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 and under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer under oath to the extent the interrogatory is not objectionable. An objection must state with specificity the grounds for objection to the interrogatory and must also state whether any responsive information is being withheld on the basis of that objection. A timely objection to an interrogatory stays the obligation to answer those portions of the interrogatory objected to until the court resolves the objection. No separate motion for protective order under C.R.C.P. 26(c) is required.

(2) The answers are to be signed by the person making them, and the objections signed by the attorney making them.

(3) The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 35 days after the service of the interrogatories. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties pursuant to C.R.C.P. 29.

(4) All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection will be deemed to be waived unless the party's failure to object is excused by the court for good cause shown.

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

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

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

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

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

Source: (a) to (c) amended and adopted and (e) added and adopted April 14, 1994, effective January 1, 1995, for all cases filed on or after that date; committee comment approved June 10, 1994; (b)(3) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); (b)(1) and comments amended and adopted May 28, 2015, effective July 1, 2015, for cases filed on or after July 1, 2015; (b)(1), (e), and comments amended and adopted January 12, 2017, effective March 1, 2017.

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).

COMMENTS

1995

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

[2] A discovery schedule for the case is required by C.R.C.P. 16(b)(1)(IV). Under the requirements of that Rule, the parties must set forth in the Case Management Order the timing and number of interrogatories and the

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basis for the necessity of such discovery with attention to the presumptive limitation and standards set forth in C.R.C.P. 26(b)(2). There is also the requirement that counsel certify they have advised their clients of the estimated expenses and fees involved in the discovery. Discovery is thus tailored to the particular case. The parties in the first instance and ultimately the Court are responsible for setting reasonable limits and preventing abuse.

2017

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

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

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).

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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 C.R.C.P. 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 or 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, or state with specificity the grounds for objecting to the request. The responding party may state that it will produce copies of information instead of permitting inspection. The production must then be completed no later than the time for inspection stated in the request or another reasonable time stated in the response. An objection must state whether any responsive materials are being withheld on the basis of that objection. If objection is made to part of an item or category, the part shall be specified. A timely objection to a request for production stays the obligation to produce which is the subject of the objection until the court resolves the objection. No separate motion for protective order pursuant to C.R.C.P. 26(c) is required. The party submitting the request may move for an order pursuant to C.R.C.P. 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

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

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); (b) and (c) and comments amended and adopted May 28, 2015, effective July 1, 2015, for cases filed on or after July 1, 2015.

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 parties, see C.R.C.P. 17 to 25.

COMMENTS

1995

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

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

2015

[3] Rule 34 is changed to adopt similar revisions as those proposed to Fed. R. Civ. P. 34, which are designed to make responses to requests for documents more meaningful and transparent. The first amendment is to avoid the practice of repeating numerous boilerplate objections to each request which do not identify specifically what is objectionable about each specific request. The second amendment is to allow production of documents in place of permitting inspection but to require that the production be scheduled to occur when the response to the document request is due, or some other specific and reasonable date. The third amendment is to require that when an objection to a document request is made, the response must also state whether, in fact, any responsive materials are being withheld due to that objection. The fourth and final amendment is simply to clarify that a written objection to production under this Rule is adequate to stop production without also filing a motion for a protective order.

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 ray, 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).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. PROCEDURE.

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

"Lone Pine orders", where a trial court orders plaintiffs to present prima facie evidence supporting their claims after initial disclosures, but before other discovery commences, or risk having their case dismissed, are prohibited under state law. While the supreme court revised this rule to create a "differential case management/early disclosure/limited discovery system", these revisions are not so substantial as to effectively overrule other supreme court holdings. Although portions of C.R.C.P. 16 and C.R.C.P. 26 may afford trial courts more discretion than they previously had, that discretion is not so broad as to allow courts to issue Lone Pine orders. And, notably, the state's version of C.R.C.P. 16 does not include the language relied upon by federal courts when issuing Lone Pine orders. Existing procedures under the Colorado rules of civil procedure sufficiently protect against meritless claims, and, therefore, a Lone Pine order was not required solely on that basis. Strudley v. Antero Res. Corp., 2013 COA 106, 350 P.3d 874, aff'd, 2015 CO 26, 347 P.3d 149.

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

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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).

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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 and imposing sanctions as follows:

(1) Appropriate Court. An application for an order to a party or to a person who is not a party shall be made to the court in which the action is pending.

(2) Motion. (A) If a party fails to make a disclosure required by C.R.C.P. 26(a), any other party may move to compel disclosure and for appropriate sanctions. The motion shall be accompanied by a certification that the movant in good faith has conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

(B) If a deponent fails to answer a question propounded or submitted pursuant to C.R.C.P. Rules 30 or 31, or a corporation or other entity fails to make a designation pursuant to C.R.C.P. Rules 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted pursuant to C.R.C.P. 33, or if a party, in response to a request for inspection submitted pursuant to C.R.C.P. 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion shall be accompanied by a certification that the moving party in good faith has conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

(3) Evasive or Incomplete Disclosure, Answer, or Response. For purposes of this subsection an evasive or incomplete disclosure, answer, or response shall be deemed a failure to disclose, answer, or respond.

(4) Expenses and Sanctions. (A) If a motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court may, after reasonable notice and an opportunity to be heard, if requested, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified or that other circumstances make an award of expenses manifestly unjust.

(B) If a motion is denied, the court may make such protective order as it could have made on a motion filed pursuant to C.R.C.P. 26(c) and may, after affording an opportunity to be heard if requested, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses manifestly unjust.

(C) If the motion is granted in part and denied in part, the court may make such protective order as it could have made on a motion filed pursuant to C.R.C.P. 26(c) and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to Comply with Order.

(1) Non-Party Deponents-Sanctions by Court. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in which the action is pending or from which the subpoena is issued, the failure may be considered a contempt of court.

(2) Party Deponents-Sanctions by Court. If a party or an officer, director, or managing agent of a party, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under section (a) of this Rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

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(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring the party to produce another for examination, such orders as are listed in subparagraphs (A), (B), and (C) of this subsection (2), unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order, or the attorney advising the party, or both, to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Failure to Disclose; False or Misleading Disclosure; Refusal to Admit. (1) A party that without substantial justification fails to disclose information required by C.R.C.P. 26(a) or 26(e) shall not be permitted to present any evidence not so disclosed at trial or on a motion made pursuant to C.R.C.P. 56, unless such failure has not caused and will not cause significant harm, or such preclusion is disproportionate to that harm. The court, after holding a hearing if requested, may impose any other sanction proportionate to the harm, including any of the sanctions authorized in subsections (b)(2)(A), (b)(2)(B) and (b)(2)(C) of this Rule, and the payment of reasonable expenses including attorney fees caused by the failure.

(2) If a party fails to admit the genuineness of any document or the truth of any matter as requested pursuant to C.R.C.P. 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that

(A) the request was held objectionable pursuant to C.R.C.P. 36(a), or

(B) the admission sought was of no substantial importance, or

(C) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or

(D) there was other good reason for the failure to admit.

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated pursuant to C.R.C.P. Rules 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice; or (2) to serve answers or objections to interrogatories submitted pursuant to C.R.C.P. 33, after proper service of the interrogatories; or (3) to serve a written response to a request for inspection submitted pursuant to C.R.C.P. 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the

failure as are just, and among others it may take any action authorized by subparagraphs (A), (B), and (C) of subsection (b)(2) of this Rule. Any motion specifying a failure under clauses (2) or (3) of this subsection shall be accompanied by a certification that the movant in good faith has conferred or attempted to confer with the party failing to answer or respond in an effort to obtain such answer or response without court action. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney fees, caused by the failure unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subsection may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has previously filed a motion for a protective order as provided by C.R.C.P. 26(c).

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; IP(a), (a)(4)(A), (a)(4)(B), (b)(2)(B), (b)(2)(E), (c)(1) and comments amended and adopted May 28, 2015, effective July 1, 2015, for cases filed on or after July 1, 2015.

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 sanctions for civil contempt, see C.R.C.P. 107; for vacating a final judgment, see C.R.C.P. 60(b); for requests for admission, see C.R.C.P. 36.

COMMENTS

1990

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

1995

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

2015

[3] The threat and, when required, application, of sanctions is necessary to convince litigants of the importance of full disclosure. Because the 2015 amendments also require more complete disclosures, Rule 37(a)(4) now authorizes, for motions to compel disclosures or discovery, imposition of sanctions against the losing party unless its

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actions “were substantially justified or that other circumstances make an award of expenses *manifestly* unjust.” This change is intended to make it easier for judges to impose sanctions.

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

RECENT ANNOTATIONS

The 2015 amendment to C.R.C.P. 26(a)(2)(B) that expert testimony "shall be limited to matters disclosed in detail in the [expert] report" does not create mandatory exclusion of expert testimony. Instead, the harm and proportionality analysis under section (c) of this rule remains the proper framework for determining sanctions for discovery violations. Section (c)(1) works in conjunction with rule 26 to authorize the trial court to sanction a party for failing to comply with discovery requirements. Catholic Health v. Earl Swensson Assocs., 2017 CO 94, 403 P.3d 185.

Sovereign immunity does not bar an award of attorney fees against a public entity because sovereign immunity does not apply unless statutorily created and the Colorado Governmental Immunity Act does not provide immunity for an award of attorney fees against a public entity. C.K. v. People, 2017 CO 111, 407 P.3d 566.

When evaluating whether a failure to disclose is harmless under section (c), the inquiry is whether the failure to disclose will prejudice the opposing party by denying the party an adequate opportunity to defend against that evidence. Todd v. Bear Valley Vill. Apartments, 980 P.2d 973 (Colo. 1999); Farm Credit of S. Colo. v. Mason, 2017 COA 42, __ P.3d __ [published April 6, 2017].

ANNOTATION

I. General Consideration.
II. Motion for Order.
  A. In General.
  B. Failure to Answer.
  C. Award of Expenses of Motion.
III. Failure to Comply.
  A. Sanctions by Court in District.
  B. Sanctions by Court in Which Action is Pending.
IV. Expenses on Failure to Admit.
V. Failure to Disclose.
VI. Failure of Party to Attend Deposition.

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).

Specific finding of prejudice not required for award of attorney fees under section (a)(4). Hauer v. McMullin, 2015 COA 90, __ P.3d __.

"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 section (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).

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Court erred in awarding monetary sanctions against government entity for discovery violations. While this rule permits a trial court to order a party, the party's attorney, or both to pay reasonable expenses, it does not expressly authorize an award against a public entity. People in Interest of L.K., 2016 COA 112, __ P.3d __.

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 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).

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 section (a)(3). Graefe & Graefe v. Beaver Mesa Exploration, 695 P.2d 767 (Colo. App. 1984).

Entry of an award is discretionary under section (a)(4). Where party's objection to disclosure was based on a good-faith belief that the documents sought exceeded the scope of permissible discovery and that failure to apply for a protective order would waive its objection to the admissibility of evidence, the court did not abuse its discretion in denying an award of attorney fees in connection with the motion. DA Mtn. Rentals, LLC v. Lodge at Lionshead Phase III Condo. Ass'n, 2016 COA 141, __ P.3d __.

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).

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Gross negligence on the part of counsel resulting in a default judgment being entered pursuant to section (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 section (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 section (b)(2) does not require a finding of willfulness or bad faith by disobedient party. McRill v. Guar. Fed. Savings & Loan Ass'n, 682 P.2d 498 (Colo. App. 1984).

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

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

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

Dismissal is not required where corporation's C.R.C.P. 30(b)(6) deponent failed to have personal knowledge regarding the question specified in the deposition subpoena, despite the fact that the district court's sanction of an award of costs did not cure the prejudice to the party noticing the deposition. Mun. Subdist., Northern Colo. Water Conservancy Dist. v. OXY USA, Inc., 990 P.2d 701 (Colo. 1999).

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

IV. EXPENSES ON FAILURE TO ADMIT.

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

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

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

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

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

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

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

V. FAILURE TO DISCLOSE.

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

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

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

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

Because section (c) expressly requires the court to afford an opportunity to be heard, on remand, trial court must hold a hearing on defendant's motion seeking sanctions and attorney fees from plaintiff's attorneys. In doing so, the court must determine whether the disclosures were misleading or there was a failure seasonably to supplement misleading disclosures and, if so, whether the failure was 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).

Failure to properly disclose expert rebuttal testimony was harmless because the excluded testimony was important to plaintiff's case, should not have surprised defendant, and did not disrupt the trial and there was no evidence that plaintiffs acted in bad faith. Accordingly, trial court abused its discretion in striking rebuttal testimony. Warden v. Exempla, Inc., 2012 CO 74, 291 P.3d 30.

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

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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 non-appearance. 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 section (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).

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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

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).