Merely because the person designated for appointment as personal representative in the motion for substitution is not appointed by the court does not serve to make the motion a nullity. Smith v. Bridges, 40 Colo. App. 171, 574 P.2d 511 (1977).

When there is no prejudice caused by delay nor a lengthy period of inaction by a movant for substitution, rather than allowing substantial rights to be lost by dismissing the action, the court should either allow a reasonable additional time for the movant to submit an amended motion or, failing that, appoint a proper personal representative such as the public administrator. Smith v. Bridges, 40 Colo. App. 171, 574 P.2d 511 (1977).

Dismissal of action based on C.R.C.P. 41 not to be considered under this rule. Where the record revealed that the action against the estate was dismissed voluntarily, without prejudice, under C.R.C.P. 41, and not based on failure to make a timely substitution under this rule, dismissal under this rule could not be considered in the appeal of the second action. Vigil v. Lewis Maintenance Serv., Inc., 38 Colo. App. 209, 554 P.2d 703 (1976).

Dismissal for failure to make a timely substitution when a party dies falls within the purview of C.R.C.P. 41 (b)(1), but not as to the claims against remaining defendants. Cheney v. Hailey, 686 P.2d 808 (Colo. App. 1984).

If there is a substitution of parties, any error therein is waived by failure to object. Thomason v. McAlister, 748 P.2d 798 (Colo. App. 1987).

Applied in Ray v. Schooley, 156 Colo. 33, 396 P.2d 730 (1964); Wildenstein v. Stills, 156 Colo. 96, 396 P.2d 969 (1964).

III. TRANSFER OF INTEREST.

For cases construing the former code provision, see Perkins v. Marrs, 15 Colo. 262, 25 P. 168 (1890); Portland Gold Mining Co. v. Stratton's Independence, 196 F. 714 (D. Colo. 1912); Winchester v. Walker, 59 Colo. 17, 147 P. 343 (1915); Metro. State Bank v. Bisher, 82 Colo. 421, 260 P. 688 (1927).

When plaintiff, on appeal, seeks to use section (c) of this rule to substitute a defendant post-judgment, and the trial court did not explain its decision to deny the original motion for substitution, the case shall be remanded for further proceedings conducted by the trial court, such that the trial court conduct an evidentiary hearing to determine transfer of interest. Liberty Mut. Fire Ins. Co. v. Human Res. Cos., Inc., 94 P.3d 1257 (Colo. App. 2004).

Applied in Recreational Dev. Co. v. Am. Const., 749 P.2d 1002 (Colo. App. 1987).

IV. PUBLIC OFFICERS.

Action against officer does not abate because his term of office expires. Where the obligation which is sought to be enforced is a duty devolving upon no particular officer, but is perpetual upon the then incumbent of the office and his successors, unless legally excused, the action will not abate by reason of the expiration of the term of office of the official against whom the action was originally commenced. Nance v. People, 25 Colo. 252, 54 P. 631 (1898).

Successor in office must be substituted as a party within six months. Bach v. Schooley, 155 Colo. 30, 392 P.2d 649 (1964); Union P. R. R. v. State, 166 Colo. 307, 443 P.2d 375 (1968).

Jurisdiction held not lost where facts establish predecessor's actions are continued. People ex rel. Dunbar v. Hively, 140 Colo. 265, 344 P.2d 443 (1959).

Substitution had to be effected previously. Ray v. Schooley, 156 Colo. 33, 396 P.2d 730 (1964); Gilliland v. McClearn, 168 Colo. 358, 451 P.2d 756 (1969).

Chapter 4

Disclosure and Discovery

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

(a) Required Disclosures. Unless otherwise ordered by the court or stipulated by the parties, provisions of this Rule shall not apply to domestic relations, juvenile, mental health, probate, water law, forcible entry and detainer, C.R.C.P. 120, or other expedited proceedings.

(1) Disclosures. Except to the extent otherwise directed by the court, a party shall, without awaiting a discovery request, provide to other parties the following information, whether or not supportive of the disclosing party's claims or defenses:

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

(B) a listing, together with a copy of, or a description by category, of the subject matter and location of all documents, data compilations, and tangible things in the possession, custody or control of the party that are relevant to the claims and defenses of any party, making available for inspection and copying such documents and other evidentiary material, not privileged or protected from disclosure, as though a request for production of those documents had been served pursuant to C.R.C.P. 34;

(C) a description of the categories of damages sought and a computation of any category of economic damages claimed by the disclosing party, making available for inspection and copying pursuant to C.R.C.P. 34 the documents or other evidentiary material relevant to the damages sought, not privileged or protected from disclosure, as though a request for production of those documents had been served pursuant to C.R.C.P. 34; and

(D) any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment, making such agreement available for inspection and copying pursuant to C.R.C.P. 34.

Disclosures shall be served within 28 days after the case is at issue as defined in C.R.C.P. 16(b)(1). A party shall make the required disclosures based on the information then known and reasonably available to the party and is not excused from making such disclosures because the party has not completed investigation of the case or because the party challenges the sufficiency of another party's disclosure or because another party has not made the required disclosures. Parties shall make these disclosures in good faith and may not object to the adequacy of the disclosures until the case management conference pursuant to C.R.C.P. 16(d).

(2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required by subsection (a)(1) of this Rule, a party shall disclose to other parties the identity of any person who may present evidence at trial, pursuant to Rules 702, 703, or 705 of the Colorado Rules of Evidence together with an identification of the person's fields of expertise.

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

(I) Retained Experts. With respect to a witness who is retained or specially employed to provide expert testimony, or whose duties as an employee of the party regularly involve giving expert testimony, the disclosure shall be made by a written report signed by the witness. The report shall include:

(a) a complete statement of all opinions to be expressed and the basis and reasons therefor;

(b) a list of the data or other information considered by the witness in forming the opinions;

(c) references to literature that may be used during the witness's testimony;

(d) copies of any exhibits to be used as a summary of or support for the opinions;

(e) the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years;

(f) the fee agreement or schedule for the study, preparation and testimony;

(g) an itemization of the fees incurred and the time spent on the case, which shall be supplemented 14 days prior to the first day of trial; and

(h) a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

The witness's direct testimony shall be limited to matters disclosed in detail in the report.

(II) Other Experts. With respect to a party or witness who may be called to provide expert testimony but is not retained or specially employed within the description contained in subsection (a)(2)(B)(I) above, the disclosure shall be made by a written report or statement that shall include:

(a) a complete description of all opinions to be expressed and the basis and reasons therefor;

(b) a list of the qualifications of the witness; and

(c) copies of any exhibits to be used as a summary of or support for the opinions. If the report has been prepared by the witness, it shall be signed by the witness.

If the witness does not prepare a written report, the party's lawyer or the party, if self-represented, may prepare a statement and shall sign it. The witness's direct testimony expressing an expert opinion shall be limited to matters disclosed in detail in the report or statement.

(C) Unless otherwise provided in the Case Management Order, the timing of the disclosures shall be as follows:

(I) The disclosure by a claiming party under a complaint, counterclaim, cross-claim, or third-party claim shall be made at least 126 days (18 weeks) before the trial date.

(II) The disclosure by a defending party shall be made within 28 days after service of the claiming party's disclosure, provided, however, that if the claiming party serves its disclosure earlier than required under subparagraph 26(a)(2)(C)(I), the defending party is not required to serve its disclosures until 98 days (14 weeks) before the trial date.

(III) If the evidence is intended to contradict or rebut evidence on the same subject matter identified by another party under subparagraph (a)(2)(C)(II) of this Rule, such disclosure shall be made no later than 77 days (11 weeks) before the trial date.

(3) [There is no Colorado Rule—see instead C.R.C.P. 16(c).]

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

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

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

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

(2) Limitations. Except upon order for good cause shown and subject to the proportionality factors in subsection (b)(1) of this Rule, discovery shall be limited as follows:

(A) A party may take one deposition of each adverse party and of two other persons, exclusive of persons expected to give expert testimony disclosed pursuant to subsection 26(a)(2). The scope and manner of proceeding by way of deposition and the use thereof shall otherwise be governed by C.R.C.P. 26, 28, 29, 30, 31, 32, and 45.

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

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

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

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

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

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

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

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

(IV) whether because of the number of parties and their alignment with respect to the underlying claims and defenses, the proposed discovery is reasonable.

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

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

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

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

(4) Trial Preparation: Experts.

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

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

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

(D) Rule 26(b)(3) protects from disclosure and discovery drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded, and protects communications between the party's attorney and any witness disclosed under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

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

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

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

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

(B) If information produced in disclosures or discovery is subject to a claim of privilege or of protection as trial-preparation material the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must not review, use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and shall give notice to the party making the claim within 14 days if it contests the claim. If the claim is not contested within the 14-day period, or is timely contested but resolved in favor of the party claiming privilege or protection of trial-preparation material, then the receiving party must also promptly return, sequester, or destroy the specified information and any copies that the receiving party has. If the claim is contested, the party making the claim shall present the information to the court under seal for a determination of the claim within 14 days after receiving such notice, or the claim is waived. The producing party must preserve the information until the claim is resolved, and bears the burden of proving the basis of the claim and that the claim was not waived. All notices under this Rule shall be in writing.

(c) Protective Orders. Upon motion by a party or by the person from whom disclosure is due or discovery is sought, accompanied by a certificate that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

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

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

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

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

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

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

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

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

(d) Timing and Sequence of Discovery. Except when authorized by these Rules, by order, or by agreement of the parties, a party may not seek discovery from any source before service of the Case

Management Order pursuant to C.R.C.P. 16(b)(18). Any discovery conducted prior to issuance of the Case Management Order shall not exceed the limitations established by C.R.C.P. 26(b)(2). Unless the parties stipulate or the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

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

(f) [No Colorado Rule—See C.R.C.P. 16.]

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

(1) Every disclosure made pursuant to subsections (a)(1) or (a)(2) of this Rule shall be signed by at least one attorney of record in the attorney's individual name. An unrepresented party shall sign the disclosure and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

(2) Every discovery request, or response, or objection made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name. An unrepresented party shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information and belief, formed after a reasonable inquiry, the request, response or objection is:

(A) Consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(B) Not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(C) Not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

If a request, response or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

(3) If without substantial justification a certification is made in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who made the certification, the party on whose behalf the disclosure, request, response or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including reasonable attorney fees.

Source: Entire rule repealed April 14, 1994, effective January 1, 1995; entire rule adopted April 14, 1994, effective January 1, 1995, or all cases filed on or after that date; committee comment approved June 10, 1994; (f) corrected and effective January 9, 1995; (g)(2) and (g)(3) amended and adopted October 30, 1997, effective January 1, 1998; entire rule and committee comment amended and adopted May 24, 2001, effective July 1, 2001; (b)(1) and committee comment amended and adopted November 15, 2001, effective January 1, 2002; (a)(4) amended and adopted October 20, 2005, effective January 1, 2006; (a)(1) last paragraph, (2)(C)(I), (2)(C)(II), and (2)(C)(III) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); (b)(5) amended and effective September 18, 2014; (a)(1), (a)(2)(B), (a)(2)(C)(I), IP(b), (b)(1), (b)(2)(A), (b)(2)(B), (b)(2)(F), (b)(3)(A), (b)(4)(A), (b)(4)(B), (b)(5), (c)(2), (d), and (e) and comments amended and adopted and (b)(4)(D) added and adopted May 28, 2015, effective July 1, 2015, for cases filed on or after July 1, 2015.

COMMENTS

1995

SCOPE

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

2002

COLORADO DIFFERENCES

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

[3] The Colorado differences from the Fed.R.Civ.P. are: (1) timing and scope of mandatory automatic disclosures is different (C.R.C.P. 16(b)); (2) the two types of experts in the Federal Rule are clarified by the State Rule (C.R.C.P. 26(a)(2)(B)), and disclosure of expert opinions is made at a more realistic time in the proceedings (C.R.C.P. 26(a)(2)(C)); (3) sequenced disclosure of expert opinions is prescribed in C.R.C.P. 26(a)(2)(C) to avoid proliferation of experts and related expenses; (4) the parties may use a summary of an expert's testimony in lieu of a report prepared by the expert to reduce expenses (C.R.C.P. 26(a)(2)(B)); (5) claiming privilege/protection of work product (C.R.C.P. 26(b)(5)) and supplementation/correction provisions (C.R.C.P. 26(e)) are relocated in the State

Rules to clarify that they apply to both disclosures and discovery; (6) a Motion for Protective Order stays a deposition under the State Rules (C.R.C.P. 121 § 1-12) but not the Federal Rule (Fed.R.Civ.P. 26(c)); (7) presumptive limitations on discovery as contemplated by C.R.C.P. 16(b)(1)(VI) are built into the rule (see C.R.C.P. 26(b)(2)); (8) counsel must certify that they have informed their clients of the expense of the discovery they schedule (C.R.C.P. 16(b)(1)(IV)); (9) the parties cannot stipulate out of the C.R.C.P. 26(b)(2) presumptive discovery limitations (C.R.C.P. 29); and (10) pretrial endorsements governed by Fed.R.Civ.P. 26(a)(3) are part of Colorado's trial management system established by C.R.C.P. 16(c) and C.R.C.P. 16(d).

[4] As with the Federal Rule, the extent of disclosure is dependent upon the specificity of disputed facts in the opposing party's pleading (facilitated by the requirement in C.R.C.P. 16(b) that lead counsel confer about the nature and basis of the claims and defenses before making the required disclosures). If a party expects full disclosure, that party needs to set forth the nature of the claim or defense with reasonable specificity. Specificity is not inconsistent with the requirement in C.R.C.P. 8 for a "short, plain statement" of a party's claims or defenses. Obviously, to the extent there is disclosure, discovery is unnecessary. Discovery is limited under this system.

FEDERAL COMMITTEE NOTES

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

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

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

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

2001 COLORADO CHANGES

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

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

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

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

2015

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

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

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

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

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

Changes to subsections (A) (persons with information) and (B) (documents) of Rule 26(a)(1) require information related to claims for relief and defenses (consistent with the scope of discovery in Rule 26(b)(1)). Also the identification of persons with relevant information calls for a "brief *description* of the *specific*information that each individual is known or believed to possess." Under the prior rule, disclosures of persons with discoverable information identifying "the subjects of information" tended to identify numerous persons with the identification of

"X is expected to have information about and may testify relating to the facts of this case." The change is designed to avoid that practice and obtain some better idea of which witnesses might actually have genuinely significant information.

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

"Other" (non-retained) experts must make disclosures that are less detailed. Many times a lawyer has no control over a non-retained expert, such as a treating physician or police officer, and thus the option of a "statement" must be preserved with respect to this type of expert, which, if necessary, may be prepared by the lawyers. In either event, the expert testimony is to be limited to what is disclosed in detail in the disclosure. Rule 26(a)(2)(B)(II).

[19] Retained or non-retained experts.Non-retained experts are persons whose opinions are formed or reasonably derived from or based on their occupational duties.

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

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

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

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

RECENT ANNOTATIONS

The 2015 amendment to section (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 C.R.C.P. 37(c) remains the proper framework for determining sanctions for discovery violations. Rule 37(c)(1) works in conjunction with this rule 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.

Plaintiff did not comply with this rule because he did not timely endorse expert witnesses withdrawn by the opposing party. Plaintiff also did not inform the court and opposing party that he would use experts' depositions at trial under C.R.C.P. 16(f)(3)(VI)(D). Sovde v. Scott, 2017 COA 90, 410 P.3d 778.

Trial court did not abuse its discretion in concluding that father was not prejudiced by inadequate disclosures under section (a) when father did not argue how he was prejudiced by the defects in the department's expert disclosures and all parties stipulated that all experts endorsed by any party were qualified as experts in their listed areas of expertise. People in Interest of S.L., 2017 COA 160, __ P.3d __ [published December 28, 2017].

ANNOTATION

I. GENERAL CONSIDERATION.

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

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

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

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

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

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

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

"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 C.R.C.P. 16 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 this rule and C.R.C.P. 16 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.

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

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

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

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

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

Since use of all discovery methods is sanctioned, the frequency of use of these methods should not be limited, unless there is a showing of good cause in the particular circumstances of the case. Sanchez v. District Court, 624 P.2d 1314 (Colo. 1981).

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

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

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

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

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

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

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

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

Board of assessment appeals erred in denying a board of equalization request for loan appraisals, because, even if such documents were not admissible in evidence at the board of assessment appeals hearing, they were discoverable under the broad standards applicable to district court discovery proceedings. FirstBank Longmont v. Boulder County Bd. of Equaliz., 990 P.2d 1109 (Colo. App. 1999).

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

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

Applied in Weissman v. District Court, 189 Colo. 497, 543 P.2d 519 (1975); Ricci v. Davis, 627 P.2d 1111 (Colo. 1981); Franco v. District Court, 641 P.2d 922 (Colo. 1982); Hadley v. Moffat County Sch. Dist. RE-1, 681 P.2d 938 (Colo. 1984); Leland v. Travelers Indem. Co. of Illinois, 712 P.2d 1060 (Colo. App. 1985); Watson v. Reg'l Transp. Dist., 762 P.2d 133 (Colo. 1988); Sunahara v. State Farm Mut. Auto. Ins. Co., 2012 CO 30M, 280 P.3d 649; Gonzales v. Windlan, 2014 COA 176, __ P.3d __.

II. METHODS.

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

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

The appropriate analysis in deciding whether to allow a destructive test as part of discovery where the owner of the object sought the testing was parallel to that involved in a conventional request for inspection under C.R.C.P. 34 and a resulting motion for a protective order under this rule. Cameron v. District Court, 193 Colo. 286, 565 P.2d 925 (1977).

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

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

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

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

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

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

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

III. SCOPE.

A. In General.

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

Scope of discovery is very broad. The information sought need only be relevant to the subject matter. It need not be admissible as long as it is reasonably calculated to lead to admissible evidence. Kerwin v. District Court, 649 P.2d 1086 (Colo. 1982); In re A.H. Robins Co., Inc., 681 P.2d 540 (Colo. App. 1984).

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

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

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

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

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

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

The plain language of section (b)(1) appears to create a two-tiered process of attorney-managed and court-managed discovery. Under the first tier, parties are permitted, as a matter of right, to seek discovery into any nonprivileged matter "relevant to the claim or defense of any party". Under the second tier, the court may permit

broader discovery into "any matter relevant to the subject matter involved in the action". However, this rule does not explain the difference between discovery relevant to a "claim or defense" and discovery relevant to the "subject matter". And, attempts to define the specific contours of this distinction may only encourage additional contention among litigants. DCP Midstream, LP v. Anadarko Petroleum Corp., 2013 CO 36, 303 P.3d 1187.

Therefore, when judicial intervention is invoked, the actual scope of discovery should be determined according to the reasonable needs of the action. This commonsense approach will help avoid the pitfalls of providing an analytical framework buttressed by a distinction that, in practice, is likely to have little meaning, while furthering the obligation to construe the rules liberally to give effect to their overriding purpose. DCP Midstream, LP v. Anadarko Petroleum Corp., 2013 CO 36, 303 P.3d 1187.

The purpose of the final sentence of section (b)(1) of this rule, which provides that "it is not ground for objection that testimony will be inadmissible at a trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence" is not to limit the scope of examination, but rather to enlarge it by eliminating the objection that the testimony sought would not be admissible at a trial. It is not intended to limit the preceding clause of this rule which conditions discovery to that which is "relevant to the subject matter involved in the pending action", so that it embraces only that testimony calculated to lead to the discovery of admissible evidence. Lucas v. District Court, 140 Colo. 510, 345 P.2d 1064 (1959).

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

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

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

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

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

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

Section (b) requires courts to take an active role managing discovery when a scope objection is raised. When faced with a scope objection, the trial court must determine the appropriate scope of discovery in light of the reasonable needs of the case and tailor discovery to those needs. DCP Midstream, LP v. Anadarko Petroleum Corp., 2013 CO 36, 303 P.3d 1187; In re Gromicko, 2017 CO 1, 387 P.3d 58.

To resolve a dispute regarding the proper scope of discovery in a particular case, the trial court should, at a minimum, consider the cost-benefit and proportionality factors set forth in section (b)(2)(F). When tailoring discovery, the factors relevant to a trial court's decision will vary depending on the circumstances of the case. DCP Midstream, LP v. Anadarko Petroleum Corp., 2013 CO 36, 303 P.3d 1187; In re Gromicko, 2017 CO 1, 387 P.3d 58.

Section (b)(2)(F) factors require active judicial management to prevent excessive discovery. DCP Midstream, LP v. Anadarko Petroleum Corp., 2013 CO 36, 303 P.3d 1187; In re Gromicko, 2017 CO 1, 387 P.3d 58.

Trial court did not take an active role in managing discovery because it did not determine the appropriate scope of discovery in light of the reasonable needs of the case, nor did it attempt to tailor discovery to those needs. DCP Midstream, LP v. Anadarko Petroleum Corp., 2013 CO 36, 303 P.3d 1187.

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

A refusal to answer interrogatories may be the basis of reversing a favorable judgment. Where the correctness of a ruling of a trial court denying the right to have a party answer interrogatories can be reviewed by writ of error, a party refusing to answer such interrogatories does so at his peril, since such refusal may be the basis

for reversal of a favorable judgment. Denver & Rio Grande W. R. R. v. District Court, 141 Colo. 208, 347 P.2d 495 (1959).

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

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

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

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

B. Materials.

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

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

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

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

The work-product privilege is perverted if it is used to further illegal activities, and there are no overpowering considerations that would justify the shielding of evidence that aids continuing or future criminal activity. Law Offices of Bernard D. Morley, P.C. v. MacFarlane, 647 P.2d 1215 (Colo. 1982).

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

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

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

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

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

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

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

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

Applicability of crime-fraud exception within trial court's discretion. Whether the prosecution has established a proper foundation in fact for the application of the crime-fraud exception is best left for determination by the trial court, whose exercise of discretion will not be overturned unless the record shows an abuse of that discretion. People v. Board, 656 P.2d 712 (Colo. App. 1982).

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

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

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

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

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

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

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

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

Petitioner may obtain discovery. Even if an insurance company demonstrates that the requested documents constitute trial preparation materials, a petitioner nevertheless may obtain discovery upon a showing of sub-

stantial need of the materials in the preparation of his case and an inability without undue hardship to obtain the substantial equivalent of the requested information by other means. Hawkins v. District Court, 638 P.2d 1372 (Colo. 1982).

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

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

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

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

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

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

C. Experts.

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

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

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

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

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

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

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

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

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

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

For discussion of proper scope of expert rebuttal disclosures under section (a)(2)(C)(III), see Warden v. Exempla, Inc., 2012 CO 74, 291 P.3d 30.

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

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

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

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

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

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

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

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

Trial court erred in striking expert's rebuttal testimony because the testimony specifically refuted defense expert's theory of causation and therefore constituted a proper rebuttal disclosure under section (a)(2)(C)(III). Warden v. Exempla, Inc., 2012 CO 74, 291 P.3d 30.

Failure to produce a timely formal written report that contains the qualifications of the expert witness and a complete statement describing the substance of all opinions to be expressed does not result in prejudice to

defendant when defendant was aware of all the information summarized in the report long before the trial. Saturn Sys., Inc. v. Militare, 252 P.3d 516 (Colo. App. 2011).

Plaintiff's counsel abandoned any objection to testimony of expert witness based on a failure to timely produce expert's report and therefore waived the issue for appellate review. Vanderpool v. Loftness, 2012 COA 115M, 300 P.3d 953.

D. Other Illustrative Cases.

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

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

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

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

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

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

Tripartite balancing inquiry undertaken when right to confidentiality is invoked. When the right to confidentiality is invoked to prevent disclosure of personal materials or information, a tripartite balancing inquiry must be undertaken by the court, as follows: (1) Does the party seeking to come within the protection of the right to confidentiality have a legitimate expectation that the materials or information will not be disclosed? (2) is disclosure nonetheless required to serve a compelling state interest? and (3) if so, will the necessary disclosure occur in that

manner which is least intrusive with respect to the right to confidentiality? Martinelli v. District Court, 199 Colo. 163, 612 P.2d 1083 (1980); Corbetta v. Albertson's, Inc., 975 P.2d 718 (Colo. 1999).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Blood donor's privacy interest in remaining anonymous to avoid embarrassment and humiliation associated with being identified as a carrier of the AIDS virus does not outweigh the recipient's interest in seeking information necessary to adequately pursue a claim. Nor does societal interest in maintaining abundant supply of volunteer blood outweigh society's interest in assuring that such blood is free from contamination. Belle Bonfils Mem'l Blood Ctr. v. District Court, 763 P.2d 1003 (Colo. 1988).

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

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

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

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

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

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

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

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

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

By binding plaintiff to the damage computations listed in plaintiff's initial disclosure statement merely because plaintiff did not designate the computations as estimates, the trial court effectively imposed a settlement on plaintiff and improperly involved the court in the settlement process. The trial court overemphasized plaintiff's failure to state that the initial disclosure of damages was an estimate, neglected to view the initial disclosures in the context of being information "now known and reasonably available," and was

insufficiently attentive to the importance of an early exchange of information and the resulting need to update information under this rule. Absent some indication plaintiff tried to mislead the defendants or the court in plaintiff's initial disclosure or tried to frustrate the settlement process, plaintiff not required to accept an offer limited to plaintiff's initial disclosures. By granting the defendants' joint motion for judgment for a specific amount of damages over the objection of plaintiff, the court abused its discretion. Morgan v. Genesee Co., 86 P.3d 388 (Colo. 2004).

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

IV. PROTECTIVE ORDERS.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Financially stressed nonresident need not incur unnecessarily expense of cross-country trip to take his deposition. Where one desires in good faith the deposition of a party living in another state before trial, he should have it, but not at a time or place involving the expense of a cross-country trip when it is shown that the nonresident party is without funds for the expense of such journey and a deposition taken shortly before the trial, which the nonresident party agrees to, will adequately serve the ends of justice. Manning v. Manning, 136 Colo. 380, 317 P.2d 329 (1957).

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

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

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

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

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

A court when confronted with a petition for writ of habeas corpus which establishes a prima facie case for relief may authorize the use of suitable discovery procedures reasonably fashioned to elicit facts neces-

sary to help the court dispose of the matter as law and justice may require. Hithe v. Nelson, 172 Colo. 179, 471 P.2d 596 (1970).

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

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

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

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

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

V. SUPPLEMENTATION.

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

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

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

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

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

Rule 26.1. Special Provisions Regarding Limited and Simplified Discovery

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

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

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

Rule 26.3. Limited Monetary Claim Actions

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

Rule 27. Depositions Before Action or Pending Appeal

(a) Before Action.

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

Such notice shall state the title of the proceeding, including the court and county in which it is pending, the time and place of the examination and either a brief outline of the facts expected to be proved or a description of the property to be affected by such testimony. Any notice heretofore given which contains the above required matters shall be deemed sufficient. Any personal service required by the provisions hereof shall be made at least 14 days before the testimony is taken. If any person named in the petition as an expected adverse party is stated in any paper filed in such proceeding to be an infant or incompetent person, the provisions of Rule 17(c) apply, but no guardian ad litem need be appointed for any expected adverse party whose name is unknown.

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

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

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

(b) After Judgment or After Appeal. If an appeal of a judgment is pending, or, if none is pending, then at any time within 35 days from the entry of such judgment, the court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in such court. In such case the party who desires to perpetuate the testimony may make a motion in such court for leave to take the depositions, upon the same notice and service thereof as if the action were pending in such court. The motion shall show: (1) The names and addresses of the persons to be examined and the substance of the testimony, so far as known, which he expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in trial courts.

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