COURTROOM 3B CIVIL PROCEDURES

JUDGE JUAN G. VILLASEÑOR 8TH JUDICIAL DISTRICT LARIMER COUNTY

I. CASE MANAGEMENT

A. Discovery Dispute Procedures

The Court does not accept written disputed discovery motions. A "discovery dispute" means a disagreement encompassing any issues arising under Colo. R. Civ. P. 16, 16.1, 26, 30, 31, 33, 34, 35, 36, 37, and 45.

If a discovery dispute is not resolved, the moving party must complete a discovery dispute chart with the most persuasive authority included. The discovery dispute chart to be used is located at the end of this document. The moving party must **file** the following items: (1) the dispute chart; (2) the disputed written discovery at issue and the disputed responses to the discovery (e.g., Responses to First Set of Interrogatories); and (3) the parties' substantive conferral correspondence about the dispute (or a summary of such correspondence if not in writing). The parties are further directed to contact the Court's Clerk by telephone or email to set a hearing on the dispute. **The parties must file the required materials at least seven days before the hearing, unless the circumstances don't permit it.**

The Court expects counsel to confer in a meaningful way in writing, and by telephone or in person to try to resolve any discovery dispute. An exchange of emails is not sufficient. If counsel cannot resolve the dispute, the Court will address all discovery disputes with a hearing and the

parties may seek leave to appear by Webex or telephone. In the event that the Court determines that it can't resolve the dispute at the hearing, it will request briefing by the parties and will issue a written order.

With respect to written discovery, the Court frowns on "boilerplate" objections that fail to provide clear and precise explanations of the legal and factual justifications for the objections as well as a specific description of any information which may be available but is not being provided because of the objection. If a responding party claims to not understand a discovery request or the meaning of any term in a request, then that party must within 14 days seek clarification of the meaning from counsel who served the discovery. Failure to do so results in waiver of any objection based on the purported lack of understanding. Any response which does not provide the information or requested material but promises to do so in the future will be treated the same as no response unless the responding party provides a specific reason for not producing the information and a specific date when it will produce it. Parties must resolve disputes regarding subpoenas in the same manner as set forth above for written discovery.

With respect to depositions, the Court generally will not intervene in an ongoing deposition via telephone to resolve disputes; rather, counsel must resolve such disputes in the same manner described above for discovery disputes. Counsel are expected to adhere strictly to Colo. R. Civ. P. 30(d)(1) and (3) and must refrain from "speaking objections," or excessive objections designed to disrupt the flow of questioning. Depositions for persons other than retained experts are limited to one day for six hours, unless otherwise provided by the Court. Colo. R. Civ. P. 30(d)(2)(A).

B. DUTY TO CONFER

Colo. R. Civ. P. 121 § 1-15(8) states that "[m]oving counsel shall confer with opposing counsel before filing a motion." Rule 121 § 1-15(8) requires the parties to identify and attempt to resolve emerging issues before engaging in motions practice. The duty to confer requires counsel

to confer in good faith either by telephone, in person, email, or in writing with any party who might potentially oppose the relief requested. One email or call, for example, is insufficient to comply with the rule. The Court expects the parties to have made (or at least attempted) follow-ups in their conferral. (E.g., a voicemail followed by a telephone call or voicemail).

The word "shall" in Rule 121 § 1-15(8) is a mandatory requirement.[1] Before filing a motion, the moving party to confer with any potentially opposing party, as detailed above. "If no conference has occurred, the reason why shall be" explained in substantive detail, and to fall within the realm of an unusual occurrence. On one end of the spectrum, it will not be acceptable for the moving party to make one phone call, leave a voicemail requesting conferral, and then submit a corresponding motion shortly thereafter. On the other hand, the Court will not require a moving party to be hamstrung by an opposing party after numerous attempts to confer, who left messages, with no timely return communication. The Court evaluates whether parties have satisfied the duty to confer on a case-by-case basis.

The Court also reads Rule 121 § 1-15(8) as applying to *pro se* parties in the same manner as it applies to any attorney entering an appearance before the Court.

C. MOTIONS PRACTICE

Regarding determination of motions pursuant to Colo. R. Civ. P. 121, § 1-15, the Court interprets the duty to confer as requiring moving parties to give non-moving parties at least two business days to respond before the moving party files the motion.

a. Motions *in Limine*

Motions *in limine* are discouraged if the Court needs to hear evidence at trial to resolve them. If a party files a motion *in limine*, it is due no later than 35 days before the trial. Colo. R. Civ. P. 16(c).

[1] The Court finds District Court Judge Frederick Gannett's interpretation of the conferral requirement persuasive and attributes the following discussion to him.

b. Motions to Amend or Supplement Pleadings

A party who files an opposed motion for leave to amend or supplement a pleading must attach as an exhibit a copy of the proposed amended or supplemental pleading which strikes through (e.g., ~~strikes through~~) the text to be deleted and underlines (e.g., underlines) the text to be amended. **The proposed amended or supplemental pleading must not incorporate by reference any part of the preceding pleading, including exhibits.**

c. Procedures for motions to dismiss under Colo. R. Civ. P. 12(b).

Motions to dismiss under Colo. R. Civ. P. 12(b) are discouraged if the defect may be resolved by the filing of an amended pleading. Counsel are expected to confer prior to filing such motions to determine whether such defect may be cured by amendment, and should exercise best efforts to stipulate to appropriate amendments. **If the motion is nonetheless filed, the movant must include a statement describing efforts to comply with the above expectation**. The requirement to confer must not apply in cases where the nonmovant is proceeding *pro se*.

1. Motion and Authority.

All motions to dismiss must state in the caption or in the opening paragraph under which rule or subsection the motion is filed.

2. Colo. R. Civ. P. 12(b)(1)-(4).

Motions brought pursuant to Colo. R. Civ. P. 12(b)(1)–(4) must identify: (a) the grounds for dismissal; (b) which party has the burden of proof; (c) the material facts; and (d) whether materials outside the pleadings should be considered.

3. Colo. R. Civ. P. 12(b)(5).

With respect to motions brought pursuant to Colo. R. Civ. P. 12(b)(5):

(i) For each claim for relief that the movant seeks to have dismissed, the movant must

identify which party has the burden of proof and identify each element that must be alleged but was not.

(ii) The respondent should utilize the same format for each challenged claim. If the respondent disputes that a particular element must be alleged, the element should be identified as "disputed" and substantiated with accompanying legal argument.

c. Procedures for Motions for Summary Judgment, Responses, and Replies.

1. Motion, Page Limits, and Exhibits.

These procedures contemplate the filing of a single motion for summary judgment by a party. The sections of a motion/response/reply discussed below that address *facts* won't count toward the page limit in Colo. R. Civ. P. 121 § 1-15(1)(a). The case caption, signature block, certificate of service, and attachments won't count toward the page limit either.

2. Exhibits.

Exhibits attached to a motion for summary judgment, a response in opposition, or in reply must follow the following format. Defendant must label his/her/its exhibits by letters: A, B, C…Z, AA, BB, etc. Plaintiff must designate his/her/its exhibits by numbers: 1, 2, 3, 4, etc.

When filing any exhibits in support of, or opposition to, a motion, the party must label the exhibit and include its title so that the description appears in the register of actions. For example: "Ex. A, John Smith Decl." "Ex. 3, Sales Contract." "Ex. F, Plaintiff Depo."

3. Motion Format.

Facts Section. The moving party must use the following format: the movant must create a section of the motion titled "Statement of Undisputed Material Facts," and must set forth in simple, declarative sentences, separately numbered and paragraphed, each material fact which the movant believes is not in dispute and which supports movant's claim that movant is entitled to judgment as a

matter of law. The movant must avoid adding unnecessary adjectives or adverbs to his or her material facts. In general, the Court finds such descriptors vague and unhelpful to adjudicate summary-judgment motions.

Each separately numbered and paragraphed fact must be accompanied by a specific reference to material in the record which establishes that fact. General references to pleadings, depositions, or documents are insufficient if the document is over one page in length. A "specific reference" means the title of the document ("Exhibit A, Pl. Depo.," e.g.) and a specific paragraph or page and line number; or, if the document is attached to the motion, the paragraph or page and line number.

Legal Argument Section. For each claim for relief or defense as to which judgment is requested, the motion must: (a) identify which party has the burden of proof; (b) identify each element that must be proved; (c) for each identified element, identify the material, undisputed facts that prove that element and the pinpoint location in the filed record; or (d) if the respondent has the burden of proof, identify the elements which the movant contends the respondent cannot prove (with reference to the record).

4. Response Format.

Facts Section. Any party opposing the motion for summary judgment must create a section of the response titled "Response to Statement of Undisputed Material Facts," and must respond by deeming the facts "undisputed," "disputed," or "undisputed for purposes of summary judgment." Each response must be made in separate paragraphs numbered to correspond to movant's paragraph numbering. A "disputed" response must address the fact as tendered by the movant, not a fact that the non-movant wishes had been tendered. Proper responses to a "disputed" fact should be limited to an argument that (1) the particular parts of materials in the record don't establish the absence or presence of a genuine dispute; or (2) the movant can't produce admissible evidence to

support the fact. The response must be accompanied by a brief factual explanation to support the dispute.

If the non-movant fails to properly address the other party's assertion of fact as required here, the Court generally will consider the fact undisputed for purposes of the motion. The Court also may, in its discretion, give that party an opportunity to properly support or address the fact.

If the party opposing the motion believes that there are additional disputed (or undisputed) facts which it has not adequately addressed in the submissions made in the facts section, the party must create a separate section of the response titled "Statement of Additional Disputed (or Undisputed) Facts," and must set forth in simple, declarative sentences, separately numbered and paragraphed, each additional, material undisputed/disputed fact which undercuts movant's claim that it is entitled to judgment as a matter of law. Each separately numbered and paragraphed fact must be accompanied by a specific reference to material in the record which establishes the fact or at least demonstrates that it is disputed/undisputed.

Legal Argument Section. The response must utilize the same format for each claim/defense as set forth above: (a) if the respondent disputes the statement of the burden of proof on necessary elements, it must identify the element as disputed and must provide supporting legal authority. (b) If the movant has the burden of proof, the respondent must identify all elements for which there are disputed material facts, as well as provide a brief explanation of the reason(s) for the dispute and specific references to supportive evidence in the record appendix. Stipulation to facts not reasonably in dispute is highly encouraged. (c) If the respondent has the burden of proof, for each element identified by the movant as lacking proof, the respondent should identify the facts and their location in the record that establish that element.

5. Reply Format.

Facts Section. At the beginning of the reply, the movant must list the facts that are undisputed and disputed by their respective paragraph number.

The movant must create a section titled "Reply Concerning Undisputed Facts," and must include any **factual** reply regarding the facts asserted in its motion to be undisputed, supported by specific references to material in the record. The reply will be made in separate paragraphs numbered according to the motion and the opposing party's response.

The movant must create a section titled "Response Concerning Disputed Facts", to respond to those facts claims to be in dispute), either admit that the fact is disputed or supply a brief factual explanation for its position that the fact is undisputed, accompanied by a specific reference to material in the record which establishes that the fact is undisputed. The movant's response to undisputed fact must be done in paragraphs numbered to correspond with the opposing party's paragraph numbering.

Legal Argument Section. The movant must respond to the legal arguments made by the respondent and must not raise new issues.

(11) Legal argument is not permitted in the factual sections of the motion/response/reply and should be reserved for the legal sections of the documents. If, for example, a party believes that an established fact is immaterial, that argument must go in the legal argument section, and the fact should be admitted. If, on the other hand, a party believes that the reference to material in the record does not support the claimed fact, that fact may be disputed accompanied with a brief *factual* argument made under these procedures.

e. Procedures for Rule 702/*Shreck* Motions

1. Content.

Rule 702 Motions must be filed no later than 70 days before the trial. Colo. R. Civ. P. 16(c).

Motions filed under Colo. R. Evid. 702 must comply with the following requirements:

(1) identify the expert witness and separately state each opinion/testimony the moving party seeks to exclude;

(2) follow each opinion/testimony with the specific foundational challenge made to the opinion/testimony, e.g., relevancy, sufficiency of facts and data, methodology. Colo. R. Evid. 702 and 703; and

(3) indicate whether an evidentiary hearing is requested, explain why such a hearing is necessary, and specify the time needed for the evidentiary hearing (assuming time is divided equally between the parties)

2. Hearing.

The Court in its discretion may set a hearing to determine the admissibility of the challenged opinions under the Colorado Rules of Evidence. The expert witness whose testimony or opinion is offered must testify at the hearing, unless ordered otherwise.

V. MISCELLANEOUS

All papers filed with the Court should be in Garamond 12-point font and double-spaced with 1" margins. **Other fonts are acceptable, but they must be in 12-point font and double-spaced with 1" margins.**

Sample Written Discovery Dispute Chart[2]

Submitted by (Plaintiff/Defendant)

Case No: 21cv0001

No./Type of Discovery Request	Disputed Response(s) or Objection(s)	Problem With Response
Plaintiff's Rog No. 2 **(Attach Rog Response.)**	1. Overbroad and burdensome; *Leidholt v. District Court*, 619 P.2d 768 (Colo. 1980)	Information sought is limited in scope. *Val Vu, Inc. v. Lacey*, 31 Colo. App. 55, 497 P.2d 723 (1972)
Plaintiff's RFP No. 8 **(Attach Response to RFP.)**	1. Attorney-client privilege; *National Farmers Union Property and Cas. Co. v. District Court For City and County of Denver*, 1986, 718 P.2d 1044 2. Not relevant; *Martinelli v. District Court In and For City and County of Denver*, 1980, 612 P.2d 1083; 3. Vague and ambiguous	Reasonably calculated to lead to discovery of admissible evidence. *Silva v. Basin Western, Inc.*, 2002, 47 P.3d 1184 Information sought is reasonably defined and scope is limited. *Curtis, Inc. v. District Court In and For City and County of Denver*, 1974, 526 P.2d 1335

[2] Acceptable abbreviations include "Rog" for Interrogatory, "RFP" for Request for Production; "RFA" for Request for Admission; "SDT" for Subpoena Duces Tecum.