CHAPTER 3

PARTIES

Rule 17. Parties Plaintiff and Defendant; Capacity

(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, conservator, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute so provides, an action for the use or benefit of another shall be brought in the name of the people of the state of Colorado.

(b) Capacity to Sue or Be Sued. A partnership or other unincorporated association may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right. A father and mother or the sole surviving parent may maintain an action for the injury or death of a child; where both maintain the action, each shall have an equal interest in the judgment; where one has deserted or refuses to sue, the other may maintain the action. A guardian may maintain an action for the injury or death of his ward.

(c) Infants or Incompetent Persons. Whenever an infant or incompetent person has a representative, such as a general guardian, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative, or such representative fails to act, he may sue by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person, provided, that in an action in rem it shall not be necessary to appoint a guardian ad litem for any unknown person who might be an infant or incompetent person.

Source: (b) amended and effective January 12, 2017.

Cross references: For competence of persons eighteen years of age or older to sue and be sued, see § 13-22-101(1)(c), C.R.S.; for rights of married women, see part 2 of article 2 of title 14, C.R.S.; for service of process on minors, see C.R.C.P. 4(e)(2); for guardians of minors and guardians of incapacitated persons, see parts 2 and 3 of article 14 of title 15, C.R.S.

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I. GENERAL CONSIDERATION.

Law reviews. For article, "Damages Recoverable for Injuries to A Spouse in Colorado", see 28 Dicta 291 (1951). For article, "Pleadings, Rules 7 to 25", see 28 Dicta 368 (1951). For article, "Parties: Rules 17-25", see 23 Rocky Mt. L. Rev. 552 (1951). For article, "One Year Review of Civil Procedure and Appeals", see 40 Den. L. Ctr. J. 66 (1963).

This rule is procedural, providing how a legally constituted entity may bring its action.

Hidden Lake Dev. Co. v. District Court, 183 Colo. 168, 515 P.2d 632 (1973).

II. REAL PARTY IN INTEREST.

A. In General.

Annotator's note. Since section (a) of this rule is similar to §§ 3 and 5 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing those sections have been included in the annotations to this rule.

This rule is identical to F.R.C.P. 17(a). Hoeppner Constr. Co. v. United States, 287 F.2d 108 (10th Cir. 1960).

This rule provides that every action shall be prosecuted in the name of the real party in interest. Nat'l Advertising Co. v. Sayers, 144 Colo. 356, 356 P.2d 483 (1960); Elk-Rifle Water Co. v. Templeton, 173 Colo. 438, 484 P.2d 1211 (1971).

The function of the real-party-in-interest rule is to ensure a proper res judicata effect by protecting the defendant against a subsequent suit by the person who is actually entitled to recover. Ajay Sports, Inc. v. Casazza, 1 P.3d 267 (Colo. App. 2000).

Standing is a jurisdictional prerequisite that requires a named plaintiff to bring suit only to protect a cognizable interest, and a plaintiff has standing if he or she has an injury in fact and that injury is to a legally protected interest. Durdin v. Cheyenne Mountain Bank, 98 P.3d 899 (Colo. App. 2004).

Argument may be waived, as where defendant asserts it in the answer but omits it from a pretrial motion to dismiss for failure to state a claim on which relief may be granted. Ajay Sports, Inc. v. Casazza, 1 P.3d 267 (Colo. App. 2000).

Constitutional questions may only be raised by a party whose interests are in fact affected by a challenged legislative act. Garcia v. City of Pueblo, 176 Colo. 96, 489 P.2d 200 (1971).

Where a decision of a court as to validity of the ordinance cannot result in further proceedings against a petitioner, he has no standing to prosecute appellate proceedings beyond the court where his acquittal occurred. Garcia v. City of Pueblo, 176 Colo. 96, 489 P.2d 200 (1971).

Substitution of real party in interest not filing of new cause. The substitution of an insurer for an insured, as party plaintiff, does not constitute the filing of a new cause of action, and the substituted party benefits from the filing date of the original complaint and is not barred by the statute of limitations if the original complaint was timely filed. Travelers Ins. Co. v. Gasper, 630 P.2d 97 (Colo. App. 1981).

People of state should not be named as party when individual is party in interest. People ex rel. Garrison v. Lamm, 622 P.2d 87 (Colo. App. 1980).

The "real parties in interest" must follow the proceedings throughout, and, if not satisfied, must present the judgment of which complaint is made for review. Gates v. Hepp, 95 Colo. 285, 35 P.2d 857 (1934).

Assignee of original real party in interest must prove its status as an assignee. Alpine Assocs., Inc. v. KP & R, Inc., 802 P.2d 1119 (Colo. App. 1990).

Applied in Williams v. Genesee Dev. Co. No. 2, 759 P.2d 823 (Colo. App. 1988).

B. Who Is Real Party in Interest.

Effect of this rule is to put end to action of ejectment. The fiction by which "John Doe" and "Richard Roe" were made to represent the plaintiff and defendant, respectively, in an action of ejectment of common law permitted any number of actions of this character to be maintained between the same parties in interest after verdict and judgment. The litigation terminated only when the unsuccessful party tired of his futile efforts, or when a court of equity, after repeated trials at law resulting in like verdicts and judgments, enjoined the unsuccessful party from harrassing, by future actions in ejectment, him who had recovered these judgments. The effect of this rule, which requires actions to be prosecuted in the name of the real party in interest, is to put an end to this practice. Under the section, standing alone, the first verdict and judgment in ejectment, as in other cases, unless it was set aside or vacated for cause, would be conclusive of the rights of the parties, that were, or might have been, there litigated. Iron Silver Mining Co. v. Campbell, 61 F. 932 (8th Cir. 1894).

Suits should be prosecuted under name of mortgagee under loss-payable clause. Where actions are required to be prosecuted in the name of the real party in interest, suits should be prosecuted in the name of the mortgagee as the person appointed to receive the amount of the loss under a policy containing a loss-payable clause, regardless of contract relations between the mortgagee and the insurer, where the amount of the mortgage equals or exceeds the loss. Reed Auto Sales v. Empire Delivery Serv., 127 Colo. 205, 254 P.2d 1018 (1953).

One who holds legal title is the real party in interest. Bassett v. Inman, 7 Colo. 270, 3 P. 383 (1883); Gomer v. Stockdale, 5 Colo. App. 489, 39 P. 355 (1895); Koch v. Story, 47 Colo. 335, 107 P. 1093 (1910); Am. Sur. Co. v. Scott, 63 F.2d 961 (10th Cir. 1933).

Real party in interest is the person or entity who holds legal title in the note sought to be enforced. Platte Valley Sav. v. Crall, 821 P.2d 305 (Colo. App. 1991); Platte Valley Mortg.

Corp. v. Bickett, 916 P.2d 631 (Colo. App. 1996).

Real party in interest is the party who, by virtue of the substantive law, has the right to invoke the aid of the court to vindicate the legal interest in question. Ogunwo v. Am. Nat'l Ins. Co., 936 P.2d 606 (Colo. App. 1997); Summers v. Perkins, 81 P.3d 1141 (Colo. App. 2003).

Parties are not real parties in interest because they are not aggrieved in a legal sense. Acad. of Charter Schs. v. Adams Cty. Sch. Dist. No. 12, 994 P.2d 442 (Colo. App. 1999), rev'd on other grounds, 32 P.3d 456 (Colo. 2001).

Association lacked standing where the association was not a party to the charter contract. Acad. of Charter Schs. v. Adams Cty. Sch. Dist. No. 12, 32 P.3d 456 (Colo. 2001).

Partial assignor is a real party in interest. A party who has made a partial assignment of a note for security purpose is a partial assignor, retains part of his substantive right and is a real party in interest under section (a) of this rule. Jouflas v. Wyatt, 646 P.2d 946 (Colo. App. 1982).

Purchaser of land may sue for accrued rents and profits. While it may be proper for a vendor of land to bring suit against the disseizor, in order that he may be able to deliver possession to the purchaser, yet, after the recovery in such action, it is entirely proper for the purchaser to sue in his own name for the rents and profits which accrued pending the former action, since he is the real party in interest. Limberg v. Higenbotham, 11 Colo. 156, 17 P. 481 (1887).

An assignee of claim may bring action in his own name. That an entire claim for damages to property may be assigned so as to vest in the assignee the right of action in his own name, is well established for the general rule is that assignability and descendibility go hand in hand. Home Ins. Co. v. Atchison, T. & S. F. R. R., 19 Colo. 46, 34 P. 281 (1893); Hoeppner Constr. Co. v. United States, 287 F.2d 108 (10th Cir. 1960); Thistle, Inc. v. Tenneco, Inc., 872 P.2d 1302 (Colo. App. 1993).

Whether it be an open account or otherwise, see Bassett v. Inman, 7 Colo. 270, 3 P. 383 (1883); Gomer v. Stockdale, 5 Colo. App. 489, 39 P. 355 (1895).

There may be annexed to the transfer a condition that when the sum is collected the whole or some part of it must be paid over to the assignor. Bassett v. Inman, 7 Colo. 270, 3 P. 383 (1883); Gomer v. Stockdale, 5 Colo. App. 489, 39 P. 355 (1895).

Almost any surviving right of action may be assigned so as to enable the assignee to maintain a suit in his own name. Reddicker v. Lavinsky, 3 Colo. App. 159, 32 P. 349 (1893).

Assignment of a claim after suit is filed but before trial is sufficient to make plaintiff a real party in interest. Thistle, Inc. v. Tenneco, Inc., 872 P.2d 1302 (Colo. App. 1993); Platte Valley Mortg. Corp. v. Bickett, 916 P.2d 631 (Colo. App. 1996).

A plaintiff not having standing at the outset of litigation may acquire standing after an objection is raised and the standing later acquired relates back to the commencement of the proceedings. Miller v. Accelerated Bureau of Collections, Inc., 932 P.2d 824 (Colo. App. 1996).

Generally, if a claim has been assigned in full, the assignee is the real party in interest with a right to pursue an action thereon; however, a partial assignor retains part of his or her substantive right and is a real party in interest under section (a). In re Cespedes, 895 P.2d 1172 (Colo. App. 1995).

Intangible property assignment. Assignment of all of an owner's right, title, and interest to intangible personal property includes an assignment of any agreements regarding the property to the extent the agreement benefits the transferee, and the transferee is the real party in interest to pursue its contract violation claims and related tort claims. Thistle, Inc. v. Tenneco, Inc., 872 P.2d 1302 (Colo. App. 1993).

Notice to, knowledge of, or acquiescence by the real party in interest in an action does not confer standing on the plaintiff. The stipulation entered into between the plaintiffs and the bankruptcy trustee deals only with the relationship between the plaintiffs and the trustee and does not confer standing on the plaintiffs. Miller v. Accelerated Bureau of Collections, Inc., 932 P.2d 824 (Colo. App. 1996).

A claim asserted by a grantee of lands against the grantor for moneys paid to relieve them of taxes for which the grantor was liable may be effectually assigned so as to give the assignee an action in his own name. Rambo v. Armstrong, 45 Colo. 124, 100 P. 586 (1909).

As legal title to a note is in one by reason of assignment, an action will lie in his name. Walsh v. Allen, 6 Colo. App. 303, 40 P. 473 (1895); Best v. Rocky Mt. Nat'l Bank, 37 Colo. 149, 85 P. 1124 (1906).

Where, after the execution and delivery of a promissory note, a person other than the payee and not otherwise connected with the note, for a new and sufficient consideration receives by himself from the payee promises to pay the note and thereupon indorses the same, he thereby makes the debt his own, and such debt is assignable so as to vest in the assignee a right of action in his own name. Fisk v. Reser, 19 Colo. 88, 34 P. 572 (1893); Gates v. Hepp, 95 Colo. 285, 35 P.2d 857 (1934).

An assignee of a valid mechanic's lien has a right to recover, and in an action to foreclose is the real party in interest. Howard v. Fisher, 86 Colo. 493, 283 P. 1042 (1929).

"Surviving" partner of dissolved partnership may sue on account due. Where a part-

nership has, in fact, been dissolved when suit is brought and plaintiff, through a settlement between himself and his copartner, including his purchase of the partnership property, has become the exclusive owner of an account sued on, he is therefore the only party really interested in collecting the balance due; hence, under this rule the action is properly brought in his name alone. Bassett v. Inman, 7 Colo. 270, 3 P. 383 (1883).

Partner in a general partnership is a real party in interest. Erickson v. Oberlohr, 749 P.2d 996 (Colo. App. 1987).

Even though a contract involved is entered into for the ultimate benefit of plaintiff's parent corporation, plaintiff is real party in interest entitled to bring the action without joining its parent corporation. P & M Vending Co. v. Half Shell of Boston, Inc., 41 Colo. App. 78, 579 P.2d 93 (1978).

Contrary common-law rule no longer applies. The common-law principle that an action for a partnership debt, whether instituted before or after dissolution of the firm, must be prosecuted in the name of all the partners, does not, under the present practice apply. Walker v. Steel, 9 Colo. 388, 12 P. 423 (1886).

Partner in whose name contract was made may sue in own name. In action for breach of contract where plaintiff has partners and the profits will be split, but he has the sole handling of the matter everything is in his name and defendant makes no attempt to have other parties joined, plaintiff has the capacity to sue in his own name. Monks v. Hemphill, 121 Colo. 1, 212 P.2d 1004 (1949).

Action on bond of county treasurer should be in his name. Since a bond taken by a county treasurer as security for county money deposited by him in a bank, running to him as treasurer, is a bond for his own safety and not for the benefit of the county, he is the real party in interest therein and the one in whose name an action thereon should be brought. Moulton v. McLean, 5 Colo. App. 454, 39 P. 78 (1895).

Action on injunction bond personal right of treasurer. Where an injunction against a county treasurer was dissolved, a right of action upon the injunction bond is a personal right of the treasurer, and he might maintain a personal action upon the bond after his term of office has expired. He is the proper party to maintain such action, and the fact that the county may have paid the expenses of resisting the injunction and would be entitled to receive the amount of damages recovered when collected, is immaterial to the obligors in the bond. Breeze v. Haley, 13 Colo. App. 438, 59 P. 333 (1899).

It is not necessary to appoint administrator to prosecute action upon appeal bond, but that action could be prosecuted by devisee in own name. Austin v. Snider, 17 Colo. App. 182, 68 P. 125 (1902).

Party was properly dismissed based upon holding that an employer or business may not recover against a third party for economic losses it suffered as a result of the third party's tortious injury to its employee. Gonzalez v. Yancey, 939 P.2d 525 (Colo. App. 1997).

For the right of a bank commissioner to bring action against bank stockholders, see Broadbent v. McFerson, 80 Colo. 264, 250 P. 852 (1926).

Applied in Baumgarten v. Burt, 148 Colo. 64, 365 P.2d 681 (1961); Valley Realty & Inv. Co. v. McMillan, 160 Colo. 109, 414 P.2d 486 (1966); Hollingsworth v. Satterwhite, 723 P.2d 169 (Colo. App. 1986).

C. Action by Executor or Trustee or in Contract.

A non-attorney trustee may not proceed pro se on behalf of a trust in a litigation matter. Application for Water Rights of Town of Minturn, 2015 CO 61, 359 P.3d 29.

A trustee may at his option sue in his own name or may join his "cestuis que" trust. Hecker v. Cook, 20 Colo. App. 282, 78 P. 311 (1904); Faust v. Goodnow, 4 Colo. App. 352, 36 P. 71 (1906).

Under this rule, a trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought. Elk-Rifle Water Co. v. Templeton, 173 Colo. 438, 484 P.2d 1211 (1971).

The judgment in an action by either will bar a subsequent action by the other. Hecker v. Cook, 20 Colo. App. 282, 78 P. 311 (1904).

It is not necessary that a trustee set forth the trust. The trustee of an express trust in real property may maintain an action to restrain irreparable injury thereto, without setting forth the nature of the trust, the name of the beneficiary, or his character as trustee. An averment of his trust capacity may be treated as surplusage. Koch v. Story, 47 Colo. 335, 107 P. 1093 (1911); Elk-Rifle Water Co. v. Templeton, 173 Colo. 438, 484 P.2d 1211 (1971).

Where the official bond of an officer in a fraternal society runs to the trustees of the society under the name the society bore prior to incorporation, such trustees can maintain an action in their own names on the bond for a default therein without making the society a party thereto, although at the time of the execution of the bond and the bringing of the action the society was incorporated under a slightly different name from that it bore prior to incorporation. Hecker v. Cook, 20 Colo. App. 282, 78 P. 311 (1904).

An averment of trust capacity may be treated as surplusage. Koch v. Story, 47 Colo. 335, 107 P. 1093 (1911).

The trustee of an express trust is authorized to maintain an action. Hardy v. Swigart, 25 Colo. 136, 53 P. 380 (1898); Houck v. Williams, 34 Colo. 138, 81 P. 800 (1905).

Cashier of bank who contracts may become the trustee of an express trust. The cashier of an unincorporated bank, who is also a partner, who is alone authorized to transact all the business, and in whose name contracts are habitually made for the bank may become by virtue of such a contract the trustee of an express trust and may sue thereon in his own name. Merchants' Bank v. McClelland, 9 Colo. 608, 13 P. 723 (1886).

A suit on contract is properly brought in the name of the contractor. City & County of Denver v. Morrison, 88 Colo. 67, 291 P. 1023 (1930).

A person with whom or in whose name a contract has been made for the benefit of another may maintain an action thereon in his own name. Rockwell v. Holcomb, 3 Colo. App. 1, 31 P. 944 (1892).

Although others are interested in the contract, it is not necessary that they should be made parties. City & County of Denver v. Morrison, 88 Colo. 67, 291 P. 1023 (1930).

In an action by a bank to collect certain money which it had been expressly authorized to collect by one to whom the money was owing, the suit need not be brought in the name of the beneficial owner, for the suit could be maintained in the name of the trustee. First Nat'l Bank v. Hummel, 14 Colo. 259, 23 P. 986 (1890).

Where a contract is made for the benefit of a third person, the latter may bring an action thereon. Haldane v. Potter, 94 Colo. 558, 31 P.2d 709 (1934).

There is nothing to prevent real party from becoming litigant. While one who has made a contract for the benefit of another can prosecute an action in his own name, there is nothing to prevent the real party in interest from becoming the actual litigant. Gates v. Hepp, 95 Colo. 285, 35 P.2d 857 (1934).

When, as a matter of fact, the beneficiary becomes an actual party to the action, the latter, in respect to the primary right, supersedes the former, whereupon the judgment entered must be in favor of the beneficiary if he succeeds or against him if he fails. Gates v. Hepp, 95 Colo. 285, 35 P.2d 857 (1934).

An action may be brought by a bank on a promissory note given in renewal of a similar note made payable to it, although the renewal note mistakenly is made payable to the president of the bank, who turns it over to the bank as its property, the latter retaining it in possession at all times, notwithstanding section (a) of this rule which provides that one in whose name a contract is made for the benefit of another may sue without joining the person beneficially interested. Best v. Rocky Mt. Nat'l Bank, 37 Colo. 149, 85 P. 1124 (1906).

If a person has the right to sue, no error can be based on a proceeding under this rule. Rockwell v. Holcomb, 3 Colo. App. 1, 31 P. 944 (1892).

If defendants imagined it to be necessary for their protection that the beneficiary should be brought into the suit, doubtless they might procure an order for the purpose, but, having taken no action in the trial court, they cannot be held on appeal to assign error concerning it. Faust v. Goodnow, 4 Colo. App. 352, 36 P. 71 (1894).

Estate beneficiaries are not indispensable parties to a partition action commenced by the personal representative, where the personal representative is acting on behalf of all the estate beneficiaries to segregate their collective interests in the real property to be partitioned, so that he can perform his statutory duty to settle and distribute the estate expeditiously and efficiently. Fry & Co. v. District Court, 653 P.2d 1135 (Colo. 1982).

III. CAPACITY TO SUE OR BE SUED.

A. In General.

Annotator's note. Since section (b) of this rule is similar to §§ 6 and 9 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing §§ 6 and 9 have been included in the annotations to this rule.

Actions may be brought only by legal entities and against legal entities. Ivanhoe Grand Lodge A.F. & A.M. v. Most Worshipful Grand Lodge A.F. & A.M., 126 Colo. 515, 251 P.2d 1085 (1952).

There must be some ascertainable persons, natural or artificial, to whom judgments are awarded and against whom they may be enforced. Ivanhoe Grand Lodge A.F. & A.M. v. Most Worshipful Grand Lodge A.F. & A.M., 126 Colo. 515, 251 P.2d 1085 (1952).

A voluntary condominium association has standing and may maintain an action on behalf of its members if: (1) Its members would otherwise have standing to sue in their own right; (2) the interests sought to be protected are germane to the association's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the litigation. Villa Sierra Condominium v. Field Corp., 787 P.2d 661 (Colo. App. 1990).

This rule does not grant the right to sue to a loosely formed group. Hidden Lake Dev. Co. v. District Court, 183 Colo. 168, 515 P.2d 632 (1973).

B. Married Women.

That section (b) relates to procedure and does not confer a substantive right is an objection that cannot be urged successfully against § 6 of art. II, Colo. Const. Rains v. Rains, 97 Colo. 19, 46 P.2d 740 (1935).

If the common-law fiction of unity ever existed in this state, it does not exist now. Whyman v. Johnston, 62 Colo. 461, 163 P. 76 (1917); Hedlund v. Hedlund, 87 Colo. 607, 290 P. 285 (1930); Rains v. Rains, 97 Colo. 19, 46 P.2d 740 (1935).

A married woman may sue and be sued in all matters, including contract. A married woman may in this state enter into any contract, express or implied, the same as if she were sole; she may, in like manner, be held liable thereon; and in civil actions, she may sue and be sued in all matters the same as if she were sole. Rose v. Otis, 18 Colo. 59, 31 P. 493 (1892); Thompson v. Thompson, 30 Colo. App. 57, 489 P.2d 1062 (1971).

A married woman may sue husband for personal injuries caused by his negligence. In view of the broad, liberal provisions of the constitution and statutes of this state and the liberal construction thereof adopted by the courts of this state, a wife may sue her husband for personal injuries caused by the negligence of her husband. Rains v. Rains, 97 Colo. 19, 46 P.2d 740 (1935).

C. Partnerships or Unincorporated Associations.

At common law, an unincorporated association of persons had no capacity to sue or be sued in any character other than as partners in whatever was done, and it was necessary for such an association to sue or defend in the names of its members, and liability had to be enforced against each member. Thomas v. Dunne, 131 Colo. 20, 279 P.2d 427 (1955).

Necessities dictated otherwise. The growth of large unincorporated associations of many different kinds, and the necessities arising therefrom, at an early date called for legal recognition of such associations as entities possessed of capacity to sue, and be sued, in their common name. Thomas v. Dunne, 131 Colo. 20, 279 P.2d 427 (1955).

This rule purports to create a new right not theretofore recognized in the law and authorizes the bringing of an action in the common name of an unincorporated association. Thomas v. Dunne, 131 Colo. 20, 279 P.2d 427 (1955).

Section (b) is permissive and not mandatory. A partnership or a limited partnership may sue or be sued either in its common name or by naming its partners. Frazier v. Carlin, 42 Colo. App. 226, 591 P.2d 1348 (1979).

Section (b) must be viewed as either creating an entity or permitting existing ones to sue. Section (b) of this rule must be held either to create an artificial entity of a partnership or unincorporated association or to permit existing entities to bring suit in an artificial name. Ivanhoe Grand Lodge A.F. & A.M. v. Most Worshipful Grand Lodge A.F. & A.M., 126 Colo. 515, 251 P.2d 1085 (1952).

If this rule is held to be one creating a legal entity capable of suing or being sued, it is performing a legislative, rather than a judicial function, and the rule would therefore, be beyond the power of the court. Ivanhoe Grand Lodge A.F. & A.M. v. Most Worshipful Grand Lodge A.F. & A.M., 126 Colo. 515, 251 P.2d 1085 (1952).

If an existing entity is permitted to sue under a common or artificial name, then, upon challenge by defendant, the plaintiff must disclose the identity of the parties so doing; and if defendant seeks affirmative relief in excess of the property or rights owned, held, possessed, or exercised by the partnership or unincorporated association itself, then the ascertained legal entities must be properly served with process and be made parties to the action. Ivanhoe Grand Lodge A.F. & A.M. v. Most Worshipful Grand Lodge A.F. & A.M., 126 Colo. 515, 251 P.2d 1085 (1952).

Status of an unincorporated association to sue must be founded on more than a bold allegation, and to sue as an unincorporated association in name only is insufficient. Hidden Lake Dev. Co. v. District Court, 183 Colo. 168, 515 P.2d 632 (1973).

D. Injury or Death of Child.

While a father and mother may join in a damage suit, it is not essential that they should so join. Pierce v. Conners, 20 Colo. 178, 37 P. 721 (1894).

The joining of the father and mother is permissive. The joining of the father and mother appears to be permissive, not imperative. Pierce v. Conners, 20 Colo. 178, 37 P. 721 (1894).

Joinder or nonjoinder material only to parents themselves. The joinder or nonjoinder of a parent in an action for damages is material only to the parents themselves. Pierce v. Conners, 20 Colo. 178, 37 P. 721 (1894).

Since either or both may sue, the defendant cannot be affected or prejudiced whichever course they may take; the grounds and measure of recovery are the same in either case, and the defendant can only be subjected to a

single suit. Pierce v. Conners, 20 Colo. 178, 37 P. 721 (1894).

IV. INFANTS OR INCOMPETENT PERSONS.

A. In General.

Law reviews. For article, "Legal Capacity of Adjudged Incompetents", see 29 Dicta 292 (1952).

Annotator's note. Since section (c) of this rule is similar to § 7 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

Quasi-judicial immunity. A court appointed guardian ad litem in service of the public interest in the welfare of children is entitled to absolute quasi-judicial immunity. Short by Ossterhous v. Short, 730 F. Supp. 1307 (D. Colo. 1990).

Applied in Welsh v. Independent Lumber Co., 110 Colo. 280, 133 P.2d 535 (1943).

B. Sue or Defend.

Where an infant is a party to a suit, he must appear by next friend or guardian to be appointed by the court or judge. Seaton v. Tohill, 11 Colo. App. 211, 53 P. 170 (1898).

He is in reality, however, but the agent of the court through whom it acts to protect the interest of the minor. Seaton v. Tohill, 11 Colo. App. 211, 53 P. 170 (1898).

The court is itself the guardian. Seaton v. Tohill, 11 Colo. App. 211, 53 P. 170 (1898).

The court will suffer no advantage to be taken of those acting in the infant's behalf to the detriment of the infant. Seaton v. Tohill, 11 Colo. App. 211, 53 P. 170 (1898).

If a next friend does not perform properly, the court could and should remove her, and, if appropriate, could appoint a successor. The court should not allow the next friend's conduct to deprive the infant of his rights. Black ex rel. Bayless v. Cullar, 665 P.2d 1029 (Colo. App. 1983).

Next friend may assist child in suit to enforce support obligation of parent. When a noncustodial parent's child support obligation is incorporated into a dissolution decree, and the custodial parent dies and the child is not in the physical custody of the noncustodial parent, the child support obligation of the noncustodial parent continues beyond the death of the custodial parent in accordance with the terms of the dissolution decree, and such obligation of the parent can be enforced through a suit on behalf of the child by a next friend. Abrams v. Connolly, 781 P.2d 651 (Colo. 1989).

Son may bring action on behalf of his incompetent father by proceeding as his next friend although son had not been appointed guardian. Delsas ex rel. Delsas v. Centex Home Equity, 186 P.3d 141 (Colo. App. 2008).

An infant cannot be bound by the admissions of his guardian unless they are for his benefit. Seaton v. Tohill, 11 Colo. App. 211, 53 P. 170 (1898).

An infant cannot be bound by guardian's errors or omissions in his answers or pleadings. Seaton v. Tohill, 11 Colo. App. 211, 53 P. 170 (1898).

It is the policy of the law to fully protect the rights of minors, and this may be done, even if the guardian or "prochein ami" does not properly claim such rights or has even failed to claim them at all. Hutchison v. McLaughlin, 15 Colo. 492, 25 P. 317 (1890); Seaton v. Tohill, 11 Colo. App. 211, 53 P. 170 (1898).

Presence of both parents at an administrative hearing concerning a minor is not required, thus administrative law judge's order of sequestration that included minor's father, since he was a witness, was not error. M.G. v. Colo. Dept. of Human Servs., 12 P.3d 815 (Colo. App. 2000).

C. Appointment of Guardian.

This rule does not make the appointment of a guardian "ad litem" mandatory. Johnson v. Lambotte, 147 Colo. 203, 363 P.2d 165 (1961).

Where a mental incompetent is "otherwise represented" by well qualified lawyers of long experience at the bar, the appointment of a guardian "ad litem" is not necessary. Johnson v. Lambotte, 147 Colo. 203, 363 P.2d 165 (1961).

The appointment of a guardian ad litem is a matter left to the discretion of the court if the adult incompetent is already represented by an attorney. People in Interest of M.M., 726 P.2d 1108 (Colo. 1986).

"Incompetent person" includes those who are mentally impaired to the degree of being incapable of effectively participating in a proceeding and thus need the assistance of a fiduciary representative. People in Interest of M.M., 726 P.2d 1108 (Colo. 1986).

When a substantial question exists regarding the mental competence of a spouse in a domestic relations proceeding, the preferred procedure is for the trial court to conduct a hearing to determine whether or not the spouse is competent, so that a guardian ad litem may be appointed if needed. In re Sorensen, 166 P.3d 254 (Colo. App. 2007).

It would be an abuse of discretion not to appoint a guardian ad litem in those situations in which the spouse (1) is mentally impaired so as to be incapable of understanding the nature and significance of the proceeding;

(2) is incapable of making critical decisions; (3) lacks the intellectual capacity to communicate with counsel; or (4) is mentally or emotionally incapable of weighing the advice of counsel on the particular course to pursue in his or her own interest. In re Sorensen, 166 P.3d 254 (Colo. App. 2007).

No error in trial court's determination that it had not automatically lost jurisdiction to enter an award for payment of guardian ad litem fees by husband upon wife's death; in contrast to an order pertaining to custody, parenting time, property division, or attorney fees under the Uniform Dissolution of Marriage Act, trial court's authority to appoint a guardian ad litem and to order payment of the guardian's fees was not dependent upon the fact that the case at hand was a dissolution of marriage proceeding. In re Heil, 33 P.3d 1270 (Colo. App. 2001).

Rule 18. Joinder of Claims and Remedies

(a) Joinder of Claims. A party asserting a claim to relief as an original claim, counterclaim, cross claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal or equitable, as he has against an opposing party.

(b) Joinder of Remedies; Fraudulent Conveyances. Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money.

ANNOTATION

I. General Consideration.
II. Joinder of Claims.
III. Joinder of Remedies.

I. GENERAL CONSIDERATION.

Law reviews. For article, "A Victim of 'Permissive Counterclaims'", see 18 Dicta 83 (1941). For article, "Parties: Rules 17-25", see 23 Rocky Mt. L. Rev. 552 (1951). For article, "Pleadings, Rules 7 to 25", see 28 Dicta 368 (1951). For article, "One Year Review of Civil Procedure", see 34 Dicta 69 (1957).

II. JOINDER OF CLAIMS.

Law reviews. For article, "Direct Action Against the Liability Insurer Under the Rules of Civil Procedure", see 22 Dicta 314 (1945). For comment on Crowley v. Hardman Bros. appearing below, see 23 Rocky Mt. L. Rev. 366 (1951). For article, "Joinder of Claims and Counterclaims in Cases Under the Uniform Dissolution of Marriage Act", see 15 Colo. Law. 1818 (1986).

At common law, legal and equitable causes of action could not be joined. Colo. High Sch. Activities Ass'n v. Uncompahgre Broadcasting Co., 134 Colo. 131, 300 P.2d 968 (1956).

Under this rule, however, either a plaintiff or defendant may join, either as independent or as alternate claims, as many claims either legal or equitable or both as he may have against an opposing party. Colo. High Sch. Activities Ass'n v. Uncompahgre Broadcasting Co., 134 Colo. 131, 300 P.2d 968 (1956).

Joinder of claims allowed if the requirements of C.R.C.P. 20 are met. Section (a) of this rule allows the joinder of as many claims as a plaintiff has when there are multiple parties, if the requirements of C.R.C.P. 20 are met. Twin Lakes Reservoir & Canal Co. v. Bond, 156 Colo. 433, 399 P.2d 793 (1965).

Where claims involve the same series of transactions and common questions of fact and law, the claims met the test for joinder as laid down in section (a) of this rule and C.R.C.P. 20. Twin Lakes Reservoir & Canal Co. v. Bond, 156 Colo. 433, 399 P.2d 793 (1965).

A claim for personal injuries and one for damages to automobile may properly be joined under this rule. Gray v. Blight, 112 F.2d 696 (10th Cir.), cert. denied, 311 U.S. 704, 61 S. Ct. 170, 85 L. Ed. 457 (1940).

A difference in the evidence required to prove two different causes of action is ground for holding them misjoined. Colo. High Sch. Activities Ass'n v. Uncompahgre Broadcasting Co., 134 Colo. 131, 300 P.2d 968 (1956).

In order to state a claim to set aside a fraudulent conveyance, a plaintiff need not first have a judgment against the debtor. Emarine v. Haley, 892 P.2d 343 (Colo. App. 1994).

Under these rules it is no longer necessary that each one of several parties have a like interest in all the claims of the other parties before all of them can join in a common suit. Schwab v. Martin, 165 Colo. 547, 441 P.2d 17 (1968).

Diverse parties in a foreclosure action can join in requesting a common receiver, if they

feel their own interests can best be served thereby. Schwab v. Martin, 165 Colo. 547, 441 P.2d 17 (1968).

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

This rule does not relieve a pleader from the requirement that claims must be separately stated in his pleadings, and "a fortiori", expressly requested as relief in his complaint. Colo. High Sch. Activities Ass'n v. Uncompahgre Broadcasting Co., 134 Colo. 131, 300 P.2d 968 (1956).

Officers of a municipal corporation cannot, in the same action, be charged officially and personally, since nothing in this rule compels a departure from this long established and fundamental principle. Colo. State Bd. of Exam'rs of Architects v. District Court, 126 Colo. 340, 249 P.2d 146 (1952).

Where a liability policy contains a "no action" clause providing that no action will lie against the insurer until judgment has been obtained against the insured, one may not sue the insured and the insurance carrier jointly or the insurance carrier separately, but must first obtain a judgment against the insured, and then and then only, if the provisions of the policy are such as to create a contractual relationship between the insured and the insurer, the injured party's rights against the insurer first ripens into existence. Such a provision establishes a substantive right in the insurer and does not violate the rules of civil procedure. Crowley v. Hardman Bros., 122 Colo. 489, 223 P.2d 1045 (1950).

An election requirement between rescission or damages on a contract ordered by a court is not prejudicial where at the time the motion for election was filed plaintiff has already accepted damages and the only issue left to be tried is whether the remedy of rescission is available. Gladden v. Guyer, 162 Colo. 451, 426 P.2d 953 (1967).

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

Refusal to allow joinder of employer as a third party defendant was proper because Colorado law does not recognize a right to contribution between employers and third parties. Gruntmeir v. Mayrath Industries, Inc., 841 F.2d 1037 (10th Cir. 1988).

III. JOINDER OF REMEDIES.

Law reviews. For article, "Direct Action Against the Liability Insurer Under the Rules of Civil Procedure", see 22 Dicta 314 (1945). For article, "Reaching Fraudulent Conveyances and Equitable Interests of Debtors", see 27 Dicta 137 (1950).

Applied in Greco v. Pullara, 166 Colo. 465, 444 P.2d 383 (1968).

Rule 19. Joinder of Persons Needed for Just Adjudication

(a) Persons to be Joined if Feasible. A person who is properly subject to service of process in the action shall be joined as a party in the action if: (1) In his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may: (A) As a practical matter impair or impede his ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenever Joinder Not Feasible. If a person as described in subsections (a) (1) and (a) (2) of this Rule cannot be made a party, the court shall determine whether in the interest of justice the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: First, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in

the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subsections (a) (1) and (a) (2) of this Rule who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is subject to the provisions of Rule 23.

Cross references: For pleading claims for relief, see C.R.C.P. 8(a); for class actions, see C.R.C.P. 23.

ANNOTATION

I. General Consideration.
II. Joined if Feasible.
 A. In General.
 B. Illustrative Cases.
III. Determination by Court.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Pleadings, Rules 7 to 25", see 28 Dicta 368 (1951). For article, "Parties: Rules 17-25", see 23 Rocky Mt. L. Rev. 552 (1951). For article, "One Year Review of Civil Procedure", see 34 Dicta 69 (1957). For note on current developments, "Civil Procedure Application of 'Indispensable Party' Provision of Colo. R. Civ. P. 19 — the 'Procedural Phantom' Still Stalks in Colorado", see 46 U. Colo. L. Rev. 609 (1974-75).

Due process of law requires that those parties whose interests are at stake be before the court. Hidden Lake Dev. Co. v. District Court, 183 Colo. 168, 515 P.2d 632 (1973).

This rule pertains not to permissive or discretionary joinder of the parties, as under C.R.C.P. 20, but to the question of who must be made parties because of necessity or indispensability to a complete adjudication of rights as between the litigants. Bender v. District Court, 133 Colo. 12, 291 P.2d 684 (1955).

This rule recognizes difference between "necessary" and "indispensable" parties. This rule clearly shows its section (a) modified by its section (b), thus recognizing a difference between a necessary party and an indispensable party. Centennial Cas. Co. v. Lacey, 133 Colo. 357, 295 P.2d 690 (1956).

Rule inapplicable to State Administrative Procedure Act proceedings. Because the general assembly specifically has addressed the question of joinder in § 24-4-106, this rule is not applicable in proceedings brought under the state Administrative Procedure Act. Town of Frederick v. Colo. Water Quality Control Comm'n, 628 P.2d 129 (Colo. App. 1980), rev'd on other grounds, 641 P.2d 958 (Colo. 1982).

Complaint should not be dismissed for misjoinder of parties where the co-obligee on a construction performance bond was present in the case. Weyerhaeuser Mortgage Co. v. Equitable General Insurance Co., 686 P.2d 1357 (Colo. App. 1983).

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

Partnership not required to be joined as indispensable party. Erickson v. Oberlohr, 749 P.2d 996 (Colo. App. 1987).

In litigation concerning a transfer of a conservation easement tax credit, joinder of a transferee who is represented by its tax matters representative is not required. Kowalchik v. Brohl, 2012 COA 49, __ P.3d __.

Environmental protection agency was an indispensable party where plaintiffs' claims for relief essentially challenged the reasonableness of the agency's removal action under CERCLA. Aztec Minerals Corp. v. Romer, 940 P.2d 1025 (Colo. App. 1996).

The director of a state agency is not necessarily an indispensable party in a suit challenging the constitutionality of a statute governing the state agency. The director is an indispensable party when the appeal involves a statutory duty of the director that concerns a mandatory exercise of discretion. Cruz-Cesario v. Don Carlos Mexican Foods, 122 P.3d 1078 (Colo. App. 2005).

Applied in Colo. High Sch. Activities Ass'n v. Uncompahgre Broadcasting Co., 134 Colo. 131, 300 P.2d 968 (1956); Howard v. First Nat'l Bank of Denver, Inc., 354 F.2d 217 (10th Cir. 1966); Union P. R. R. v. State, 166 Colo. 307, 443 P.2d 375 (1968); Greco v. Pullara, 166 Colo. 465, 444 P.2d 383 (1968); Hennigh v. Bd. of County Comm'rs, 168 Colo. 128, 450 P.2d 73 (1969); F.R. Orr Constr. Co. v. Ready Mixed Concrete Co., 28 Colo. App. 273, 472 P.2d 193 (1970); Bashor v. Northland Ins. Co., 29 Colo. App. 81, 480 P.2d 864 (1970), aff'd, 177 Colo. 463, 494 P.2d 1292 (1972); Sentinel Petroleum Corp. v. Bernat, 29 Colo. App. 109, 478 P.2d 688 (1970); Jones v. Adkins, 34 Colo. App. 196, 526 P.2d 153 (1974); Stalos v. Booras, 34 Colo. App. 252, 528 P.2d 254 (1974); Fischer v. District Court, 193 Colo. 24, 561 P.2d 1266 (1977); Erger v. District Court, 198 Colo. 369, 599 P.2d

917 (1979); West-Brandt Found., Inc. v. Carper, 199 Colo. 334, 608 P.2d 339 (1980); Lin Ron, Inc. v. Mann's World of Arts & Crafts, Inc., 624 P.2d 1343 (Colo. App. 1981); Creditor's Serv., Inc. v. Shaffer, 659 P.2d 694 (Colo. App. 1982); Mitchell v. District Court ex rel. Eighth Judicial Dist., 672 P.2d 997 (Colo. 1983); Durango & Silverton Narrow Guage R.R. Co. v. Wolf, 2013 COA 118, __ P.3d __.

II. JOINED IF FEASIBLE.

A. In General.

Section (a) is mandatory and requires the trial court to join persons falling within its provisions, if feasible. Potts v. Gordon, 34 Colo. App. 128, 525 P.2d 500 (1974).

Persons having an interest "proper parties". Persons having an interest in the subject matter of litigation which may conveniently be settled therein are "proper parties". Woodco v. Lindahl, 152 Colo. 49, 380 P.2d 234 (1963).

Presence is not indispensable. If interests of parties before the court may be finally adjudicated without affecting interests of absent parties, the presence of "proper parties" is not indispensable. Woodco v. Lindahl, 152 Colo. 49, 380 P.2d 234 (1963); Brody v. Bock, 897 P.2d 769 (Colo. 1995).

Only if an absent person's interest in the subject matter of the litigation is such that no decree can be entered in the case that will do justice between the parties actually before the court without injuriously affecting the right of such absent person is the absent person considered indispensable. Brody v. Bock, 897 P.2d 769 (Colo. 1995).

Persons whose presence is essential to a determination of entire controversy are "necessary parties". Woodco v. Lindahl, 152 Colo. 49, 380 P.2d 234 (1963).

Persons having a joint interest in the subject of an action should be made parties. Woodco v. Lindahl, 152 Colo. 49, 380 P.2d 234 (1963).

Joinder is "feasible". Joinder is "feasible" under this rule as long as the absentee is subject to service of process, his joinder will not deprive the court of jurisdiction, and he has no valid objection to venue of the court. Potts v. Gordon, 34 Colo. App. 128, 525 P.2d 500 (1974).

In order to be a person whose joinder is required, it is not necessary that the legal relief contemplated purport to be binding on the absent person, for the prejudicial effect of nonjoinder may be practical rather than legal in character. Potts v. Gordon, 34 Colo. App. 128, 525 P.2d 500 (1974).

Joinder will be insisted upon if the action might detrimentally affect the absentee's ability to protect his property or to prosecute or defend any subsequent litigation in which he might become involved. Potts v. Gordon, 34 Colo. App. 128, 525 P.2d 500 (1974).

For recovery of damages for joint interest in an item, it is mandatory, under section (a) of this rule that the person having a joint interest be joined on the same side as the other party having the joint interest. Weng v. Schleiger, 130 Colo. 90, 273 P.2d 356 (1954), aff'd, 133 Colo. 441, 296 P.2d 748 (1956); Clubhouse at Fairway Pines v. Fairway Pines Estates, 214 P.3d 451 (Colo. App. 2008).

Joinder is not required if the award will not affect property values of the absent owners. Seago v. Fellet, 676 P.2d 1224 (Colo. App. 1983); Clubhouse at Fairway Pines v. Fairway Pines Estates, 214 P.3d 451 (Colo. App. 2008).

When a person who should join as a plaintiff refuses to do so, or his consent cannot be obtained, he may be made a defendant or, in proper cases, an involuntary plaintiff. Reed Auto Sales, Inc. v. Empire Delivery Serv., 127 Colo. 205, 254 P.2d 1018 (1953).

Persons summoned if subject to jurisdiction. Persons who are not indispensable to an action, but who ought to be parties if complete relief is to be accorded between those already parties, shall be summoned to appear in the action if subject to the jurisdiction of the court. Woodco v. Lindahl, 152 Colo. 49, 380 P.2d 234 (1963).

Even if it is impossible to join all absentees in a case, the trial court is not necessarily precluded from continuing with the case. Potts v. Gordon, 34 Colo. App. 128, 525 P.2d 500 (1974).

Failure to join a necessary party is not a ground for dismissal of an action. McIntosh v. Romero, 32 Colo. App. 435, 513 P.2d 239 (1973).

Court should join party or allow amendment to complaint. Instead of dismissing a complaint where a necessary party has not been joined, the court should proceed in accordance with this rule, joining the party, or allowing the opportunity to amend the complaint. McIntosh v. Romero, 32 Colo. App. 435, 513 P.2d 239 (1973).

Judgment void. A judgment which adversely affects an indispensable party who is not joined is void. Hidden Lake Dev. Co. v. District Court, 183 Colo. 168, 515 P.2d 632 (1973).

Joinder first raised on appeal. Joinder has been required under this rule after trial where the issue was first raised on appeal. Potts v. Gordon, 34 Colo. App. 128, 525 P.2d 500 (1974).

B. Illustrative Cases.

In action for breach of contract against a subdivision developer in which certain plaintiffs held property in subdivision as joint tenants

with their spouses, spouses were indispensable parties. Seago v. Fellett, 676 P.2d 1224 (Colo. App. 1983).

And any error resulting from a failure to insist upon joinder of a spouse who is a co-owner, when the record shows that a party had and rejected a clear opportunity to insist upon joinder at trial, is invited error. Karakehian v. Boyer, 900 P.2d 1273 (Colo. App. 1994).

All individual landowners within a subarea of a subdivision were indispensable parties, notwithstanding that the homeowner's association was a party, where the complaint implicated the interests of all of the individual landowners and the individual landowners had potentially conflicting interests with each other and with the association itself. Dunne v. Shenandoah Homeowners Ass'n, Inc., 12 P.3d 340 (Colo. App. 2000).

One joint owner cannot recover damages to the jointly owned property without joining the other joint owner in the action. Downing v. Don Ward & Co., 28 Colo. App. 75, 470 P.2d 868 (1970).

Individual landowners neither indispensable nor necessary parties in initiative or referendum proceedings dealing with zoning. Individual landowners are neither indispensable nor necessary parties to an action involving initiative and referendum petitions dealing with the zoning of their property as the relief sought can be granted in their absence, and the relief neither impairs nor impedes the landowners' ability to protect their interests and does not involve the risk of multiple inconsistent obligations. Margolis v. District Court, 638 P.2d 297 (Colo. 1981).

Landowners not affected by special use permit not indispensable. Where the grant of special use permits to one landowner does not create a particularized benefit in other owners of land contained within the boundaries of the permit areas, such landowners are not indispensable parties in a proceeding under C.R.C.P. 106(a)(4). Thorne v. Bd. of County Comm'rs, 638 P.2d 69 (Colo. 1981).

Additional landowners not indispensable parties in action to enforce easement across defendant's property. Although the additional landowners may have been joined permissibly, their presence was not necessary to accord the parties already joined complete relief; the non-joined parties would not lose their ability to assert their rights; and the defendant would not be exposed to the risk of inconsistent decisions, multiple suits, and related obligations or injuries. Williamson v. Downs, 829 P.2d 498 (Colo. App. 1992).

Defendant-lawyer is not proper party to action by seller against buyer and guarantor. Where sellers of personal property had two distinct claims: an action on a note and other matters against the buyer and the guarantor and a malpractice action against the lawyer, the lawyer would not have been either a proper or necessary party to the other lawsuit. Deaton v. Mason, 616 P.2d 994 (Colo. App. 1980).

Where both mortgagor and mortgagee are parties in interest, both should join in the suit. Reed Auto Sales, Inc. v. Empire Delivery Serv., 127 Colo. 205, 254 P.2d 1018 (1953); Centennial Cas. Co. v. Lacey, 133 Colo. 357, 295 P.2d 690 (1956).

No requirement to join persons who have separate notes or contract arrangements with a guarantor. Andrikopoulos v. Minnelusa Co., 911 P.2d 663 (Colo. App. 1995), aff'd on other grounds, 929 P.2d 1321 (Colo. 1996).

Plaintiff shall have opportunity to join third party agreements if plaintiff has alleged a meritorious claim that third party agreements have affected its rights and obligations as a judgment debtor and because the equitable issue may again rise if the third party fails to pay promissory note. Lakeside Ventures, LLC v. Lakeside Dev. Co., 68 P.3d 516 (Colo. App. 2002).

The bailor is not a necessary party to an action by the bailee against a third person for injury to the subject matter of the bailment, such person not being exposed to a multiplicity of lawsuits because payment of the damages to the bailee will bar any subsequent suit by the bailor for the same cause of action. Downing v. Don Ward & Co., 28 Colo. App. 75, 470 P.2d 868 (1970).

Other water users need not be joined. In controversies involving the respective rights of users from flowing streams or impounded waters, then, since only the disputed rights between litigants are involved in such proceedings, other users of water from the same source need not be joined. Bender v. District Court, 133 Colo. 12, 291 P.2d 684 (1955).

Water rate petitioners without special interest in appeal not indispensable parties. Petitioners who request that their county commissioners fix a maximum water rate, which would then apply to all water users in the county, and who have no interest in the outcome of the litigation beyond that of all persons subject to the rate are not indispensable parties in an appeal of the ratemaking order. Talbott Farms, Inc. v. Bd. of County Comm'rs, 43 Colo. App. 131, 602 P.2d 886 (1979).

Shareholders in mutual ditch company should be joined in condemnation action. Pursuant to this rule and the court's power under C.A.R. 21, the district court should join as parties to a condemnation action those shareholders in a mutual ditch corporation whose water rights would be affected by the condemnation action of the defendant as of the date of the initiation of the condemnation action and all parties in interest. Jacobucci v. District Court, 189 Colo. 380, 541 P.2d 667 (1975).

In a situation in which a court has been asked to determine the disposition of escrowed money, as a pragmatic matter, the money is there and there is a duty on the part of the judiciary, once asked, to reach a decision on the merits; and to do so means that the trial court must sua sponte join the parties necessary to a determination as to who gets the money. City & County of Denver v. City of Arvada, 192 Colo. 88, 556 P.2d 76 (1976).

The trial court had and currently has an obligation to bring in water users, or their successors in interest, who have paid tap fees requested by Denver as the furnisher of the water for a determination of escrowed tap fees, irrespective of the fact that neither of the original parties moved for joinder. City & County of Denver v. City of Arvada, 192 Colo. 88, 556 P.2d 76 (1976).

County treasurer not indispensable party in proceeding challenging lien priority. In a tax sale the county treasurer who issued the certificate of sale to purchaser of tax sale was not an indispensable party under section (a) of this rule to a proceeding challenging priority of lien of a secured party in the property sold at the tax sale since complete relief could be and was afforded without the treasurer's presence as a party. John Deere Indus. Equip. Co. v. Moorehead, 38 Colo. App. 220, 556 P.2d 91 (1976), rev'd on other grounds, 194 Colo. 398, 572 P.2d 1207 (1977).

City council is indispensable party to suit brought seeking review of denial of rezoning petition and failure to join it is a jurisdictional defect requiring dismissal. Dahman v. City of Lakewood, 44 Colo. App. 261, 610 P.2d 1357 (1980).

County was an indispensable party where issue was whether roads that crossed private property were public or private roads. Bittle v. CAM-Colo., LLC, 2012 COA 93, 318 P.3d 65.

An applicant for a zoning variance is an indispensable party to an action challenging the approval of the variance. Norby v. City of Boulder, 195 Colo. 231, 577 P.2d 277 (1978).

Applicant whose request for rezoning is challenged is indispensable party. An applicant whose request for rezoning is challenged in court is an indispensable party to the judicial proceeding. Norby v. City of Boulder, 195 Colo. 231, 577 P.2d 277 (1978).

Applicant for special review use is indispensable party. Applicant for a special review use is an indispensable party to an action challenging approval of special review use. Norby v. City of Boulder, 195 Colo. 231, 577 P.2d 277 (1978).

Fire protection district not necessary party to tax refund action involving allocation for protection. Where a community seeks a refund of taxes mistakenly paid for fire protection from the board of county commissioners, the fire protection district is not a necessary party to the action, and failure by the community to join the district is not a ground for dismissal. Bd. of County Comm'rs v. District Court, 199 Colo. 338, 607 P.2d 999 (1980).

Claimant who has not intervened in civil rights commission proceeding is not party and service of a petition for judicial review is not required upon that individual under § 24-34-308 (3). Red Seal Potato Chip Co. v. Colo. Civil Rights Comm'n, 44 Colo. App. 381, 618 P.2d 697 (1980).

Child, through guardian ad litem, is indispensable party in dependency and neglect hearing. People in Interest of M.M.T., 676 P.2d 1238 (Colo. App. 1983).

As is applicant for use permit. An applicant for use permit is an indispensable party to a proceeding challenging the grant of the application. Neighbors For A Better Approach v. Nepa, 770 P.2d 1390 (Colo. App. 1989).

III. DETERMINATION BY COURT.

One is not an indispensable party to a suit merely because he has a substantial interest in the subject matter of the litigation. Woodco v. Lindahl, 152 Colo. 49, 380 P.2d 234 (1963).

A mere interest in the subject matter of litigation, even though substantial, is not sufficient in itself to warrant a determination of indispensability. Thorne v. Bd. of County Comm'rs, 638 P.2d 69 (Colo. 1981).

One is not an indispensable party even though one's interest in the subject matter of the litigation is such that his presence as a party to the suit is required for a complete adjudication in that suit of all questions related to the litigation. Woodco v. Lindahl, 152 Colo. 49, 380 P.2d 234 (1963).

The test for an indispensable party may be stated thus: Is the absent person's interest in the subject matter of the litigation such that no decree can be entered in the case which will do justice between the parties actually before the court without injuriously affecting the right of such absent person? Woodco v. Lindahl, 152 Colo. 49, 380 P.2d 234 (1963); Civil Serv. Comm'n v. District Court, 185 Colo. 179, 522 P.2d 1231 (1974); Civil Serv. Comm'n v. District Court, 186 Colo. 308, 527 P.2d 531 (1974); Intermountain Rubber Industries v. Valdez, 688 P.2d 1133 (Colo. App. 1984); Prutch Bros. TV v. Crow Watson No. 8, 732 P.2d 241 (Colo. App. 1986).

The definition of "indispensable parties" by the U.S. supreme court is: Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good con-

science. Davis v. Maddox, 169 Colo. 433, 457 P.2d 394 (1969).

Whether or not a party is indispensable turns on the facts of each case. Civil Serv. Comm'n v. District Court, 185 Colo. 179, 522 P.2d 1231 (1974); I.M.A., Inc. v. Rocky Mountain Airways, Inc., 713 P.2d 882 (Colo. 1986).

Though injury to the absent party is the most important factor in determining indispensability, other factors are recognized such as the danger of inconsistent decisions, avoidance of a multiplicity of suits, and the reluctance of a court to render a decision which will not finally settle the controversy before it. Davis v. Maddox, 169 Colo. 433, 457 P.2d 394 (1969).

A party permitted to intervene pursuant to C.R.C.P. 24 is not necessarily indispensable pursuant to this rule. C.R.C.P. 24(a)(2) provides for intervention when the applicant claims an interest relating to the property or transaction that is the subject of the action and he or she is so situated that the disposition of the action may as a practical matter impair or impede his or her ability to protect that interest. Although language of this rule and C.R.C.P. 24 are similar, this rule involves a two-step analysis: (1) Whether the party is necessary within the meaning of section (a) of this rule; and (2) whether the party is indispensable based on the factors of section (b) of this rule. Hicks v. Joondeph, 232 P.3d 248 (Colo. App. 2009).

The issue of indispensability was not waived by the common interest community association where the association raised indispensability to protect the interests of absent parties rather than to protect itself against possible future claims by such parties, and, as the defendant, the association did not choose the parties to the action. Clubhouse at Fairway Pines v. Fairway Pines Estates, 214 P.3d 451 (Colo. App. 2008).

If present trust property is involved and a money judgment is recovered in an action, it will be property of the trust, and so the holder of the legal title should be a party. Davis v. Maddox, 169 Colo. 433, 457 P.2d 394 (1969).

Beneficiaries of a trust are not indispensable parties where the trust is a party to the action and is represented by the trustee. In such a case the beneficiaries' absence does not "impair or impede" a complete adjudication of the parties' rights. Francis v. Aspen Mtn. Condo. Ass'n, 2017 COA 19, __ P.3d __.

Nonresident shareholders need not be joined if the action is merely one to review the propriety of an election and does not seek any action directly or indirectly against the particular shareholder whose vote is being challenged. State ex rel. Gentles v. Barnholt, 145 Colo. 259, 358 P.2d 466 (1961).

Grantors of a warranty deed which is the subject of an action to determine an adverse possession encumbrance are not indispensable parties to a determination of the dispute. Rivera v. Queree, 145 Colo. 146, 358 P.2d 40 (1960).

Partial assignees of an agreement of a plaintiff, though necessary parties, are not indispensable, and failure to join is not fatal. Centennial Cas. Co. v. Lacey, 133 Colo. 357, 295 P.2d 690 (1956).

Where a judgment creditor and an insured party make an agreement whereby the insured will sue his insurance company to pay off the judgment against him, the judgment creditor is not an indispensable and necessary party, because a third party judgment creditor of an insured cannot sue the insurer. Northland Ins. Co. v. Bashor, 177 Colo. 463, 494 P.2d 1292 (1972).

Even if indispensable parties are omitted, the question of jurisdiction shall not be raised. Centennial Cas. Co. v. Lacey, 133 Colo. 357, 295 P.2d 690 (1956).

Court had jurisdiction to determine that party was indispensable. Although federal court had dismissed actions twice for lack of jurisdiction based on finding that a party was indispensable and therefore diversity did not exist, issue was not res judicata and state court did have jurisdiction since determination of whether a party is indispensable was not substantive question. Sharp Bros. Constr. v. Westvaco Corp., 878 P.2d 38 (Colo. App. 1994).

If a court can do justice to the parties before it without injuring absent persons, it will do so and shape its relief in such a manner as to preserve the rights of the persons not before the court. Woodco v. Lindahl, 152 Colo. 49, 380 P.2d 234 (1963).

Purchaser pendente lite in mechanic's lien action is not an indispensable party. Abrams v. Colo. Seal and Stripe, Inc., 702 P.2d 765 (Colo. App. 1985).

Party held not to be indispensable. Draper v. Sch. Dist. No. 1, 175 Colo. 216, 486 P.2d 1048 (1971).

The court may dismiss a claim without prejudice at the close of plaintiff's evidence if it concluded that indispensable parties have not been included. Bock v. Brody, 870 P.2d 530 (Colo. App. 1993).

Trial court did not abuse its discretion by denying county's motion to dismiss under C.R.C.P. 12(b)(5) and 12(b)(6) and section (a) of this rule for failure to join landowners as indispensable parties. A finding that county land use department abused its discretion by refusing to perform ministerial task of accepting application of fire protection district in no way implicated landowner's interests as to make them indispensable parties. Nor did fire protection district's request for a declaration that project could proceed absent an amendment to the planned unit development (PUD). At root, question presented involved which process the district was required to employ in order to build its

tiffs before joining in a common suit with them. Western Homes, Inc. v. District Court, 133 Colo. 304, 296 P.2d 460 (1956); Schwab v. Martin, 165 Colo. 547, 441 P.2d 17 (1968).

Individual claims do not result in a fatal misjoinder. The fact that the claim of each plaintiff is individually his own and free from any right of other plaintiffs to share therein does not result in a fatal misjoinder either of parties or claims. Western Homes, Inc. v. District Court, 133 Colo. 304, 296 P.2d 460 (1956).

Such joinder is discretionary. When the grounds upon which liability is based are mutually exclusive, a request for a joinder pursuant to section (a) of this rule, which deals with permissive parties, is addressed to the sound discretion of the trial court. Draper v. Sch. Dist. No. 1, 175 Colo. 216, 486 P.2d 1048 (1971).

Broadest possible reading, to rule's permissive language is desirable. In view of the full protection allowed by C.R.C.P. 42(b) and section (b) of this rule, it is desirable to give the broadest possible reading to the permissive language of section (a) of this rule. Sutterfield v. District Court, 165 Colo. 225, 438 P.2d 236 (1968).

In action for death caused by negligent operation of motor vehicle, the owner was properly joined with the driver as a party defendant under this rule. Drake v. Hodges, 114 Colo. 10, 161 P.2d 338 (1945).

The administrative law judge's (ALJ) reliance on this rule was misplaced. This rule was not the proper vehicle by which to accomplish joinder because the plaintiff did not, in the first instance, assert any right to relief against the parties whom the ALJ ordered to be joined. However, the ALJ did not abuse his discretion by joining those parties because the question of their liability had been raised and the joinder posed no risk of prejudice. Renaissance Salon v. Indus. Claim Appeals Office, 994 P.2d 447 (Colo. App. 1999).

Applied in Arms Roofing Co. v. Petrie, 136 Colo. 154, 314 P.2d 903 (1957); Twin Lakes Reservoir & Canal Co. v. Bond, 156 Colo. 433, 399 P.2d 793 (1965); O'Neal v. Reliance Mortg. Corp., 721 P.2d 1230 (Colo. App. 1986).

III. SEPARATE TRIALS.

A trial judge is permitted wide discretion when he finds that the necessary prerequisites to separate trials laid down by this rule exist. Sutterfield v. District Court, 165 Colo. 225, 438 P.2d 236 (1968).

Severance cannot be sustained without proper findings. Where a trial court makes no finding that any of the conditions permitting separate trials of properly joined claims are present, a severance cannot be sustained until proper findings are made. Sutterfield v. District Court, 165 Colo. 225, 438 P.2d 236 (1968).

IV. PARTIES JOINTLY OR SEVERALLY LIABLE.

A. In General.

Annotator's note. Since section (c) of this rule is similar to § 13 of the former Code of Civil Procedure, which was supplanted by the Rules of Civil Procedure in 1941, relevant cases construing that section have been included in the annotations to this rule.

The effect of this rule is to abrogate the common-law rule respecting parties to actions on joint contracts of the descriptions specified. Mattison v. Childs, 5 Colo. 78 (1879).

Common-law rule not changed where a joint maker dies. A joint maker having died, a separate action is maintainable against either the survivor or the executors of the deceased. but they cannot, however, be joined in the same action; as against one the judgment would be "de bonis propriis", and against the other "de bonis testatoris". In this respect, this rule is not believed to have changed the common-law rule. Mattison v. Childs, 5 Colo. 78 (1879).

This rule does not purport in any way to alter the obligations which parties have assumed in their contracts. Bennett v. Morse, 6 Colo. App. 122, 39 P. 582 (1895).

The rule does not make a contract valid which would otherwise be invalid. Bennett v. Morse, 6 Colo. App. 122, 39 P. 582 (1895).

The rule operates merely as an enlargement of the remedy upon a contract, permitting suit to be brought against any of the parties liable or against all, at the plaintiff's pleasure. Bennett v. Morse, 6 Colo. App. 122, 39 P. 582 (1895).

Where parties contract jointly, there must be a joint liability in order that there may be a several liability, for, if a joint agreement is invalid or incapable of enforcement against all of its makers, it is invalid and incapable of enforcement against any one or more of them. Bennett v. Morse, 6 Colo. App. 122, 39 P. 582 (1895).

A stranger to a contract cannot become a party to it without consent of both parties. Kruschke v. Quatsoe, 49 Colo. 312, 112 P. 769 (1910).

A stranger cannot become a surety without such consent within the meaning of this rule. which, in this respect, applies only to persons jointly or severally liable upon the same instrument, including parties to bills of exchange and promissory notes as well as sureties on the same or separate instruments, and not to the independent volunteer guarantor of the payment of the instrument executed by other parties. Kruschke v. Quatsoe, 49 Colo. 312, 112 P. 769 (1910).

Where an action is dismissed as to the principal and continued as to the surety, it is the same as though the action in the first instance had been brought by the obligee against

the surety only, and this is permitted by this rule. McAllister v. People, 28 Colo. 156, 63 P. 308 (1900).

If a judgment creditor seeks by "scire facias" to keep a judgment in force, then he must proceed against all defendants. Allen v. Patterson, 69 Colo. 302, 194 P. 934 (1920).

If the judgment creditor selects a new action on the judgment, he need join only such as he elects to join; this conclusion is not only supported by the weight of authority, but is in accord with principles of harmonious and consistent procedure and also with equity and good conscience. Allen v. Patterson, 69 Colo. 302, 194 P. 934 (1920).

This rule is intended to include proceedings in other tribunals besides courts of record. Hughes v. Fisher, 10 Colo. 383, 15 P. 702 (1887).

This rule applies to actions on appeal bonds. Wilson v. Welch, 8 Colo. App. 210, 46 P. 106 (1896), aff'd, 12 Colo. App. 185, 55 P. 201 (1898).

B. Joint and Several Obligations.

Whenever the word "obligation" is used as the name of a contract as it is in this rule, an agreement in writing, sealed or unsealed, is referred to, but, where, in a legislative provision, it is used with reference to legal duty or liability, such duty or liability may arise from an oral or written contract, or, in some instances, from actionable tortious conduct. The word is used in statutes, as well as in textbooks and decisions, with these different meanings, and the significance to be given it in each statute must be gathered from the purpose and context of the enactment. Exchange Bank v. Ford, 7 Colo. 314, 3 P. 449 (1884); Sawyer v. Armstrong, 23 Colo. 287, 47 P. 391 (1896).

"Obligation", as employed in this rule, does not embrace or apply to oral contracts. Exchange Bank v. Ford, 7 Colo. 314, 3 P. 449 (1884); Townsend v. Heath, 106 Colo. 273, 103 P.2d 691 (1940).

It is argued that giving this restricted meaning to the word "obligation" in this rule renders the word "instrument" entirely superfluous; that "instrument" includes all written contracts, sealed as well as simple; and that, unless a court assents to the proposition that "obligation" includes oral contracts, it violates the rule requiring effect to be given, if possible, to all the language. The use of the word "obligation" under the common law was originally confined to sealed instruments of a certain kind, and courts have not always given it the significance adopted under this rule. Exchange Bank v. Ford, 7 Colo. 314, 3 P. 449 (1884).

A joint obligation will not support a judgment in an action brought against but one of the joint obligors. Erskine v. Russell, 43 Colo. 449, 96 P. 249 (1908).

A firm's debts are joint obligations, not joint and several, and action therefore must be brought against the firm, not against an individual member. Erskine v. Russell, 43 Colo. 449, 96 P. 249 (1908).

In an action against an individual for rent under a lease signed by him where it appears that the lease was made to defendant's firm and that defendant was not acting in his individual capacity, the partner should be made a party to the suit. Erskine v. Russell, 43 Colo. 449, 96 P. 249 (1908).

This rule does not apply to partnership obligations. Thompson v. White, 25 Colo. 226, 54 P. 718 (1898).

An action cannot be maintained against the executor or administrator of a deceased partner upon a partnership contract, whether such contract be written or oral, unless it be shown that the partnership has been finally settled and that the partnership assets are insufficient to pay the firm debts. Thompson v. White, 25 Colo. 226, 54 P. 718 (1898).

A contention made by defendant that his "partner" is an indispensable party to an action on a promissory note is without merit where there previously has been an action for a partnership accounting and termination brought by the "partner" which was settled by a stipulation in which defendant agreed to pay certain obligations, including the unpaid balance on the note in question. Sakal v. Donnelly, 30 Colo. App. 384, 494 P.2d 1316 (1972).

Where an obligation is joint and several, an action is proper against either of the joint makers. Milner Bank & Trust Co. v. Estate of Whipple, 61 Colo. 252, 156 P. 1098 (1916).

Where a surety agreement provides that the principal and surety will be jointly and severally liable, a creditor may, at his option, bring an action against both the principal and the surety or either one alone. Fountain Sand & Gravel Co. v. Chilton Constr., 40 Colo. App. 363, 578 P.2d 664 (1978).

One who has indorsed a promissory note previous to its delivery is a maker, and the obligation is joint and several. Tabor v. Miles, 5 Colo. App. 127, 38 P. 64 (1894).

Holder may sue indorser after obtaining judgment against maker. Under this rule the holder of a note who sues the maker and indorser as joint makers, dismisses as to the indorser without prejudice, and obtains judgment against the maker may afterwards sue the indorser. Hamill v. Ward, 14 Colo. 277, 23 P. 330 (1890).

Obligee on appeal bond may sue surety with or without principal. The obligee in a bond given on appeal may, if he so elects, sue the surety thereon without joining the principals, or having joined them and not having

procured service of summons upon them, may proceed against the defendant served as if he were the only defendant. Lux v. McLeod, 19 Colo. 465, 36 P. 246 (1894).

Where the liability is several, the parties may be joined. Upon a contract expressing a several liability of the defendants, they may, under this rule, be joined in an action thereon; this construction is in accord with the reform spirit and express purpose of code practice. Irwine v. Wood, 7 Colo. 477, 4 P. 783 (1884).

It is perfectly proper to unite in one suit both the maker and the acceptor of an instrument. Hughes v. Fisher, 10 Colo. 383, 15 P. 702 (1887).

Where an agreement is regarded as one of suretyship and not of guarantee, the subscribers are liable severally as well as jointly. News-Times Publishing Co. v. Doolittle, 51 Colo. 386, 118 P. 974 (1911).

A receiver and purchaser of a railroad may both be proper parties in an action for damages. Where a passenger on a railroad is killed after a foreclosure sale of the road, but before the sale has been consummated and while the road is still being operated by a receiver, and the decree of foreclosure provides that the purchasers should take the property upon condition that they should pay all indebtedness, obligations, or liabilities legally contracted or incurred by the receiver before the delivery of possession, to the extent that the assets or proceeds in the hands of the receiver are insufficient for that purpose, and the property is conveyed to the purchaser and the receiver is discharged under an order which provides that the discharge should not operate to prevent the prosecution in the name of the receiver of any suit then pending, or from defending any suit then pending or which might thereafter be brought against him as such receiver, the receiver and purchaser are both proper parties defendant to an action for damages for the death of such passenger brought after the discharge of such receiver. Denver & R. G. R. R. v. Gunning, 33 Colo. 280, 80 P. 727 (1904).

This rule does not apply to an action against two persons who, acting separately, deprive one of what belongs to him, as they are in no sense liable jointly or severally as contemplated. Millard v. Miller, 39 Colo. 103, 88 P. 845 (1907).

Where two parties, acting separately, appropriated to their respective use certain lands belonging to plaintiff, the liability, if any, against them is several and must be availed of, if at all, in separate actions. Millard v. Miller, 39 Colo. 103, 88 P. 845 (1907).

Defendant-lawyer is not proper party to action by seller against buyer and guarantor. Where sellers of personal property had two distinct claims: an action on a note and other matters against the buyer and the guarantor and a malpractice action against the lawyer, the lawyer would not have been either a proper or necessary party to the other lawsuit. Deaton v. Mason, 616 P.2d 994 (Colo. App. 1980).

Applied in Wilder v. Baker, 147 Colo. 92, 362 P.2d 1045 (1961).

Rule 21. Misjoinder and Nonjoinder of Parties

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

ANNOTATION

Law reviews. For article, "Pleadings, Rules 7 to 25", see 28 Dicta 368 (1951). For article, "New Role for Nonparties in Tort Actions — The Empty Chair", see 15 Colo. Law. 1650 (1986).

Common-law rule altered. This rule alters the common-law rule requiring dismissal of an entire action in which parties have been improperly joined. King v. W.R. Hall Transp. & Storage Co., 641 P.2d 916 (Colo. 1982).

The proper remedy for misjoinder is to require the party against whom the objection lies to bring in such additional parties as are required or permitted by the rules. Krueger v. Merriman Elec., 29 Colo. App. 492, 488 P.2d 228 (1971).

This requirement can be met either by actually joining the omitted party or by establishing that the rights of the omitted party are properly under the jurisdiction of the court for determination. Krueger v. Merriman Elec., 29 Colo. App. 492, 488 P.2d 228 (1971).

The latter result can be accomplished by an assignment of the right of action to the person who actually prosecutes it, inasmuch as assignments for collection have long been recognized as valid in Colorado, and the assignee thereof is the real party in interest and entitled to prosecute the claim. Krueger v. Merriman Elec., 29 Colo. App. 492, 488 P.2d 228 (1971).

Under this rule parties may be added by order of court on motion at any stage of the proceeding. Lerner v. Stone, 126 Colo. 589, 252 P.2d 533 (1952).

This rule gives a trial court authority, even

if one has been made a party, to later sever the claims and to proceed with them separately. Centennial Cas. Co. v. Lacey, 133 Colo. 357, 295 P.2d 690 (1956).

Dropping of party under this rule is equivalent to dismissal without prejudice of the claim against that party. King v. W.R. Hall Transp. & Storage Co., 641 P.2d 916 (Colo. 1982).

Decision to drop parties is within sound discretion of the court and will not be disturbed on appeal unless abuse is shown. King v. W.R. Hall Transp. & Storage Co., 641 P.2d 916 (Colo. 1982).

Applied in Reed Auto Sales, Inc. v. Empire Delivery Serv., Inc., 127 Colo. 205, 254 P.2d 1018 (1953); Linke v. Bd. of County Comm'rs, 129 Colo. 165, 268 P.2d 416 (1954); W.R. Hall Transp. & Storage Co. v. King, 43 Colo. App. 202, 606 P.2d 75 (1979); B.C. Inv. Co. v. Throm, 650 P.2d 1333 (Colo. App. 1982); Weyerhaeuser Mortgage Co. v. Equitable General Insurance Co., 686 P.2d 1357 (Colo. App. 1983).

Rule 22. Interpleader

(1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross claim or counterclaim. The provisions of this Rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

(2) In any civil action of interpleader, a district court may enter its order restraining all claimants from instituting or prosecuting any proceeding in any court of this state affecting the property, instrument, or obligation involved in the interpleader action until further order of the court.

Such district court shall hear and determine the case, and may discharge the plaintiff from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment.

Cross references: For joinder of additional parties pursuant to counterclaims or cross claims, see C.R.C.P. 13(h); for proper venue, see C.R.C.P. 98.

ANNOTATION

Law reviews. For article, "Pleadings, Rules 7 to 25", see 28 Dicta 368 (1951).

Rule must be given liberal construction. In determining the right of one to intervene in an action, the liberal construction of the rules of civil procedure called for in C.R.C.P. 1 must be followed. Senne v. Conley, 110 Colo. 270, 133 P.2d 381 (1943).

Trial court's order not subject to collateral attack in interpleader action. McLeod v. Provident Mut. Life Ins. Co., 186 Colo. 234, 526 P.2d 1318 (1974).

Amended pleading asserting an interpleader claim is not futile if it alleges facts sufficient to support a reasonable belief that exposure to double or multiple liability may exist. Certainty of exposure to double or multiple liability is not the test; rather, the allegations must meet a minimum threshold of substantiality. Benton v. Adams, 56 P.3d 81 (Colo. 2002).

For earlier cases affording a limited sort of interpleader, see Fischer v. Hanna, 8 Colo. App. 471, 47 P. 303 (1896); Price v. Lucky Four Gold Mining Co., 56 Colo. 163, 136 P. 1021 (1913); Engineer's Constr. Corp. v. Tolbert, 74 Colo. 542, 223 P. 56 (1924) (decided under § 18 of the former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941).

Applied in Sch. Dist. No. 11 v. Colo. Springs Teachers Ass'n, 41 Colo. App. 267, 583 P.2d 952 (1978); M & G Engines v. Mroch, 631 P.2d 1177 (Colo. App. 1981); West Greeley Nat'l Bank v. Wygant, 650 P.2d 1339 (Colo. App. 1982).

Rule 23. Class Actions

(a) Prerequisites to Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if: (1) The class is so numerous that

joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. Any action may be maintained as a class action if the prerequisites of section (a) are satisfied, and in addition:

(1) The prosecution of separate actions by or against individual members of the class would create a risk of:

(A) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

(B) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interest; or

(2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(A) The interest of members of the class in individually controlling the prosecution or defense of separate actions;

(B) The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(C) The desirability or undesirability of concentrating the litigation of the claims in the particular forum;

(D) The difficulties likely to be encountered in the management of class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this section (c) may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subsection (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that: (A) The court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subsections (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subsection (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subsection (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate: (A) An action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this Rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this Rule applies, the court may make appropriate orders:

(1) Determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

(2) Requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, the notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

(3) Imposing conditions on the representative parties or on intervenors;

(4) Requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly;

(5) Dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(f) Appeals. An appeal from an order granting or denying class certification under this rule may be allowed pursuant to the procedures set forth in C.R.S. § 13-20-901 (2003).

(g) Disposition of Residual Funds.

(1) "Residual Funds" are funds that remain after the payment of all approved class member claims, expenses, litigation costs, attorneys' fees, and other court-approved disbursements to implement the relief granted. Nothing in this rule is intended to limit the parties to a class action from suggesting, or the trial court from approving, a settlement that does not create residual funds.

(2) Any order, judgment, or approved settlement in a class action certified under this rule that establishes a process for identifying and compensating members of the class shall provide for the disbursement of residual funds, if any. In matters where the claims process has been exhausted and residual funds remain, not less than fifty percent (50%) of the residual funds shall be disbursed to the Colorado Lawyer Trust Account Foundation (COLTAF) to support activities and programs that promote access to the civil justice system for low income residents of Colorado. The court may disburse the balance of any residual funds beyond the minimum percentage to COLTAF or to any other entity for purposes that have a direct or indirect relationship to the objectives of the underlying litigation or otherwise promote the substantive or procedural interests of members of the certified class.

Source: (f) added and adopted September 18, 2003, effective nunc pro tunc July 1, 2003, for civil actions filed on or after that date; (g) added and adopted January 29, 2016, effective for class action settlements approved by district courts on or after July 1, 2016.

ANNOTATION

Law reviews. For article, "Pleadings, Rules 7 to 25", see 28 Dicta 368 (1951). For article, "Standing to Sue in Colorado: A State of Disorder", see 60 Den. L.J. 421 (1983). For article, "Approval of a Class Action Settlement Under C.R.C.P. 23(e)", see 31 Colo. Law. 71 (May 2002). For article, "Class Action Certification Under C.R.C.P. 23: Procedural and Evidentiary Considerations", see 39 Colo. Law. 29 (June 2010). For article, "Recent Federal and State Decisions Help Shape the Class Certification Analysis", see 43 Colo. Law. 37 (March 2014). For article, "What's in the Package: Food, Beverage, and Dietary Supplement Law and Litigation Part II", see 43 Colo. Law. 71 (August 2014).

Courts must liberally construe this rule because its policy favors maintaining class actions. When evaluating whether this rule's requirements are met, courts must generally accept as true the allegations supporting certification and must not base determination on whether the class will ultimately succeed in establishing each element necessary to prove its claim. Farmers Ins. Exch. v. Benzing, 206 P.3d 812 (Colo. 2009).

A designation of an action as a class action does not make it so when the facts show otherwise. Associated Master Barbers, Local 115 v. Journeyman Barbers, Local 205, 132 Colo. 52, 285 P.2d 599 (1955).

Failure to meet the mandatory requirements of section (a) is grounds for denial. Borwick v. Bober, 34 Colo. App. 423, 529 P.2d 1351 (1974).

Failure to qualify under one of the subsec-

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

(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

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 in-

admissible 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).

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

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

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

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

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

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

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

C. Experts.

Certificate of review requirement under § 13-20-602 is independent of the requirement to file initial disclosures under 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 exclud-

ing 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 cau-

sation 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 mat-

ter solely within the discretion of the trial court under this rule. Orth v. Bauer, 163 Colo. 136, 429 P.2d 279 (1967).

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

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

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

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

A court when confronted with a petition for writ of habeas corpus which establishes a prima facie case for relief may authorize the use of suitable discovery procedures reasonably fashioned to elicit facts necessary to help the court dispose of the matter as law and justice may require. Hithe v. Nelson, 172 Colo. 179, 471 P.2d 596 (1970).

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

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

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

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

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

V. SUPPLEMENTATION.

The continuing duty of a party to supplement his responses and to identify and provide the location of persons who have knowledge of discoverable matters is expressly required by 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).

Cross references: For personal service of process, see C.R.C.P. 4(e); for capacity of infants or incompetents as parties, see C.R.C.P. 17(c); for subpoena for depositions, see C.R.C.P. 45(e); for period of publication of notices, see § 24-70-106, C.R.S.; for persons before whom depositions may be taken, see C.R.C.P. 28; for depositions upon oral examination, see C.R.C.P. 30; for depositions upon written questions, see C.R.C.P. 31; for evidence, see C.R.C.P. 43; for appeals from judgments, see applicable rules in C.A.R.

dure, which was replaced by the Rules of Civil Procedure in 1941).

Admission of deposition where party is present at trial can be harmless error. Where the admission of a deposition of a party is objected to on the ground that the party is in court and available to testify, such admission is harmless error when the evidence contained therein is merely cumulative to the evidence already before the court and its admission neither adds to nor detracts from evidence previously admitted. Sentinel Petroleum Corp. v. Bernat, 29 Colo. App. 109, 478 P.2d 688 (1970).

Entry of the deposition of a defendant into evidence does not deny him the full benefit of having his credibility judged by the jury, or impair his right of rehabilitation, for upon presentation of his defense, defendant may protect both these rights by taking the stand in his own behalf. Stauffer v. Karabin, 30 Colo. App. 357, 492 P.2d 862 (1971).

This rule allows method of preserving objection. Should a deposition eventually be used at trial, the rules allow a party to preserve his objection to the wording of a question for trial by simply objecting to the question at the time the deposition is taken. Seymour v. District Court, 196 Colo. 102, 581 P.2d 302 (1978).

For purposes of section (d)(1), court endorses interpretation of "promptly" that calls for notice within a reasonable time under all the facts and circumstances of the case. This interpretation, allowing for more flexibility, is more in keeping with the scheme of the state's discovery rules. The nonexclusive list of factors identified in Todd v. Bear Valley Village Apartments, 980 P.2d 973 (Colo. 1999), may be considered to determine whether an objection to the inadequacy of a deposition notice is prompt. A party should not be denied the ability to defend himself or herself in court because of an inflexible application of a procedural rule. Keenan ex rel. Hickman v. Gregg, 192 P.3d 485 (Colo. App. 2008).

IV. EFFECT OF TAKING OR USING.

Annotator's note. Prior to revision of the Rules of Civil Procedure which took effect in 1970, section (c) of this rule was C.R.C.P. 26(f) and, cases decided under that rule have been included in the annotations to this rule.

Under this rule, the taking of a deposition was held not to be a waiver of objection to the competency of a witness where the deposition of the party was avowedly taken for the purpose of discovery under C.R.C.P. 26(a), and neither the deposition nor any part of it was offered in evidence. Gottesleben v. Luckenbach, 123 Colo. 429, 231 P.2d 958 (1951).

As to the rebuttal of evidence this rule is made applicable to interrogatories by the language of C.R.C.P. 33(b), by which it is provided: "Interrogatories may relate to any matters which can be inquired into under C.R.C.P. 26(b), and the answers may be used to the extent (permitted by the rules of evidence)". Ridley v. Young, 127 Colo. 46, 253 P.2d 433 (1953).

V. ERRORS AND IRREGULARITIES.

A. Taking.

Objections to leading questions cannot be made at trial. The objection that a question propounded to a witness examined upon commission was leading cannot be made at the trial. Greenlaw Lumber & Timber Co. v. Chambers, 46 Colo. 587, 105 P. 1091 (1909) (decided under § 388 of the former Code of Civil Procedure, which was replaced by the Rules of Civil Procedure in 1941).

B. Completion and Return.

This rule is intended to render technical objections unavailable at the trial. Appelhans v. Kirkwood, 148 Colo. 92, 365 P.2d 233 (1961).

This rule provides that irregularities in the preparation, etc., of a deposition are waived unless a motion to suppress the deposition is made with reasonable promptness after such defect is discovered or with due diligence might have been ascertained. Appelhans v. Kirkwood, 148 Colo. 92, 365 P.2d 233 (1961).

A deposition is not inadmissible on the basis that it is unsigned where an objection to such is not promptly made. Linker v. Linker, 28 Colo. App. 136, 470 P.2d 882 (1970).

Objections must be substantial and must affect the value of the deposition as evidence in order to preclude its use at the trial. Appelhans v. Kirkwood, 148 Colo. 92, 365 P.2d 233 (1961).

It was error for the trial court to order a deposition suppressed upon the basis of the first appearance of irregularities in the deposition of not being properly certified and filed where counsel for defendants was merely seeking to establish an impeaching foundation by asking the plaintiff whether she had made particular statements on the occasion of the giving of the deposition, since under no circumstances would a motion to suppress be proper at this point. Rather, the question of the inadmissibility of the deposition would not be a valid issue until such time as defendant's counsel proposed to impeach plaintiff by introducing the deposition. Appelhans v. Kirkwood, 148 Colo. 92, 365 P.2d 233 (1961).

Rule 33. Interrogatories to Parties

(a) Availability. Any party may serve upon any other party written interrogatories, not exceeding the number, including all discrete subparts, set forth in the Case Management Order, to be answered by the party served or, if the party served is a public or private corporation, or a partnership, or association, or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Leave of court must be obtained, consistent with the principles stated in C.R.C.P. Rules 16(b)(1) and 26(b) and subsection (e) of this Rule, to serve more interrogatories than the number set forth in the Case Management Order. Without leave of court or written stipulation, interrogatories may not be served before the time specified in C.R.C.P. 26(d).

(b) Answers and Objections. (1) Each interrogatory shall be answered separately and fully, in writing and under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer under oath to the extent the interrogatory is not objectionable. An objection must state with specificity the grounds for objection to the interrogatory and must also state whether any responsive information is being withheld on the basis of that objection. A timely objection to an interrogatory stays the obligation to answer those portions of the interrogatory objected to until the court resolves the objection. No separate motion for protective order under C.R.C.P. 26(c) is required.

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

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

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

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

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

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

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

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

Source: (a) to (c) amended and adopted and (e) added and adopted April 14, 1994, effective January 1, 1995, for all cases filed on or after that date; committee comment approved June 10, 1994; (b)(3) amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to

C.R.C.P. 1(b); (b)(1) and comments amended and adopted May 28, 2015, effective July 1, 2015, for cases filed on or after July 1, 2015; (b)(1), (e), and comments amended and adopted January 12, 2017, effective March 1, 2017.

Cross references: For protective orders concerning discovery, see C.R.C.P. 26(c); for answer to a motion for order compelling discovery, see C.R.C.P. 37(a); for sanctions for failure of party to serve answers to interrogatories, see C.R.C.P. 37(b)(2) and (d).

COMMENTS

1995

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

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

2017

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

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

ANNOTATION

I. General Consideration.
II. Availability and Procedure.
III. Scope and Use.
IV. Option to Produce Business Records.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Use of Summary Judgments and the Discovery Procedure", see 24 Dicta 193 (1947). For article, "Notes on Proposed Amendments to Colorado Rules of Civil Procedure", see 27 Dicta 165 (1950). For article, "Amendments to the Colorado Rules of Civil Procedure", see 28 Dicta 242 (1951). For article, "Depositions and Discovery, Rules 26 to 37", see 28 Dicta 375 (1951). For article, "Depositions and Discovery: Rules 26-37", see 23 Rocky Mt. L. Rev. 562 (1951). For article, "Plaintiff's Advantageous Use of Discovery, Pre-Trial and Summary Judgment", see 40 Den. L. Ctr. J. 192 (1963).

C.R.C.P. 26 to 37 must be construed together along with the requirement that plaintiff establish a prima facie case for punitive damages, as a condition precedent to the plaintiff's right to discovery of defendant's financial information. Leidholt v. District Court, 619 P.2d 768 (Colo. 1980).

Civil discovery rules inapplicable to release hearings. Based on §§ 16-8-115 to 16-8-117 and on the special nonadversary nature of a release inquiry, the participants in release proceedings do not have the broad right of discovery as provided in the rules of civil procedure. People v. District Court, 192 Colo. 225, 557 P.2d 414 (1976).

Under C.R.C.P. 81(a), the procedure in release hearings under § 16-8-115 is so inconsistent and in conflict with the rules of civil procedure as to make civil discovery rules inapplicable to release hearings. People v. District Court, 192 Colo. 225, 557 P.2d 414 (1976).

Applied in Ricci v. Davis, 627 P.2d 1111 (Colo. 1981); Hawkins v. District Court, 638 P.2d 1372 (Colo. 1982).

II. AVAILABILITY AND PROCEDURE.

If interrogatories, otherwise objectionable, are made material to the issues involved by virtue of stipulation, then the petitioner is entitled to answers to them. Mote v. Koch, 173 Colo. 82, 476 P.2d 255 (1970).

Refusal to answer valid interrogatories is grounds for reversal. Where the information sought by interrogatories is subject to discovery under C.R.C.P. 26(b) and 33, the refusal to

supply the information requested is in itself a ground for reversal. Dolan v. Mitchell, 179 Colo. 359, 502 P.2d 72 (1972).

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

Where the primary cause for defendants' failure to answer interrogatories was the inexcusable neglect of defendants' attorney in whom they had placed their confidence, the trial court abused its discretion in refusing to set aside a default judgment for failure of the defendants to answer interrogatories, particularly since setting aside the default judgment and ordering a trial on the merits would not unwarrantedly prejudice the plaintiff. Coerber v. Rath, 164 Colo. 294, 435 P.2d 228 (1967).

Where interrogatories which are not answered involve matters entirely foreign to the issues involved, any error, therefore, cannot be prejudicial. Mote v. Koch, 173 Colo. 82, 476 P.2d 255 (1970).

Interrogatories may be served on governmental official of another state though they cannot be compelled to appear in Colorado for taking depositions. Minnesota ex rel. Minnesota Att'y Gen. v. District Court, 155 Colo. 521, 395 P.2d 601 (1964).

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

Extent of discovery of defendant's financial condition is not unlimited. Leidholt v. District Court, 619 P.2d 768 (Colo. 1980).

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

Plaintiff has burden of establishing prima facie right to punitive damages. When punitive damages are in issue and information is sought by the plaintiff relating to the defendant's financial condition, justice requires no less than the imposition on the plaintiff of the burden of establishing a prima facie right to punitive damages. Leidholt v. District Court, 619 P.2d 768 (Colo. 1980).

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

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

Applied in Godfrit v. Judd, 116 Colo. 489, 182 P.2d 907 (1947).

III. SCOPE AND USE.

Law reviews. For comment on Ridley v. Young appearing below, see 25 Rocky Mt. L. Rev. 392 (1953).

Annotator's note. Where reference is made in the annotations to the Rules of Civil Procedure, citation and language have been changed where needed to comport with the nomenclature and wording of the 1970 revision of the rules in any still-relevant case decided previous thereto.

Only discrete subparts of non-pattern interrogatories, and not those subparts logically or factually subsumed within and necessarily related to the primary question, must be counted toward the interrogatory number limit set forth in the case management order. Leaffer v. Zarlengo, 44 P.3d 1072 (Colo. 2002).

Supreme court adopts test set forth in Kendall v. GES Exposition Servs., Inc., 174 F.R.D. 684 (D. Nev. 1997), to aid courts in distinguishing between discrete subparts of non-pattern interrogatories and those that are logically or factually subsumed within and necessarily related to the primary question. Leaffer v. Zarlengo, 44 P.3d 1072 (Colo. 2002).

Answers made by a party to interrogatories submitted by his adversary are not evidence until introduced as such during the course of trial. Ridley v. Young, 127 Colo. 46, 253 P.2d 433 (1953).

When answers to interrogatories are introduced in evidence, they stand on the same plane as other evidence. Ridley v. Young, 127 Colo. 46, 253 P.2d 433 (1953).

Answers to interrogatories may be treated as admissions against interest. Ridley v. Young, 127 Colo. 46, 253 P.2d 433 (1953).

An answer filed by a party to an interrogatory has the same effect as a judicial admission made in a pleading or in open court, for it relieves the opposing party of the necessity of proving the fact admitted. Ridley v. Young, 127 Colo. 46, 253 P.2d 433 (1953).

An answer to an interrogatory treated as an admission is not conclusive and will not prevail over evidence offered at the trial. Ridley v. Young, 127 Colo. 46, 253 P.2d 433 (1953).

Answers to the interrogatories are not "judicial admissions" which are conclusive. Ridley v. Young, 127 Colo. 46, 253 P.2d 433 (1953).

Furnishing false answers to interrogatories may constitute first-degree perjury. People v.

Chaussee, 847 P.2d 156 (Colo. App. 1992), aff'd in part and rev'd in part on other grounds, 880 P.2d 749 (Colo. 1994).

Court need not reject testimony of witnesses which contradicts answers. Where a defendant answers interrogatories under this rule, making admissions therein against his own interest, and thereafter does not appear upon the trial, with plaintiff offering the answers to the interrogatories in evidence, the trial court need not reject the evidence of witnesses, who are called by counsel appearing for defendant, if the testimony of such witnesses contradicts the statements of defendant as contained in the answers to the interrogatories. Ridley v. Young, 127 Colo. 46, 253 P.2d 433 (1953).

Rebuttal of evidence is applicable to interrogatories. The language of this rule by which it is provided: "Interrogatories may relate to any matters which can be inquired into under C.R.C.P. 26(b), and the answers may be used to the extent (permitted by the rules of evidence)", made the rebuttal of evidence under C.R.C.P. 32(c), applicable to interrogatories. Ridley v. Young, 127 Colo. 46, 253 P.2d 433 (1953).

Interrogatory answers for discovery should not be irrevocably binding. Answers to interrogatories propounded primarily for the purpose of discovery and to prevent surprise should not be held to be irrevocably binding upon the person making said answers. Ridley v. Young, 127 Colo. 46, 253 P.2d 433 (1953).

IV. OPTION TO PRODUCE BUSINESS RECORDS.

With regard to interrogatories which request information and data obtainable from available documents, the general rule is that a party should not be permitted to compel his opponent to make compilations or perform research and investigations with respect to statistical information which he might make for himself by obtaining the production of the books and documents pursuant to C.R.C.P. 34(a) or by doing a little footwork, as the case may be. Val Vu, Inc. v. Lacey, 31 Colo. App. 55, 497 P.2d 723 (1972).

Where one furnishes certain business records and furnishes other documents as they become available by use of C.R.C.P. 34(a), there is no prejudice resulting from the trial court's discretionary ruling that interrogatories are of an oppressive nature. Val Vu, Inc. v. Lacey, 31 Colo. App. 55, 497 P.2d 723 (1972).

Rule 34. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes

(a) Scope. Subject to the limitations contained in the Case Management Order, a party may serve on any other party a request:

(1) To produce and permit the party making the request, or someone acting on the party's behalf, to inspect and copy any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of C.R.C.P. 26(b) and which are in the possession, custody, or control of the party upon whom the request is served; or

(2) To permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of C.R.C.P. 26(b).

(b) Procedure. The request shall set forth the items to be inspected either by individual item or by category, and describe each item or category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 35 days after the service of the request. A shorter or longer time may be directed by the court or agreed to in writing by the parties pursuant to C.R.C.P. 29. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, or state with specificity the grounds for objecting to the request. The responding party may state that it will produce copies of information instead of permitting inspection. The production must then be completed no later than the time for inspection stated in the request or another reasonable time stated in the response. An objection must state whether any responsive materials are being withheld on the basis of that objection. If objection is made to part of an item or category, the part shall be specified. A timely objection to a request for production stays the obligation to produce which is the subject of the objection

until the court resolves the objection. No separate motion for protective order pursuant to C.R.C.P. 26(c) is required. The party submitting the request may move for an order pursuant to C.R.C.P. 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

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

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

Source: (a) and (b) amended and adopted effective April 14, 1994, effective January 1, 1995, for all cases filed on or after that date; committee comment approved June 10, 1994; committee comment corrected and effective January 9, 1995; (b) 2nd paragraph amended and adopted December 14, 2011, effective January 1, 2012, for all cases pending on or filed on or after January 1, 2012, pursuant to C.R.C.P. 1(b); (b) and (c) and comments amended and adopted May 28, 2015, effective July 1, 2015, for cases filed on or after July 1, 2015.

Cross references: For scope of discovery, see C.R.C.P. 26(b); for inspection of mines, see § 34-50-105, C.R.S.; for protective orders concerning discovery, see C.R.C.P. 26(c); for motion for order compelling discovery, see C.R.C.P. 37(a); for parties, see C.R.C.P. 17 to 25.

COMMENTS

1995

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

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

2015

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

ANNOTATION

I. General Consideration.
II. Scope.
III. Procedure.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Use of Summary Judgments and the Discovery Procedure", see 24 Dicta 193 (1947). For article, "Notes on Proposed Amendments to Colorado Rules of Civil Procedure", see 27 Dicta 165 (1950). For article, "Amendments to the Colorado Rules of Civil Procedure", see 28 Dicta 242 (1951). For article, "Depositions and Discovery, Rules 26 to 37", see 28 Dicta 375 (1951). For article, "Depositions and Discovery: Rules 26-37", see