

CLEAN VERSION

PROPOSAL FOR AMENDMENT TO RULE 16.1 (SIMPLIFIED PROCEDURE)

(10/18/16)

Rule 16.1 was adopted a number of years ago in hopes that lawyers and parties would use it as a way to increase access to the courts and diminish the cost of litigation for cases under \$100,000. Well over 50% of the civil cases filed in Colorado seek relief in amounts less than \$100,000. Utilization of Rule 16.1 is voluntary and has become primarily used for collection cases, with most other eligible cases opting out. Those lawyers who have used it and judges who have seen it operating strongly approve of it. *See Gerety, Simplified Pretrial Procedure in the Real World Under C.R.C.P. 16.1*, 40 *The Colo. Lwr.* 23, 25 (April 2011),

The Colorado Supreme Court has approved a number of changes designed to improve access to justice for all civil cases, and has requested the Civil Rules Committee to consider possible changes to Rule 16.1. Based on surveys and analyses of court dockets there appear to be several articulated reasons why lawyers and parties opt out of 16.1. The primary ones are (1) the fact that the \$100,000 limit includes attorney fees; (2) voluntarily agreeing to limited discovery might expose a lawyer to malpractice claims; and (3) the Rule banned *any* depositions. (Rarely admitted are that some clients believe that using excessive discovery will force better settlements and lawyers' general distaste for anything new and different.) *See, e.g.,* Stuart Jorgenson, "A Rule That is Ready for Retirement," 42 *The Colorado Lawyer* 53 (Feb. 2013).

The attached proposal tries to deal with these major criticisms. It would exempt from the \$100,000 limit claims for attorney fees. It would allow up to 6 hours of depositions per party, along with 5 requests for production of documents. And finally, it will apply to all applicable civil cases unless, upon a party's motion showing good cause, the court allows the case to proceed under the normal litigation rules.

One of the additional benefits for leaving cases under Rule 16.1 is that those cases would not have to comply with the proposed requirements for filing a Proposed Case Management Order and attendance at the in-person Case Management Conference, which otherwise may increase the burden on the smallest of cases and should normally be unnecessary for those cases.

Attached is a version of the proposals for changing Rule 16.1.

PROPOSED REVISIONS TO RULE 16.1. SIMPLIFIED PROCEDURE FOR CIVIL ACTIONS (10/18/16)

(a) Purpose of Simplified Procedure.

The purpose of this rule, which establishes Simplified Procedure, is to provide maximum access to the district courts in civil actions; to enhance the provision of just, speedy, and inexpensive determination of civil actions; to provide earlier trials; and to limit discovery and its attendant expense.

(b) Actions Subject to Simplified Procedure and Civil Cover Sheet. Simplified Procedure applies to all civil actions other than:

(1) civil actions that are class actions, domestic relations, juvenile, mental health, probate, water law, forcible entry and detainer, C.R.C.P. 106 and 120, or other similar expedited proceedings, unless otherwise stipulated by the parties; or

(2) civil actions in which any party seeks monetary judgment from any other party of more than \$100,000, exclusive of reasonable attorney fees, interest and costs, as shown by a statement on the Civil Cover Sheet by the party's attorney or, if unrepresented, by the party, that "In compliance with C.R.C.P. 11, based upon information reasonably available to me at this time, I certify and believe that at least one of my claims against one of the other parties in this case has a fair expectation of being in excess of \$100,000."

(3) Each pleading containing an initial claim for relief in a civil action, other than class actions, domestic relations, juvenile, mental health, probate, water law, forcible entry and detainer, C.R.C.P. 106 and 120 shall be accompanied by a completed Civil Cover Sheet in the form and content of Appendix to Chapters 1 to 17, Form 1.2 (JDF 601), at the time of filing. Failure to file the Civil Cover Sheet shall not be considered a jurisdictional defect in the pleading but may result in a clerk's show cause order requiring its filing.

(c) Limitations on Damages. In cases subject to Simplified Procedure, a claimant's right to a monetary judgment against any one party shall be limited to a maximum of \$100,000, including penalties or punitive damages, but excluding allowable reasonable attorney fees, interest and costs. The \$100,000 limitation shall not restrict an award of non-monetary relief. The jury shall not be informed of the \$100,000 limitation. If the jury returns a verdict for damages in excess of \$100,000, the trial court shall reduce the verdict to \$100,000.

(d) Motion for Exclusion from Simplified Procedure. Simplified Procedure shall apply unless, no later than 35 days after the case is at issue as defined in C.R.C.P. 16(b)(1), either (i) all parties and their attorneys sign a stipulation that the case shall be excluded from the application of Simplified Procedure, or (ii) any party files a motion, signed by both the party and its counsel, if any, establishing good cause to exclude the case from the application of Simplified Procedure, which the court grants, in its discretion. In determining whether good cause has been established, the court may consider proportionality, including the needs of the case, the importance of the issues at stake in the action, the parties' relative access to relevant information, the parties' resources, the importance of the additional discovery in resolving the issues, and

Commented [CJB1]: Means that the reduction would not be appealable. the possibility of appellate review could be preserved by adding, "...\$100,000, unless the interests of justice clearly indicate otherwise."

Commented [CJB2]: establishes the standard for appellate review

whether the burden or expense of ~~the proposed~~ such additional discovery outweighs its likely benefit, without giving weight to the amount in controversy.

(e) Election for Inclusion Under this Rule. In actions excluded by subsection (b)(2) of Simplified Procedure, within 42 days after the case is at issue, as defined in C.R.C.P. 16(b)(1), the parties may file a stipulation to be governed by this Rule. In such event, they will not be bound by the \$100,000 limitation on judgments contained in section (c) of this Rule.

(f) Case Management Orders. In actions subject to Simplified Procedure, the case management order requirements of C.R.C.P. 16(b)(2), (3) and (7) shall apply, except that preparing and filing a Proposed Case Management Order is not required.

(g) Trial Setting. No later than 42 days after the case is at issue, the responsible attorney shall set the case for trial pursuant to C.R.C.P. 121, section 1-6, unless otherwise ordered by the court.

(h) Certificate of Compliance. No later than 49 days after the case is at issue, the responsible attorney shall file a Certificate of Compliance stating that the parties have complied with all the requirements of sections (f), (g) and (k)(1) of this Rule or, if the parties have not complied with each requirement, shall identify the requirements which have not been fulfilled and set forth any reasons for the failure to comply.

(i) Expedited Trials. Trial settings, motions and trials in actions subject to Simplified Procedure should be given early trial settings, hearings on motions and trials.

(j) Case Management Conference. If any party believes that it would be helpful to conduct a case management conference, a notice to set a case management conference shall be filed stating the reasons why such a conference is requested. If any party is unrepresented or if the court determines that such a conference should be held, the court shall set a case management conference. The conference may be conducted by telephone.

(k) Simplified Procedure. Cases subject to Simplified Procedure shall not be subject to C.R.C.P. 16, 26-27, 31, 33 and 36, unless otherwise specifically provided in this Rule, and shall be subject to the following requirements:

(l) Required Disclosures.

(A) Disclosures in All Cases. Each party shall make disclosures pursuant to C.R.C.P. 26(a)(1), 26(a)(4), 26(b)(5), 26(c), 26(e) and 26(g), no later than 28 days after the case is at issue as defined in C.R.C.P. 16(b)(1). In addition to the requirements of C.R.C.P. 26(g), the disclosing party shall sign all disclosures under oath.

(B) Additional Disclosures in Certain Actions. Even if not otherwise required under subsection (A), matters to be disclosed pursuant to this Rule shall also include, but are not limited to, the following:

(i) Personal Injury Actions. In actions claiming damages for personal or emotional injuries, the claimant shall disclose the names and addresses of all doctors, hospitals, clinics, pharmacies and other health care providers utilized by the claimant within five years prior to the date of injury, and shall produce all records from those providers or written waivers allowing the opposing party to obtain those records subject to appropriate protective provisions obtained pursuant to C.R.C.P. 26(c). The claimant shall also produce transcripts or tapes of recorded statements, documents, photographs, and video and other recorded images that address the facts of the case or the injuries sustained. The defending party shall disclose transcripts or tapes of recorded statements, any insurance company claims memos or documents, photographs, and video and other recorded images that address the facts of the case, the injuries sustained, or affirmative defenses. A party need not produce those specific records for which the party, after consultation pursuant to C.R.C.P. 26(c), timely moves for a protective order from the court;

(ii) Employment Actions. In actions seeking damages for loss of employment, the claimant shall disclose the names and addresses of all persons by whom the claimant has been employed for the ten years prior to the date of disclosure and shall produce all documents which reflect or reference claimant's efforts to find employment since the claimant's departure from the defending party, and written waivers allowing the opposing party to obtain the claimant's personnel files and payment histories from each employer, except with respect to those records for which the claimant, after consultation pursuant to C.R.C.P. 26(c), timely moves for a protective order from the court. The defending party shall produce the claimant's personnel file and applicable personnel policies and employee handbooks;

(C) Document Disclosure. Documents and other evidentiary materials disclosed pursuant to C.R.C.P. 26(a)(1) and 16.1(k)(1)(B) shall be made immediately available for inspection and copying to the extent not privileged or protected from disclosure.

(2) Disclosure of Expert Witnesses. The provisions of C.R.C.P. 26(a)(2)(A) and (B), 26(a)(4), 26(b)(4)(B)-(D), 26(b)(5), 26(c), 26(e) and 26(g) shall apply to disclosure for expert witnesses. Written disclosures of experts shall be served by parties asserting claims 91 days (13 weeks) before trial; by parties defending against claims 63 days (7 weeks) before trial; and parties asserting claims shall serve written disclosures for any rebuttal experts 49 days before trial. The parties shall be limited to one expert witness retained pursuant to C.R.C.P. 26(a)(2)(B)(I), per side, unless the trial court authorizes more for good cause shown.

(3) Mandatory Disclosure of Trial Testimony. Each party shall serve written disclosure statements identifying the name, address, telephone number, and a detailed statement of the expected testimony for each witness the party intends to call at trial whose deposition has not been taken, and for whom expert reports pursuant to subparagraph (k)(2) of this Rule have not been provided. For adverse party or hostile witnesses a party intends to call at trial, written disclosure of the expected subject matters of the witness' testimony, rather than a detailed statement of the expected testimony, shall be sufficient. Written disclosure shall be served by parties asserting claims 91 days (13 weeks) before trial; by parties defending against claims 63

days (9 weeks) before trial; and parties asserting claims shall serve written disclosures for any rebuttal witnesses 49 days before trial.

(4) Permitted Discovery. The following discovery is permitted, to the extent allowed by C.R.C.P. 26(b)(1):

(i) Each party may take a combined total of not more than six hours of depositions.

(ii) A party who intends to offer the testimony of an expert or other witness may, pursuant to C.R.C.P. 30(b)(1)-(4), take the deposition of that witness for the purpose of preserving the witness' testimony for use at trial. Such a deposition shall be taken at least 7 days before trial. In that event, any party may offer admissible portions of the witness' deposition, including any cross-examination during the deposition, without a showing of the witness' unavailability. Any witness who has been so deposed may not be offered as a witness to present live testimony at trial by the party taking the preservation deposition.

(iii) Not more than five requests for production of documents may be served by each party.

(iv) The parties may request discovery pursuant to C.R.C.P. 34(a)(2) (inspection of property) and C.R.C.P. 35 (medical examinations).

(5) Depositions for Obtaining Documents from a Non-Party. In addition to depositions allowed under subsection (k)(4)(i) and (ii) of this Rule, depositions also may be taken for the sole purpose of obtaining and authenticating documents from a non-party.

(6) Trial Exhibits. All exhibits to be used at trial which are in the possession, custody or control of the parties shall be identified and exchanged by the parties at least 35 days before trial. Authenticity of all identified and exchanged exhibits shall be deemed admitted unless objected to in writing within 14 days after receipt of the exhibits. Documents in the possession, custody and control of third persons that have not been obtained by the identifying party pursuant to document deposition or otherwise, to the extent possible shall be identified 35 days before trial and objections to the authenticity of those documents may be made at any time prior to their admission into evidence.

(7) Limitations on Witnesses and Exhibits at Trial. In addition to the sanctions under C.R.C.P. 37(c), witnesses and expert witnesses whose depositions have not been taken shall be limited to testifying on direct examination about matters disclosed in reasonable detail in the written disclosures, provided, however, that adverse parties and hostile witnesses shall be limited to testifying on direct examination to the subject matters disclosed pursuant to subparagraph (k)(3) of this Rule. However, a party may call witnesses for whom written disclosures were not previously made for the purpose of authenticating exhibits if the opposing party made a timely objection to the authenticity of such exhibits specifying the factual issues concerning the authenticity of the exhibits.

(8) Juror Notebooks and Jury Instructions. Counsel for each party shall confer about items to be included in juror notebooks as set forth in C.R.C.P. 47(t). At the beginning of trial or at such

other date set by the court, the parties shall make a joint submission to the court of items to be included in the juror notebook. Jury instructions and verdict forms shall be prepared pursuant to C.R.C.P. 16(g).

(9) Voluntary Discovery. [Do we want this anymore?]In addition to the disclosures required by section (k)(1) of this Rule and the discovery permitted by section (k)(4) of this Rule, voluntary discovery may be conducted as agreed to by all the parties. However, the scheduling of such voluntary discovery may not serve as the basis for a continuance of the trial, and the costs of such discovery shall not be deemed to be actual costs recoverable at the conclusion of the action. Disputes relating to such agreed discovery may not be the subject of motions to the court. If a voluntary deposition is taken, such deposition shall not preclude the calling of the deponent as a witness at trial.

(l) Changed Circumstances. In a case under Simplified Procedure, any time prior to trial, upon a specific showing of substantially changed circumstances sufficient to render the application of Simplified Procedure unfair and a showing of good cause for the timing of the motion to terminate, the court shall terminate application of Simplified Procedure and enter such orders as are appropriate under the circumstances.