

**THE COLORADO CIVIL ACCESS PILOT PROJECT
APPLICABLE TO BUSINESS ACTIONS IN CERTAIN DISTRICT COURTS**

**FREQUENTLY ASKED QUESTIONS
(LAST UPDATED ON JULY 17, 2012)**

This document is intended only to provide procedural guidance. It is not binding authority upon the courts and cannot limit the independent judgment and discretion of judges to interpret and apply rules as they see fit within the context of a particular case.

The Colorado Civil Access Pilot Project (“CAPP”) contained in Chief Justice Directive (“CJD”) 11-02 arose out of increasing concern that more and more litigants are priced out of the civil justice system for dispute resolution, while judges have fewer resources to handle the claims that do make it to court. The project is an effort decrease the burden of civil litigation on both litigants and courts, increase access to judicial dispute resolution, and protect the civil trial as a valuable institution.

By design, the CAPP Rules will require a significant change in litigation practice. In their application, parties and counsel should consider the intent of the project, the concept of proportionality, and the dictates of common sense. For more information, please visit: <http://www.courts.state.co.us/Courts/Civil Rules.cfm>.

1. Are the CAPP Rules final?

Yes. The Colorado Supreme Court authorized the Pilot Project after extensive consideration of the rules and after a public hearing and comment period. Accordingly, the CAPP Rules are in their final form and changes will not be considered until after the pilot period concludes. However, attorneys who litigate CAPP cases will have the opportunity to provide feedback through surveys. It is important for the Court to have honest information about how the CAPP Rules work in practice.

2. Which courts are implementing the CAPP Rules?

The CAPP Rules apply in Colorado District Court in the districts listed in CJD 11-02. If a county listing follows the district, only the listed counties in that district are participating in the Pilot Project. For those districts, counties not listed in the CJD, such as Broomfield in the 17th Judicial District, will not be participating although they may be in the same judicial district as a participating county. Essentially, district courts in the following counties are in the Pilot Project: Adams, Arapahoe, Denver, Gilpin, and Jefferson. The CAPP Rules are mandatory for applicable cases in those counties.

3. When does the Pilot Project begin and end?

The CAPP Rules apply to all “business actions” in the pilot court locations filed on or between January 1, 2012 and December 31, 2013. All CAPP cases filed during this two-year period will use the CAPP Rules for their duration, even if they are resolved after 2014 begins.

4. What is considered a “business action” under CAPP?

CJD 11-02 Appendix A (amended October 7, 2011) sets forth the “business actions” to which the CAPP Rules apply. Case types listed in Section I are included in the Pilot Project, while Section II contains specific exclusions from the Pilot Project. The determination of CAPP status is based only on the claims in the plaintiff’s initial complaint. The following are not factors: size of the case (e.g., amount in dispute or number of parties); type of party (e.g., entity or individual); nature of the remedy (e.g., legal or equitable).

5. What if a case has some claims that are included and some claims that are excluded under Appendix A?

CAPP status will be governed by the “predominant” claim contained in the complaint. Accordingly, if the plaintiff’s case primarily involves an included claim, it will generally proceed under the CAPP Rules even if there is also an excluded claim alleged.

6. What if a claim type is not specifically addressed in Appendix A?

The intent of Appendix A was to provide as much clarity as possible. Unfortunately, the rule drafters could not identify and list every potential claim. The “included” actions are those specifically contemplated for the Pilot Project. The “excluded” actions are those that the rule drafters chose to specifically exempt from the Pilot Project. The ultimate determination of whether CAPP applies to any particular case rests with the judge.

7. Are *pro se* cases included in CAPP?

Yes. The criterion for inclusion is case type rather than party type, so cases involving unrepresented parties may fall within the Pilot Project. The overall policy behind CAPP is to increase access, streamline the process, and reduce delays and costs. *Pro se* litigants ought to benefit from that policy.

8. Is it possible to opt out of the Pilot Project?

No. The CAPP Rules are mandatory for all cases meeting the three criteria for inclusion: pilot court, filing date, and case type. This is necessary to obtain sufficient and consistent data for evaluation of the Pilot Project. Keep in mind that the process is designed to lead to faster and less costly judicial dispute resolution, a benefit to the parties.

9. How is a case designated as within or excluded from the Pilot Project?

The District Court Civil Case Cover Sheet (JDF 601) has been amended to account for CAPP. The amended cover sheet should be used for all cases filed statewide, and is available on the Colorado Judicial Branch website at: http://www.courts.state.co.us/Courts/Civil_Rules.cfm and through the District Court Civil “Forms” tab under the “Rule 16.1 Simplified Procedure” link.

The filing party or attorney makes the initial determination concerning pilot project status, as indicated on the cover sheet. This allows the parties to comply with the relatively short time frames.

According to best practice, pilot court judges review all filed complaints and cover sheets forthwith, but no later than ten days from the date of filing. If accurate, the judge takes no action and the case proceeds in accordance with the cover sheet designation. If the judge determines that the cover sheet designation is in error, he or she will issue an order changing the designation and providing a reasonable timeframe for compliance with the applicable rules.

10. What is the relationship between CAPP and Rule 16.1?

CAPP is mandatory for all cases within its scope. Accordingly, as directed on the new Civil Case Cover Sheet (JDF 601), the filing attorney must first consider whether CAPP applies. If it does, Rule 16.1 is not an option and the case must proceed under the CAPP Rules. If CAPP does not apply, proceed with the Rule 16.1 applicability analysis.

11. Will a CAPP case ever become a non-CAPP case or vice versa?

No. According to CAPP Rule 1.1, “[i]nclusion in the pilot project will be determined based on the contents of the complaint at the commencement of the action.” The judge’s assessment of CAPP applicability upon review of the complaint is final, and the case will remain under the same set of rules until resolution at the trial court level. A case cannot move into or out of the Pilot Project—regardless of how it ultimately develops—unless it is transferred to a court operating under a different set of rules. This is important for continuity and for evaluation purposes.

12. How do the new rules affect service of the complaint?

A new form Summons has been created for CAPP cases. This summons informs the defendant(s) that an answer is required within 21 days after the plaintiff files an initial disclosure statement. It is publicly available on the Colorado Judicial Branch website at: http://www.courts.state.co.us/Courts/Civil_Rules.cfm.

Please note that, while Pilot Project applicability is governed by the filing date, the timeline begins running from the date of service of the complaint. Therefore, a plaintiff could elect to delay service

until after Pilot Project status has been officially determined by the court. In most of the Pilot Project court locations, a new Delay Reduction Order requires service within 35 days of the filing of the complaint for CAPP cases.

13. How are the CAPP deadlines counted?

All existing rules apply to Pilot Project cases to the extent not in conflict with the CAPP Rules. C.R.C.P. 6 sets forth the standards for time computation. Please note that the Court has made changes to the time provisions, effective January 1, 2012. In particular, the Court has eliminated the three days provided by C.R.C.P. 6(e).

14. What is the relationship between the CAPP deadlines and the C.R.C.P. deadlines?

For CAPP cases, a case-specific court order (e.g., the initial case management order) controls. If a court order does not address an issue, the CAPP Rules control. To the extent that an issue is not addressed in an order or CAPP Rule, the normal procedures under the C.R.C.P. will govern (C.R.C.P. 16.1 is not a consideration for Pilot Project cases).

15. Are CAPP cases subject to a heightened pleading standard?

Rule 2.2 states that the party bearing the burden of proof “should” plead all known material facts in support of the claim or affirmative defense. In addition, general denials of factual statements are not permitted in a responsive pleading, as any statement not denied with specificity is deemed admitted. The CAPP pleading rules are not designed to affect the standard for a Motion to Dismiss. Rather, the purpose is to narrow the disputed issues more quickly and to facilitate initial disclosures. In fact, the pleadings are one of three available opportunities to educate the judge before he or she tailors the pretrial and discovery process to the needs of the case. (The other two opportunities are: the initial disclosure statement and the joint case management report.)

16. Is the time for filing an answer shortened if a plaintiff files the initial disclosure statement along with the complaint (or shortly thereafter) but does not immediately serve the defendant?

Rule 3.2 requires an answer within 21 days after the plaintiff’s initial disclosure statement is filed. However, if the defendant is not served until after the filing of the initial disclosure statement, the judges are generally allowing 21 days from the date of service to file an answer. Defendants in this position should immediately contact the court to ensure the provision of sufficient time.

17. How are the deadlines affected by a Motion to Dismiss?

A Motion to Dismiss does not relieve the defendant’s obligation to file an answer 21 days after the plaintiff’s initial disclosures. In fact, it does not stay any of the pleading or disclosure deadlines, or the timing of the initial case management conference. If the motion is based upon jurisdictional

defect, the filing party may move the court for a stay, and the judge will determine whether it would be appropriate to grant the motion.

18. What is the difference between the CAPP initial disclosures and Rule 26 initial disclosures?

The CAPP Rules require an initial disclosure statement filed with the court, as well as served on the opposing party or parties. The contents of that statement are set forth in Rules 3.1 and 3.3. The parties must disclose all known information related to the claims, *whether supportive or harmful*. If the disclosure statement contains sensitive information, it may be filed as “private” and viewing will be restricted to the court and the other parties. *Note: The statement should be filed as a “Disclosure Certificate” in LexisNexis File&Serve, as the Pilot Project is generally limited to existing document categories.*

19. New: Must the initial disclosure statement be served upon the opposing party? Is personal service of process required?

Rules 3.1 and 3.3 state that the initial disclosure statement must be filed with the court. All existing rules apply to CAPP cases to the extent that they do not conflict with the CAPP Rules. C.R.C.P. 5 requires filings to be served on the opposing party. Accordingly, the initial disclosure statement must be provided to the opposing party using one of the methods listed in C.R.C.P. 5(a). Personal service by a process server under C.R.C.P. 4 is not mandated for the initial disclosure statement.

20. New: When must the documents listed in the initial disclosure statement be made available to the opposing party for inspection and copying?

Rules 3.1 and 3.3 require a certification that the disclosing party “has available” for inspection and copying the documents and things listed in the initial disclosure statement as related to the claim. Rule 3 is intended to require meaningful information exchange at the time of the initial disclosures—including allowing the defendant access to the documents prior to filing an answer—so the issues can be appropriately framed at the earliest point possible. Accordingly, the “reasonably available” documents and things must be produced or available to the opposing party immediately, and the disclosing party cannot wait until the case is “at issue” before providing access to these items.

21. What if a party fails to disclose required information?

As an initial matter, a party may not object to the adequacy of disclosures until the Initial Case Management Conference. However, sanctions for failure to timely and completely disclose are mandatory under the CAPP Rules, unless the judge determines the conduct to be justified under the circumstances or harmless. Parties and counsel can expect the CAPP Rules to be enforced as written.

22. What if a party is not aware of all of the relevant information by the disclosure deadline?

The initial obligation to disclose all information related to the claims is defined in part by Rule 3.6 and the ongoing duty to supplement disclosures “promptly upon becoming aware of the supplemental information.” The parties and counsel must disclose all *known* information upon undertaking a reasonable and good faith investigation and must disclose new information as it becomes known.

23. New: Under Rule 6.1, the parties must meet and confer concerning preservation “within 14 days after the filing of an answer.” Does this requirement apply only to answers or does it include other “responsive pleadings”?

Rule 6.1’s “meet and confer” requirement applies only to answers, as specifically stated in the rule. The purpose is for the parties to come together to explicitly address preservation at an early stage in the litigation. Accordingly, the meeting deadline is based on the defendant’s appearance in the action (i.e., answer date). The filing of another type of responsive pleading under C.R.C.P. 7(a) does not necessitate a second preservation discussion between the same parties. It should be noted, however, that the parties should communicate and cooperate on preservation issues as appropriate throughout the litigation.

24. What happens with respect to Rule 6.1 if multiple defendants file answers at different times?

Because each party presents different preservation issues, and because these issues ought to be addressed at the earliest point possible, the parties need to meet and confer after each defendant answers (“*an* answer”). Depending upon the number of parties and the timing of their answers, multiple conferences may be required.

25. The Initial Case Management Conference takes place “no later than 49 days after the answer and responsive pleading are filed.” What if multiple defendants file answers at different times?

Because the comprehensive Initial Case Management Conference shapes the litigation process in accordance with the specific needs of the case, it is intended to take place after the pleading and disclosure phase is complete. Accordingly, the conference should be scheduled within 49 days after the *last* answer is filed (“*the* answer”). In most of the Pilot Project court locations, a new Delay Reduction Order requires the plaintiff to serve a Notice to Set the conference within 7 days

after the last answer. Please note that a Motion to Dismiss does not stay the deadline for filing an answer.

CAPP cases will be subject to close judicial management. Therefore, the judge may decide to hold earlier and/or more frequent conferences, particularly in complex cases with many parties.

26. How is the timeline affected by counterclaims, cross-claims, and third party complaints?

Any time a new claim is properly asserted, a disclosure statement related to that claim must be filed within 21 days. The opposing party then has 21 days to respond to the claim and 21 days thereafter to file the related disclosure statement. Generally, the comprehensive Initial Case Management Conference does not take place until after the pleadings and disclosures on counterclaims, cross-claims, and third party complaints have been completed. The court may convene, or the parties may request, a status conference at any point. *Note: To keep better track of the last answer, and to distinguish between pleading and motions practice for evaluation purposes, responses to counterclaims, cross-claims, and third party complaints should be filed under one of the “Answer” options in LexisNexis File&Serve, not under the “Response” option.*

27. When and how is the Initial Case Management Conference set?

Setting practices vary by court. In most of the Pilot Project court locations, a new Delay Reduction Order requires the plaintiff to serve a Notice to Set the Initial Case Management Conference within seven days after the filing of the last answer.

28. Lead counsel is required to attend the Initial Case Management Conference. What if lead counsel’s schedule does not permit attendance?

On the court side, the goal of efficiency is served when one judge, who is educated about the case, handles all aspects of the proceedings (see CAPP Rule 5.1). The same is true for counsel. Attorneys can expect that the individual(s) appearing for the Initial Case Management Conference will be considered lead counsel on the case.

29. What is the role of the Joint Case Management Report (Appendix B to CJD 11-02)?

At the Initial Case Management Conference, the judge specifically tailors the remaining pretrial process to the needs of the case—including the timeline, the level of discovery, and the trial date—based on the proportionality principle. The decisions made at the conference are codified in the Initial Case Management Order. The Joint Case Management Report, filed at least seven days prior to the Initial Case Management Conference, constitutes the parties’ recommendation(s) to the judge. Stipulations contained in the Joint Report are not binding on the court, and the Initial Case Management Order will govern the case unless the court finds good cause for its modification.

Nevertheless, the Joint Report is an important vehicle for providing the judge with information on the appropriate level of process.

30. Is the scope of discovery limited under CAPP?

The parties are entitled to discover “matters that would enable a party to prove or disprove a claim or defense or to impeach a witness.” Moreover, the concept of proportionality shall be applied to all discovery undertaken in Pilot Project cases.

31. Is the amount of discovery limited under CAPP?

The CAPP Rules are designed to ensure that the pretrial process and its costs are proportionate to the needs of the case. Accordingly, the amount of permitted discovery will vary from case to case. For example, the discovery needs are different in a complex shareholder derivative action than in a straightforward two-party breach of contract case. At or shortly after the Initial Case Management Conference, the judge will set discovery parameters based on the pleadings, the initial disclosure statements, the joint case management report, and the parties’ arguments about what is required to fairly resolve the dispute. Factors to be considered include the amount in controversy, the complexity of the case, and the importance of the issues. Accordingly, the Initial Case Management Order controls the amount of discovery and no additional discovery is permitted “absent further court order based on a showing of good cause and proportionality.”

With respect to expert witnesses, the only discovery permitted is the disclosure of the expert’s written report and file. “There shall be no depositions or other discovery of experts.” See CAPP Rule 10.1(a) and Appendix C for the contents of the expert disclosure; draft reports are not required to be produced.

32. Without the ability to depose expert witnesses, how do the CAPP Rules ensure that there will not be any substantive surprises at trial?

The expert witness’s written report must fully address the substance of his or her direct testimony, and the testimony will be limited to matters disclosed in “reasonable detail” in the report. For the requirements concerning what must be disclosed, see CAPP Rule 10.1(a) and Appendix C. The CAPP Rules on expert witnesses also obviate the need for the judge to examine a deposition transcript to determine whether a particular disclosure occurred, which can stall the trial.

There is a continuing duty to supplement the expert disclosures as new information and material is obtained. The court shall determine whether any of the supplemental information may be used at trial.

33. What is the timing of expert disclosures under CAPP?

Expert witnesses need not be designated in the initial disclosure statement, which contains fact witness disclosures in accordance with CAPP Rules 3.1 and 3.3. Rather, as part of the Appendix B Joint Case Management Report, parties have the opportunity to propose deadlines for the disclosure of expert witness reports and files (see Item 14). At the Initial Case Management Conference, the judge considers the proposed dates within the context of the case. The Initial Case Management Order will contain the deadlines determined to be appropriate.

34. How are rebuttal expert witnesses treated?

CAPP Rule 10 (Expert Discovery) and Appendix C (Form for Disclosure of Expert Witness(es)) apply equally to rebuttal expert witnesses. The timing of rebuttal expert disclosures is determined at the Initial Case Management Conference and contained in the Initial Case Management Order, after input from the parties (see Appendix B (Joint Case Management Report), Item 14(b)).

35. Are parties required to share expert witnesses?

The CAPP Rules limit the number of experts to one “per side” in any given specialty or with respect to any given issue, except in “extraordinary circumstances.” Accordingly, in cases with multiple plaintiffs and/or defendants, all of the parties on a particular side must use the same expert witness for each specialty/issue, unless a request to present a separate expert is made and granted by the judge. A similar rule has been in place in Arizona Superior Court for some time. *See Arizona Rule of Civil Procedure 26(b)(4)(D).*

36. When and how is the trial date set?

The trial date is determined at the Initial Case Management Conference, and reflected in the Initial Case Management Order.

37. What constitutes “extraordinary circumstances” justifying an extension or continuance?

Continuances and extensions are “strongly disfavored” under the CAPP Rules. Parties can generally expect that such motions will be denied, even if stipulated, absent “extraordinary circumstances.” The term “extraordinary circumstances” is not defined. Accordingly, this determination rests within the sound discretion of the judge under the facts and circumstances of the particular case.

38. Is there a way to quickly resolve pretrial disputes?

Yes. As an aspect of active case management by a single judge, the parties are permitted to contact the court clerk to arrange for a prompt conference concerning any outstanding order or to resolve

a pretrial dispute. The judge may also convene the parties for additional status conferences as deemed appropriate. The purpose is to keep the case on a steady path to trial, reducing drawn out ancillary disputes and focusing on a resolution on the merits.

39. How can one be sure that the other party is following the CAPP Rules?

The failure to timely and completely comply with the CAPP Rules can result in sanctions.

40. What happens at the end of the Pilot Project?

The Colorado Supreme Court, in partnership with IAALS-The Institute for the Advancement of the American Legal System and in consultation with the National Center for State Courts, will be evaluating CAPP to assess whether it advances the just, timely, efficient and cost-effective determination of civil actions.

The evaluation cannot be conducted without the valuable input of those with CAPP experience. Therefore, it is imperative that you respond to surveys administered in connection with the Pilot Project. All information collected will be kept absolutely confidential, and the results will be reported only in the aggregate.

41. How can I get more information?

If you have further questions, please contact Melinda Taylor at melinda.taylor@du.edu