.

IT IS ORDERED that the respondent shall receive long-term care and treatment for a period not to exceed six months and for this purpose the Department of Institutions, State of Colorado, shall have custody of respondent for placement with an agency or facility designated by the executive director to provide long-term care and treatment.

This Order shall expire on _____, (date) unless extended pursuant to statute.

IT IS FURTHER ORDERED that the clerk of the court forward copies of this Order, duly certified, to the respondent, the institution or agency currently providing care and treatment, the Department of Institutions, and the respondent's attorney.

Done and signed in open court this _____.

_____
Judge

*Strike between asterisks if inapplicable.

Form M-14. (8/75)
CERTIFICATE FOR EXTENSION OF LONG-TERM CARE AND TREATMENT
(27-10-109 (5), C.R.S.)

[Insert caption A from page 1596 with the following designation of parties]

THE PEOPLE OF THE STATE OF COLORADO
IN THE INTEREST OF:

Respondent

DATE _____

The above named respondent was last ordered by this court to receive long-term care and treatment on _____, (date) at_____ (facility), such order to expire on _____. (date)

The respondent continues to be *mentally ill and, as a result of mental illness, a danger to others or to himself.* *gravely disabled.*

The respondent has been advised of the availability of, but has not accepted, voluntary treatment. *The respondent has accepted voluntary treatment; however, reasonable grounds exist to believe (s)he will not remain in a voluntary program.*

This certification for extension of long-term care and treatment is submitted to the court at least thirty days prior to the expiration date of the last order for long-term care and treatment. The undersigned states that an extension of said order is necessary for the care and treatment of the respondent.

_____
Professional person in charge of
evaluation and treatment

_____

_____

_____
Address and telephone number

NOTICE TO RESPONDENT AND HIS ATTORNEY, IF ANY

You are notified that you have a right to a hearing upon the requested extension before the court or a jury; however, you must notify the court in writing, specifying the type of hearing you desire, if any.

*Strike between asterisks if inapplicable.

Distribution:
Original — Court
Copies — Respondent (delivered), Respondent's attorney, Department of Institutions

NOTE ON USE: the **court** must notify the respondent not less than twenty days before the above expiration date of his right to a hearing on this certification.

Form M-15. (8/75)
NOTICE OF RIGHT TO HEARING
(27-10-109 (5), C.R.S.)

[Insert caption B from page 1596 with the following designation of parties]

THE PEOPLE OF THE STATE OF COLORADO
IN THE INTEREST OF:

Respondent

TO THE RESPONDENT ABOVE NAMED AND, ATTORNEY OF RECORD:

WHEREAS, this Court has entered an order for long-term care and treatment of the respondent, which order is due to expire on _____ ; and,

WHEREAS, a certification for extension of long-term care and treatment of the respondent was received by this Court on _____ ;

YOU ARE, THEREFORE, NOTIFIED HEREBY that you have a right to a hearing upon this extension before the Court or a jury; however, you must notify the Court in writing specifying the type of hearing within ten days from the date you receive this notice.

If no written request is received by the Court within the ten day period, the Court will proceed ex parte.

WITNESS my signature and the seal of said Court this _____ day of _____, 20_____ .

_____
Clerk of the _____ Court

By _____
Deputy Clerk

(SEAL OF COURT)

CERTIFICATE OF MAILING (TO ATTORNEY)

I certify that on _____, 20 _____, I mailed a copy of the foregoing notice, postpaid, by certified mail, return receipt requested, to _____ , (address) attorney for respondent, at _____ .

_____

CERTIFICATE OF SERVICE (UPON RESPONDENT)

I certify that on the _____ day of _____, 20_____ o'clock _____ M., at _____, Colorado, I duly delivered to the above named respondent a copy of the foregoing notice.

_____

NOTE ON USE: This notice should be delivered personally to the respondent and a copy mailed by certified mail, return receipt requested, to the respondent's attorney, if any.

Form M-16. (8/75)
ORDER FOR EXTENSION OF LONG-TERM CARE AND TREATMENT (27-10-109 (5), C.R.S.)

[Insert caption B from page 1596 with the following designation of parties]

THE PEOPLE OF THE STATE OF COLORADO
IN THE INTEREST OF:

Respondent

The Court, *having heard the testimony in this case,* *having the findings of the jury in this case,* *proceeding ex parte after proper notice was given to respondent and respondent's counsel,* determines that the respondent is *mentally ill and, as a result of mental illness, a danger to others or to himself,* *gravely disabled,* and in need of extended long-term care and treatment.

IT IS ORDERED that the respondent shall continue to receive long-term care and treatment for a period not to exceed six months, and for this purpose the Department of Institutions, State of Colorado, shall have custody of respondent for placement with an agency or facility designated by the executive director to provide said long-term care and treatment.

This order shall expire on _____, unless extended pursuant to statute.

IT IS FURTHER ORDERED that the Clerk of the Court shall forward copies of this order, duly certified, to the respondent, the facility or agency currently providing care and treatment, the Department of Institutions, and the respondent's attorney, if any.

DONE AND SIGNED IN OPEN COURT on _____.

BY THE COURT:

_____
Judge

*Strike between asterisks if inapplicable.

Distribution:
Original to Court
Copies to:
Respondent
Respondent's attorney, if any
Facility currently treating respondent;
Department of Institutions

Form M-17. (8/75)
DISCHARGE ORDER

[Insert caption B from page 1596 with the following designation of parties]

THE PEOPLE OF THE STATE OF COLORADO
IN THE INTEREST OF:

Respondent:

The Court, *having heard the testimony in this case,* *having the findings of the jury in this case,* determines that the respondent is not *mentally ill and, as a result of mental illness, a danger to others or to himself.* *gravely disabled.*

IT IS THEREFORE ORDERED that the respondent be discharged, and that the respondent be released from custody forthwith.

IT IS FURTHER ORDERED that the Clerk of this Court shall forward copies of this order, duly certified, to the respondent, the facility or agency currently providing care and treatment, the Department of Institutions, and the respondent's attorney, if any.

DONE AND SIGNED IN OPEN COURT on _____.

BY THE COURT:

_____
Judge

*Strike between asterisks if inapplicable.

Distribution:
Original to Court
Copies to:
Respondent
Respondent's attorney, if any
Facility currently treating respondent
Department of Institutions

Form M-18. (8/75)
MOTION AND ORDER TO TRANSPORT
(27-10-107 (8), C.R.S.)

[Insert caption A from page 1596 with the following designation of parties]

THE PEOPLE OF THE STATE OF COLORADO
IN THE INTEREST OF:

Respondent

COMES NOW the _____ Attorney of the _____ County of _____ and respectfully moves the Court to enter orders herein:

1. Transporting the above named respondent to _____ _____ (facility).

2. Directing the Sheriff of _____ County to _____ _____ _____ _____

3. _____ _____ _____ _____. (Other relief requested)

As grounds for this motion, it is respectfully shown to the Court that the above named respondent has been detained for evaluation and treatment or certified for treatment, and the attached report from _____ states that it is desirable to transfer the respondent to another facility for treatment, and the safety of the respondent or the public requires that the respondent be transported by a sheriff.

_____
_____ Attorney

ORDER

The above motion is granted and IT IS SO ORDERED.

DONE IN OPEN COURT on _____, 20_____ .

_____
Judge

Form M-19. (8/75)
APPLICATION FOR REPRESENTATION BY LEGAL COUNSEL

NAME OF RESPONDENT _____ AGE _____
Last First Middle

ADDRESS _____ PHONE NO. _____
Street City State

EMPLOYMENT STATUS:

( ) Yes, at _____

( ) No, last employer _____

( ) No, other member of household is employed at _____

RESPONDENT'S INCOME		**SOURCE OF INCOME**		**TOTAL FAMILY INCOME** (if applicable)	
Week	$ _____	( ) Employment	( ) Welfare	Week	$_____
Month	$ _____	( ) Social Security	( ) Disability	Month	$ _____
Year	$ _____	( ) Unemployment	( ) Other	Year	$ _____

MONTHLY EXPENSES (Necessities only):

(Rent) or (House Payments) Circle One $ _____ Medical Bills $ _____

Installment Payments $ _____ Child Support $ _____

Food and Clothing $ _____ Other $ _____

MARITAL STATUS:

( ) Single
( ) Married
( ) Separated
( ) Divorced

Name and address of spouse _____

_____

Spouse employed: ( ) Yes ( ) No

Name of employer: _____

Income: Week $____ Month $____ Year $____

DEPENDENTS

Children _____
Spouse _____
Other _____
Total _____

LIABILITIES

Major Debts $_____

Total Debts $_____

ASSETS (include spouse's):

( ) Savings $_____
( ) Car $_____
( ) Realty $_____
( ) Other $_____

NAME OF RESPONDENT'S ATTORNEY, IF ANY _____

Address: _____

Phone No.: _____

I certify that the information contained herein is true to the best of my knowledge and belief.

_____
Signature

The information contained in this application was obtained from the respondent or _____
_____.

The respondent refused to sign the application and the undersigned has no personal knowledge of the truth of the matter stated herein.

Name: _____

Address: _____

Phone No.: _____

THIS FORM MUST ACCOMPANY THE CERTIFICATION TO BE SUBMITTED TO THE COURT.

Form M-20. (8/75)
ORDER APPOINTING ATTORNEY
(27-10-106 & 107, C.R.S.)

[Insert caption B from page 1596 with the following designation of parties]

THE PEOPLE OF THE STATE OF COLORADO
IN THE INTEREST OF:

Respondent

The court finds that the respondent's financial condition is as represented by the attached application for representation by appointed counsel.

The respondent *meets* *does not meet* the criteria established by the legal services agency operating in this jurisdiction and is entitled to appointed counsel *at the expense of the state.*

The respondent has requested that the court appoint _____ as his attorney in this matter.

_____ is hereby appointed to represent respondent herein this _____ day of _____, 20_____ **at the expense of the state pursuant to 27-10-107, C.R.S., as amended.** **Neither this court nor the state shall be responsible for the payment of attorney's fees.**

_____
Judge

*Strike between asterisks if inapplicable.

INDEX TO
COLORADO RULES OF PROBATE PROCEDURE

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